Chapter 11: Trial of an Accused

Part 1: General Provisions

Article 213: Requirement of a Public Trial

1. All proceedings before a trial court, other than deliberations of the judge or panel of judges, must be held in public, except as otherwise provided for under Article 62.
2. Where the trial court orders the court to sit in closed sessions, it must state in public the reasons for the order and the duration of the order.

Commentary

Article 213 reiterates the right to a public trial that is set out in Article 62 of the MCCP. The court must publicly state the grounds upon which the closure of the court session will be based. These grounds must correspond with at least one of the grounds set out in Article 62(2). The trial should remain closed for the shortest time possible, and the court must publicly announce the duration of the closed session.

Article 214: Trial in the Presence of the Accused

1. The accused must be present during his or her trial, except as provided for in the MCCP.
2. The accused may waive his or her right to be present during the trial, provided he or she is represented by counsel throughout the trial.
3. The trial of a person must not be held in his or her absence, and the accused must be present throughout the trial, except where the accused is removed from the courtroom because of an order for a protective measure set out in

Article 147(f) or for misconduct before the court under Article 40, or where the accused flees as set out in Paragraph 6.

4. Where the accused is removed from the courtroom because of an order for a protective measure under Article 147(f), he or she must be returned to the courtroom after the witness has finished testifying. Counsel for the accused must remain in the courtroom while the witness is testifying and may question the witness.

5. Where the accused is removed from the courtroom under Article 40, the trial may run until its conclusion without the accused being present, unless the trial court finds good cause as to why the reasons for excluding the accused no longer apply. Counsel for the accused must remain in the courtroom during the absence of the accused.

6. If at some stage after the indictment of the accused is confirmed at the confirmation hearing under Article 201, the accused flees or fails to attend without the leave of the trial court, the trial may run until its conclusion, provided that the accused is represented by counsel throughout.

7. The accused must sit beside his or her counsel at trial and may consult with him or her throughout the hearing without restriction, subject to Article 40.

Commentary

The right of the accused to be present during a trial is found in Article 62 of the MCCP. It is important to note that counsel for the accused must be present when the accused is not to safeguard the rights of the accused. The same principle applies to a situation where the accused waives his or her right to be present during the trial.

Paragraph 6: Paragraph 6 does not advocate for a trial in the absence of the accused—often known as a *trial in absentia*. Instead it provides for a trial to take place in the absence of the accused if the accused, through his or her own will, has fled the jurisdiction and has voluntarily reneged his or her right to be present during his or her trial. The drafters of the MCCP were of the view that, despite the accused having implicitly reneged his or her right to be present during the trial, counsel must be present during the entirety of the trial to represent the interests of the absent accused person. If the accused has not engaged counsel, the state is responsible for providing counsel for the accused person. Reference should be made to the commentary to Article 62, which discusses the issue of trials in the absence of the accused in light of international human rights norms and standards.

Article 215: Requirement of the Presence of Judges throughout the Trial

The competent judge or panel of judges must be present throughout the trial.

Article 216: Burden of Proof and Standard of Proof

1. The burden of proof at trial is on the prosecutor.
2. The standard of proof applicable at trial is that of "beyond reasonable doubt."
3. The accused must not be convicted of a criminal offense unless the prosecutor proves beyond reasonable doubt that the accused committed the criminal offense.

Commentary

Paragraph 1: The burden of proof is a party's duty (in this context, the prosecutor) to prove a disputed assertion or charge. Placing the burden of proof on the prosecutor is an element of the right to the presumption of innocence set out in Article 56.

Paragraph 2: The standard of proof is the degree or level of proof needed in a specific case. This standard is used in many jurisdictions around the world. It is difficult to define, but in general it means that the trier of fact, namely the judge, must have no doubt that would prevent him or her from being firmly convinced of the accused's criminal responsibility for the offenses charged.

Article 217: Record of Trial Proceedings

1. A full and accurate record of the proceedings shall be made in accordance with Article 37.

2. The competent judge or the panel of judges may, at its discretion, permit photography or audio or video recording of the proceedings other than by court officials.

