

Section 7: Criminal Offense, Criminal Responsibility, and Commission of a Criminal Offense

Article 15: Criminal Offense

A criminal offense is an unlawful act:

- (a) that is prescribed as a criminal offense by law;
- (b) whose characteristics are specified by law; and
- (c) for which a penalty is prescribed by law.

Commentary

This provision reiterates some of the aspects of the principle of legality and others relating to the purposes and limits of criminal legislation. Reference should be made to Article 2 (“Purpose and Limits of Criminal Legislation”) and Article 3 (“Principle of Legality”) and their accompanying commentaries.

Article 16: Criminal Responsibility

A person who commits a criminal offense is criminally responsible if:

- (a) he or she commits a criminal offense, as defined under Article 15, with intention, recklessness, or negligence as defined in Article 18;

- (b) no lawful justification exists under Articles 20–22 of the MCC for the commission of the criminal offense;
- (c) there are no grounds excluding criminal responsibility for the commission of the criminal offense under Articles 23–26 of the MCC; and
- (d) there are no other statutorily defined grounds excluding criminal responsibility.

Commentary

When a person is found criminally responsible for the commission of a criminal offense, he or she can be convicted of this offense, and a penalty or penalties may be imposed upon him or her as provided for in the MCC.

Article 16 lays down the elements required for a finding of criminal responsibility against a person. A court that is assessing the criminal responsibility of a person must address the following issues:

- Whether the criminal offense was “committed,” referring to physical elements that will be set out in its definition in the Special Part of the MCC and also referring to the voluntariness of the physical acts as set out in Article 17. Reference should be made to Article 17 and its accompanying commentary.
- Whether the accused has the requisite mental element for the commission of the criminal offense, meaning: Did he or she intend to commit it? In cases where the MCC specifies that the offense can be committed through recklessness or negligence, the issue is whether the accused acted either recklessly or negligently as defined by the MCC. Reference should be made to Article 18 and its accompanying commentary. At this stage, any “specific” or “special” intention requirements or knowledge requirements that may form part of the elements of the criminal offense should be assessed. This issue is discussed in greater detail in the commentary to Article 18.
- Whether there were any justifications for the conduct of the accused person, meaning that he or she may satisfy the two criteria laid out above but still may escape criminal responsibility because he or she has a valid defense to the commission of the criminal offense. Justification defenses are those where what was clearly criminal conduct is deemed not to be so because the circumstances make the conduct socially acceptable in some way. For a detailed discussion of justification defenses, reference should be made to Articles 20–22 and their accompanying commentaries, in addition to the general commentary to Section 9 of the General Part of the MCC.
- As with lawful justifications, if a person’s conduct falls within any of the grounds for excluding criminal responsibility set out in the MCC, he or she may escape criminal responsibility. Defenses based on exclusion of criminal responsibility excuse a person from moral blame even when his or her conduct was criminal, such as when his or her conduct was not voluntary or when he or she did not

have the capacity to commit the criminal offense. For a detailed discussion of grounds of exclusion of criminal responsibility, reference should be made to Articles 23–26 and their accompanying commentaries, in addition to the general commentary to Section 9 of the General Part of the MCC.

- Whether there are other lawful grounds that make the particular act a non-criminal one. To ascertain this situation, the court may have to look to other pieces of legislation. For instance, legislation such as a police act may provide the police with the authority to use force under certain circumstances and not be held criminally responsible.

Reference should be made to annex 1, which sets out the process of evaluating criminal responsibility in a diagrammatic format.

Article 17: Commission of a Criminal Offense

1. A criminal offense may be committed by either an omission to act or a voluntary act.
2. A criminal offense is committed by an omission to act only where the perpetrator has an obligation to act but fails to do so.
3. A criminal offense may be committed by an individual, jointly with or through another person, regardless of whether that other person is criminally responsible.

Commentary

Paragraph 1: Common to all legal systems is the principle that a criminal offense can be committed either through a positive act or alternatively through a failure to act—that is, an omission. Another integral element of a criminal offense is that it must be committed voluntarily. The term *voluntary* is difficult to define and thus will be subject to judicial interpretation on a case-by-case basis to determine its scope. Examples excluded from the ambit of voluntary action include involuntary body movement (i.e., a reflex or convulsion) and acts committed while unconscious, asleep or sleepwalking, or in a hypnotic trance.

Paragraph 2: The instances in which a person can be held liable for a failure to act differ from state to state. In some states, the inclusion of a criminal offense of “failure to assist a person in danger” creates a positive legal obligation. In other states, there is no such obligation to assist. Ultimately, liability for omissions to act is really a question of

policy. In many legal systems, and under the MCC, liability for omissions will be found in the positive criminal law as part of the elements of the substantive criminal offense.

Paragraph 3: Paragraph 3 broadly articulates the grounds of participation in a criminal offense as set out in Section 11 of the MCC. The wording is derived from Article 25(2) of the Rome Statute of the International Criminal Court. Reference should be made to Section 11 and its accompanying commentaries, where the grounds of participation are dealt with in greater detail. This paragraph also states clearly that criminal liability of persons who participated in the criminal offense is not dependent on the criminal liability of the primary perpetrator.

Article 18: Intention, Recklessness, and Negligence

1. A person acts intentionally when he or she acts purposely or knowingly.
2. A person acts recklessly when he or she takes a risk that is objectively unjustifiable having regard to the circumstances known to the person.
3. A person acts negligently when he or she, unaware of any risk, takes a risk that is objectively unjustifiable having regard to the circumstances known to the person.
4. A person must not be held criminally responsible for a criminal offense on the basis of recklessness and negligence, unless specifically provided for in the MCC.
5. When the commission of a criminal offense resulted in a consequence that exceeded the intent of the perpetrator, he or she is criminally responsible for that consequence only when he or she acted recklessly or negligently in relation to the consequence.

Commentary

Article 18 deals with the mental element required for the commission of a criminal offense, sometimes referred to as the *mens rea* (“guilty mind”). The principle of *mens rea* is recognized as one of the prerequisites to ascribing criminal responsibility to a person for the commission of a criminal offense. This means that criminal responsibility may be established only if a person is sufficiently aware of acts and the consequences of acts. The basis for requiring that the mental element of a criminal offense be proven is the principle of autonomy and the assumption of a capacity to make

choices between various options to act. The basis of criminal responsibility therefore lies in conscious decision making. To establish criminal responsibility, the act (and its consequences) must be the result of a (voluntary or free and conscious) decision. *Mens rea* also encompasses the “belief principle.” According to this principle, persons should be judged only on the basis of what they believed they were doing, not on the consequences of their acts.

There is considerable divergence among states in how the mental element required for a criminal offense is expressed in domestic legislation. In essence, the laws of most states are similar in scope, meaning they criminalize the same forms of mental elements, but the nomenclature—or how the different aspects of the mental element are categorized—differs. This is true even among states that share a common legal tradition. In essence, there are four main concepts of the mental element of a criminal offense: purposefulness, intention, recklessness (or willful blindness), and negligence. The differences and similarities between states in terms of specific aspects of the mental element of a criminal offense will be discussed in more detail below. The wording of Article 18 was arrived at after an extensive comparative survey of the criminal legislation of many states around the world. A study was also made of the legal doctrine and case law that has built up around these concepts. At one stage, Article 30 from the Rome Statute of the International Criminal Court was considered for use in the MCC. However, this provision seemed confusing and unclear to the drafters and to the many experts who reviewed it. The categorization that was finally decided upon was chosen for its simplicity, brevity, and potential ease of application and understanding. To understand the meaning of the terms *intention*, *recklessness*, and *negligence* in the context of the MCC, a reader must suspend any preexisting conceptions and look beyond the definitions of those terms that he or she is familiar with in his or her own system and examine the precise meaning ascribed to them under the MCC.