Article 218: Transmission of Records of Prior Proceedings to the Trial Court

All the original records of prior proceedings in the case, excluding hearings on protective measures and witness anonymity under Articles 152 and 160, respectively, and hearings on cooperative witnesses under Article 166, must be transmitted to the trial court by the registry prior to the commencement of the trial.

Part 2: Trial Procedure

General Commentary

In some legal systems, the trial is predominantly judge led. The judge or panel of judges, as the case may be, will have had access to the case file in advance and will be aware of the evidence for and against the accused. The prosecutor will be present during the trial, and the accused may have counsel present (as may the victim in some states). The trial is conducted through the judge, who takes an active role in questioning any witnesses present. In other legal systems, the judge is viewed as more of an impartial referee of adversarial proceedings between the prosecution and the defense. The judge has a more passive role. Predominantly, though, the proceedings are party led and driven. The judge, as the trier of fact, will not have had access to the evidence in advance, and so the crux of the trial is that the relevant evidence of the opposing parties (i.e., the prosecutor and the defense) will be presented to the court. Each side will call witnesses, which the other side is permitted to cross-examine. The trial procedure under the MCCP is a hybrid of these two systems. It is constructed as an adversarial process, a contest between parties after which the judge or panel of judges must decide whether the prosecutor proved "beyond a reasonable doubt" that the accused committed the criminal offenses charged. That said, the MCCP also gives the court certain powers to adduce additional evidence, call witnesses, and question witnesses, making the judge more an active participant in the proceedings (see Part 3).

Where a post-conflict state is thinking of reforming its criminal procedure laws, and where it has not previously adhered to an adversarial trial procedure, prosecutors and lawyers may be unfamiliar with the techniques of examining and cross-examining a witness. In some post-conflict states, where new laws have been introduced on trial procedures, there have been difficulties with both parties not feeling competent to actively partake in proceedings in the manner envisaged in the law. Where there is a shift from nonadversarial to adversarial proceedings in the law, counsel and prosecutors must be sufficiently trained in the necessary courtroom skills to advocate the case effectively.

The procedure set out in the MCCP involves the official commencement of the proceedings by the judge (Article 220) and the determination of any motions (Article 221). This is followed by opening statements of both parties (Article 222). In some systems, after both parties have made their opening statements, the accused is entitled to make an unsworn statement to the court. The effect of the statement being unsworn is that the accused cannot be prosecuted for anything he or she says in the course of it under Section 17 of Part II: Special Part of the MCC ("Offenses against the Administration of Justice"). In other systems, the only participation that the accused may have is as a witness. It is therefore a strategic decision for the defense as to whether the accused may testify, because testimony is taken under oath and the accused may be cross-examined by the prosecutor. Under the MCCP, the accused may make an unsworn statement after the opening statements of the prosecutor and the defense (Article 222). After the opening statements, the presentation of evidence begins (Article 224). After the evidence of both parties has been presented, and any additional evi-

dence is brought by the judge or panel of judges under Article 239, the parties may make closing statements (Article 227). At any time, the court may adjourn or call recess on the case under Articles 225 and 226, respectively. Once closing statements are made, the judge or panel of judges will officially close the trial under Article 227 and will then go into deliberations and finally render a judgment under Chapter 11, Part 6.

Article 219: Joint and Separate Trials

1. In joint trials, each accused must be accorded the same rights as if such accused persons were being tried separately.
2. The trial court may order that persons accused jointly of a criminal offense under Article 193 be tried separately, if the trial court considers it necessary:
   (a) to avoid a conflict of interests that might cause serious prejudice to either or both accused; or
   (b) to protect the interests of justice.

Article 220: Commencement of the Trial

At the beginning of the trial, the judge, or the presiding judge of a panel of judges, must:

(a) call upon the prosecutor and the defense;

(b) verify the names of the prosecutor, the accused, and counsel for the accused and enter the names into the record;

(c) declare the trial open;

(d) require the prosecutor to read the indictment to the accused;

(e) confirm that the accused understands the nature and contents of the counts against him or her in the indictment;

(f) confirm that the rights of the accused, under Articles 54–71 and Article 200 have been respected, in particular the right to legal assistance;

(g) inform the accused of his or her right to freedom from self-incrimination and his or her right to silence; and

(h) determine what statements or admissions, if any, the accused will make regarding the criminal offense or offenses alleged. If the accused makes

an admission of criminal responsibility, the trial court must proceed as provided for under Article 87.

Commentary

At the outset of the trial, under Subparagraph (h), the accused may make an admission of criminal responsibility, in which case, if the criteria set out in Article 87 are met, the trial will not take place and the judge or panel of judges will move straight to the determination of penalties. The accused is not obliged to "enter a plea," meaning that the accused is not obliged to indicate whether he or she is or is not criminally responsible. Subparagraph (h) merely gives the accused an opportunity to make an admission under Article 87, if he or she so wishes.

Article 221: Motions Relating to Trial Proceedings

1. The judge, or the presiding judge of a panel of judges, must ask the prosecutor and the defense whether they have any objections or observations concerning the conduct of the proceedings that have arisen since the confirmation hearing.
2. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings without leave of the trial court.
3. After the commencement of the trial, the trial court, of its own accord or on the motion of the prosecutor or the defense, must rule on issues that arise during the course of the trial.

Commentary

At the confirmation hearing, the competent judge will have heard any motions of the parties (see Article 201); subsequently, the parties will have had the opportunity to lodge preliminary motions under Article 212. They also have the opportunity to do so prior to their opening statements. If the parties choose not to present any objections or observations concerning the conduct of proceedings after the confirmation hearing (and prior to the trial), they are precluded from bringing these before the court during the trial under Paragraph 2. However, other motions unrelated to the proceedings from the confirmation hearing until the commencement of the trial may be raised at

any time by the parties during the trial. These motions will be dealt with by the court as they arise.

Article 222: Opening Statements

1. Prior to the presentation of evidence by the prosecutor and the statement of the accused, if any, each party may make an opening statement.
2. The defense may, in the alternative, elect to make its statement after the conclusion of the presentation of evidence by the prosecutor and prior to the presentation of evidence by the defense.

Article 223: Statement of the Accused

1. After the opening statements of the parties, or if the defense elects to defer its opening statement under Article 222, after the opening statement of the prosecutor, the accused may, if he or she so wishes, make a statement.
2. The accused may not be compelled to make a solemn declaration and must not be examined about the content of the statement by the prosecutor or the trial court.
3. The trial court must decide on the probative value, if any, of the statement of the accused.

Commentary

As discussed in the general commentary to Part 2, the manner in which the accused may give evidence during a trial varies from state to state. In some systems, if the accused wishes to make a formal statement, he or she must act as a witness in the case and therefore must take an oath and may be cross-examined. In other systems, the accused may make an uninterrupted, unsworn statement to the court. Under the MCCP, the accused may make such an unsworn statement. When the court is assessing the totality of the evidence, it must assess the probative value (for a discussion of probative value, see the commentary to Article 228) of the accused's statement in the context of all the other evidence. The statement will then be taken into account in determining the accused's criminal responsibility. The accused may also opt to deliver

sworn testimony before the court under Article 246, in the alternative to an unsworn statement under Article 223.