The two main approaches taken in different legal systems will be discussed separately below. This discussion is important as it forms the background for the discussion on the substance of Article 18. It is worth noting that this is a general discussion based on legal systems that were reviewed during the drafting of the MCC; it does not presume to be an exhaustive analysis.

Legal Systems That Categorize the Mental Element of a Criminal Offense as Intention (Including Purposefulness), Recklessness, or Negligence. In systems wherein the concepts of intention, recklessness, and negligence are employed, intention can be *direct* or *indirect* (sometimes called *oblique* intention). Direct intention means that a person desires to bring about a particular consequence and that he or she does his or her best to do so. In this case, the person has volition, or will, to bring about this consequence.

Indirect or oblique intention means that a person sees that a consequence is virtually certain, although he or she does not desire it, but nonetheless goes ahead with the course of conduct. The person takes a deliberate action but a consequence that he or she does not desire occurs. While direct intention is premised on the basis of volition with regard to the particular consequence, indirect intention is premised on the basis of cognition, or awareness, of the consequence. In relation to this consequence of indirect intention, it is important that the person sees it as virtually certain. It is not enough that it is highly probable. Where there is a high probability of a particular consequence

happening, the discussion moves out of the realm of intention and into that of recklessness. In some jurisdictions, legislation makes specific reference to the fact that the court must not make inferences or presume that the person intended the natural and probable consequences of his or her actions. The legislation emphasizes that even if the consequences of a person's action may be objectively deemed to be the natural and probable consequences of his or her action, a person cannot be deemed to intend these consequences unless he or she possessed the cognition that the consequences were virtually certain.

In the case of recklessness, a person does not have the volition to bring about a particular result; he or she has cognition, just as with indirect intention. However, the level of cognition required for recklessness differs from that of intention. Recklessness does not require virtual certainty; "high probability" is enough. The essence of recklessness is that a person takes an unjustified risk. The question that has been answered differently in legal systems is this: By what standard is recklessness judged? In some systems, a subjective standard has been used, meaning the court will look at the accused person's state of mind vis-à-vis the particular consequence. In other systems, an objective standard is employed. In employing this objective standard in some jurisdictions, the test requires that the accused person did not consider the consequences of his or her actions and took an objectively unjustifiable risk. This objective approach has been criticized for leaving a significant loophole, so that where the accused did in fact consider the consequences of his or her action but carried on nonetheless, he or she cannot be held liable under the definition of recklessness. In some other systems, a mixture of the objective and subjective is employed. Thus recklessness will be found where the accused person knew about an objectively unjustifiable risk, which he or she took anyway. In short, in systems with the same categorization of intention, recklessness, and negligence, there is no commonly held view as to the precise parameters of recklessness.

The scope of negligence is easier to define. While recklessness requires an awareness of a risk, negligence does not. Negligence requires that a person, unaware of any consequences, take a course of action that falls below the objective standard that would be expected of a "reasonable person" or a "law-abiding citizen." This form of liability is completely objective and based upon objective standards that are independent of any subjective desires or beliefs of the accused person. A person is penalized because he or she *should* have been aware of the risks involved in his or her conduct. Relatively few criminal offenses are defined in terms of negligence. The most common are traffic offenses and environmental offenses.

Legal Systems That Categorize the Mental Element of a Criminal Offense as Intention and Negligence. Some legal systems use the term *intention* to define the mental element of both intention and recklessness, as defined above. The term *negligence* as used in these systems can also have a broader definition than *negligence* as discussed above. Intention can be classified as *direct intention (dolus directus)* or *indirect intention (dolus indirectus)*, or, alternatively, as *direct intention in the first degree* (equivalent to direct intention) or *direct intention in the second degree* (equivalent to indirect intention). In addition to these grounds of intention, there is an additional one called *eventual intent (dolus eventualis)*. Direct intention, or direct intention in the first degree, requires voli-

tion, or will. In such cases, indirect intention, or direct intention in the second degree, requires cognition or knowledge, rather than volition, or will. The degree of cognition held by the perpetrator under indirect intention must be such that he or she knows or foresees with absolute certainty that his or her act will have a particular consequence.

Eventual intent requires an element of cognition, albeit a much lesser degree of cognition than required under the principle of indirect intention. The concept of eventual intent is similar in many ways to the concept of recklessness used in the systems mentioned above. Just as in these systems, wherein there is dispute about the meaning of recklessness, so too is there dispute in relation to the precise meaning of eventual intent. It is clear that some element of cognition is required; the debate centers on what level of cognition will suffice. Some would say the accused needs to be aware of the consequences and accept the possibility of them occurring, while others would say indifference to the consequences or an appraisal of the possibility of those consequences occurring would suffice. The latter classification of eventual intent overlaps considerably with the concept of negligence as defined in these systems. Negligence is often classified as “conscious” or “unconscious” negligence. Conscious negligence, similar to eventual intent, requires that the accused considered the possibility of certain consequences but thought they would not occur. Unconscious negligence is identical to the sort of negligence discussed above in relation to the other legal systems, requiring that a person fall below an objective standard of behavior.

The discussion will now move to Article 18 of the MCC and its substance, in light of the background provided in the comparative appraisal of the mental element in different systems. But first, two issues of note should be mentioned. First, many legal systems also provide for “strict liability” offenses, where a person may be found criminally responsible irrespective of intention, recklessness, or negligence. This form of mental element is not contained in the MCC. Second, some offenses contained in the MCC have additional intention requirements, sometimes referred to as special intention, specific intention, or *dolus specialis*. A good example is the criminal offense of genocide under Article 86, which requires the intention to destroy, in whole or in part, a member of a national, ethnic, religious, or racial group. This specific intention must be proven, in addition to general intention, before a person can be held criminally liable. Some other offenses, such as crimes against humanity, also contain additional knowledge requirements under Article 87. Under this offense, it is necessary to prove that the perpetrator had knowledge of a widespread or systematic attack directed against a civilian population. These added intention or knowledge requirements should be looked at in the process of assessing criminal responsibility and should be considered at the stage of assessing the mental element required for the offense.

Paragraph 1: The concept of intention used in the MCC covers the concepts of both direct intention and indirect intention, as discussed above. The term *purposely* relates to the volition of a person in carrying out a course of conduct, meaning the person desires to bring about a particular consequence, and he or she does his or her best to do so. The term *knowingly* refers to a person’s cognition, meaning a person sees that a consequence is virtually certain, although he or she does not desire it, but nonetheless goes ahead with the course of conduct. As mentioned earlier, there should be a practical or virtual certainty that the consequence will occur. The determination of whether

a person acts “purposely” or “knowingly” is based on a subjective test of the person’s mental state and not on any objective standards of expected behavior.

Paragraph 2: The MCC has adopted an approach that includes recklessness as a ground for criminal liability rather than a categorization based on direct intention, indirect intention, and eventual intention. Direct and indirect intention are covered in Paragraph 1. Paragraph 2 covers what is known as recklessness or, in other systems, eventual intention or *dolus eventualis*. Recklessness involves cognition of a risk by a person, who nonetheless goes ahead and takes the unjustifiable risk. The cognitive element required for recklessness is less than that required for indirect intention; the probability or the possibility that the consequences will occur could suffice for a finding of recklessness by a court. Under Paragraph 2, indifference to the consequences would also suffice to fulfill the criteria for recklessness. As mentioned earlier, in many legal systems there is considerable disagreement and uncertainty as to the scope of recklessness or its equivalent, *dolus eventualis*. The MCC takes a mixed subjective-objective approach to recklessness. The intention of the drafters was to create a compromise position between a strictly objective test and a strictly subjective one, relating to all levels of knowledge of the person who carried out the criminal offense. Thus it covers the concept of conscious negligence, discussed above.

Paragraph 3: The definition of negligence employed in Paragraph 3 relates solely to a situation in which the person who commits a criminal offense is unaware of the potential consequences of his or her conduct in a situation where he or she should have been aware (i.e., he or she took an objective, unjustifiable risk). The person has neither cognition nor volition, as required in Paragraphs 1 and 2. Despite the test for negligence being objective, account will be taken of the subjective circumstances known to the person at the time. Thus the court is appraising whether the risk was objectively unjustifiable for a person in the subjective position of the alleged perpetrator at the time the criminal offense was committed.

Paragraph 4: There is a presumption in criminal law that offenses are committed intentionally. If a person is liable for the reckless or negligent commission of a criminal offense, this must be specified in legislation. In relation to specific criminal offenses, reference should be made to the individual provisions of the Special Part of the MCC. Reference should also be made to Article 19(2) and its accompanying commentary, which provide that a legal person is liable for the negligent commission of criminal offenses in certain circumstances. Another form of liability for negligent conduct is found in Article 32, “Responsibility of Commanders and Other Superiors for the Criminal Offenses of Genocide, Crimes against Humanity, and War Crimes.” Reference should be made to Article 32 and its accompanying commentary.

Paragraph 5: Paragraph 5 articulates the principle that when a person acts intentionally (through either direct or indirect intention), he or she is liable for unforeseen consequences when he or she was reckless or negligent as to these consequences. This is a form of “constructive liability,” wherein the consequences of the conduct of a person who intends to commit a criminal offense exceed his or her intention. In this case,

given the fact that the person had the intention to commit a criminal offense in the first place, the law deems it correct to hold the person liable for consequences that he or she could have foreseen (i.e., he or she acted recklessly as to the consequences) or that could have been foreseen by an objective person (i.e., he or she acted negligently as to the consequences). For example, if A intends to hit B with a bat until B is seriously injured but not dead, and B dies as a result of the attack, A is liable for the death of B, as A was reckless as to the consequences of seriously attacking B. Strictly speaking, applying the “unforeseen mode” principle abrogates from the “causation principle” or can break what is known in criminal law as the chain of causation. The causation principle requires that there be a proximate and causal link between the conduct of the perpetrator and the harm that is set out in the definition of the criminal offense. Public policy reasons dictate that this abrogation is defensible given that the person intended to commit a criminal offense in the first place. There are also limits placed on this abrogation. In the above example, A will be liable for consequences that occurred to B only if A was reckless or negligent with regard to the consequences. Thus, if something completely unforeseen by A happens to B, or something that, objectively speaking, was completely unforeseeable (an *actus novus interveniens*) happens, A will not be liable for what happens to B. An *actus novus interveniens* could be anything from a natural force to something the victim did. In the above example, if B was hit repeatedly by the bat but was not dead, and then jumped from a cliff and died as a result of the fall, then A would not be liable for B’s death. Although many states allow the operation of *actus novus interveniens* in relation to the victim’s conduct, the condition of the victim prior to the commission of the crime will not count to exclude the operation of Paragraph 5. In some states, this provision is called the eggshell skull rule. It means, essentially, that the perpetrator must take the victim as he or she finds him or her, and if the victim has some health condition that exacerbates the injury caused by the perpetrator, then this will not exclude criminal responsibility. If, in the above example, B had a weak heart that caused him or her to die as a result of the trauma of being beaten, then A would be liable for B’s death.

Under Paragraph 5, a person may also be held criminally liable where, for example, he or she intended to kill one person but ended up killing another person instead. This situation is sometimes known as transferred intention, while the example outlined in the preceding paragraph is known as unforeseen mode. Applying transferred intention means that the perpetrator did not have the requisite mental element vis-à-vis the subsequent victim of his or her criminal conduct (which was intended for a different victim). However, public policy reasons dictate that a person should in fact be held liable for his or her conduct where he or she had the intention in the first place to commit the criminal offense, just not against the same person.