Article 224: Presentation of Evidence during the Trial

1. Each party is entitled to call witnesses and present evidence during the trial.
2. Unless otherwise directed by the trial court in the interests of justice, evidence at trial must be presented as follows:
   (a) evidence of the prosecutor;
   (b) upon conclusion of the evidence of the prosecutor, evidence of the victim, if permitted under Article 76;
   (c) upon conclusion of the evidence of the victim, evidence of the defense;
   (d) after the defense has presented its case, the prosecutor must be given the opportunity to respond to the evidence presented by the defense. The defense must then be allowed to reply to the prosecutor; and
   (e) additional evidence ordered by the trial court under Article 239.
3. Direct examination, cross-examination, and reexamination of witnesses may be conducted by the prosecutor and the defense.
4. It is the responsibility of each party calling a witness to examine each witness, but a judge may at any stage put any question to the witness.
5. Cross-examination must be limited to:
   (a) the subject matter of the direct examination; or
   (b) matters affecting the credibility of the witness.
6. The trial court may, in the exercise of its discretion, permit an inquiry into additional matters to those set out in Paragraph 6.
7. The prosecutor and defense may, during examination-in-chief, cross-examination, and reexamination, object to any question posed by the other on grounds of relevance. The trial court must decide on such objections as they are raised.
8. The trial court must exercise control over the mode and order of the questioning of witnesses and the presentation of evidence during examination-in-chief, cross-examination, and reexamination so as to:

(a) make the questioning and presentation effective for the ascertainment of the truth; and

(b) avoid needless consumption of time.

Commentary

Paragraph 3: Reference should be made to Article 1(16) and 1(9) for the definitions of *direct examination* and *cross-examination*. Reexamination may be conducted only by the party who called the witness. For example, a prosecution witness may be directly examined by the prosecutor, cross-examined by the defense, and then reexamined by the prosecutor.

Paragraph 5: The principle provided under Subparagraph (b) that allows questioning relating to the credibility of a witness is important if either party wants to impeach a witness (see Article 261 and its accompanying commentary).

Article 225: Adjournment of the Trial

1. Upon the oral motion of the prosecutor or the defense, the trial may be adjourned if:
   (a) new evidence needs to be obtained;
   (b) the opposing party decides to call a new witness that was not previously known to the party making the motion;
   (c) the defense has had insufficient time to prepare a defense as required under Article 61;
   (d) the indictment has been amended under Article 203;
   (e) the accused has been found mentally incompetent to stand trial under Article 89;
   (f) a witness or expert witness fails to appear before the court; or
   (g) any other impediment exists that justifies the adjournment of the trial.
2. If the court decides to grant the motion for adjournment of the trial, it must enter the adjournment in the record of the trial and, where possible, set a date and time for the resumption of the trial.
3. Where the court orders the adjournment of the trial, it must order that the evidence be secured by the registry during the adjournment period.

Commentary

When a trial is adjourned, it may be for weeks or months. A recess, on the other hand, usually involves only a matter of hours (see Article 226). In adjourning the trial, the court should consider the right of the accused to a trial without undue delay under Article 63, which applies until the completion of the proceedings.

Article 226: Recess of the Trial

The court may order recess of the trial:

(a) due to the fact that the workday has ended;

(b) to obtain certain evidence quickly; or

(c) for any other justifiable reason.

Article 227: Closing Arguments and Closure of the Trial

1. After the presentation of all evidence, the prosecutor may present a closing argument.
2. After the closing argument of the prosecutor, if any, the defense may make a closing argument.
3. The prosecutor may present a rebuttal argument to which the defense may present a response to the rebuttal argument.
4. The trial court may, at its discretion, limit the time of the closing arguments.
5. When the prosecutor and the defense have presented closing arguments and rebuttal and response to rebuttal, the judge, or the presiding judge of a panel of judges, must declare the hearing closed.

Commentary

Paragraph 3: *Rebuttal evidence* is evidence that attempts to disprove or contradict the evidence presented by the other party.

Part 3: Rules of Evidence

General Commentary

In formulating the rules of evidence that would be incorporated into the MCCP, the drafters considered the variety of options that exist around the world. In some systems, volumes of detailed rules of evidence admissibility aim to exclude objectionable pieces of evidence or "hearsay evidence" (i.e., a statement made out of court). This is especially the case in systems employing the jury trial system, given the possible prejudicial effect of such evidence. In other systems, the rules of evidence are much more flexible and allow the inclusion of almost all evidence, based on the notion that a professional judge will be able to distinguish between evidence that is credible and evidence that is not. This evidence may have been taken in advance of the trial and thus will not be given by a "live" witness during the trial. The approach adopted in the MCCP is a combination of these two positions. The rules of evidence in the MCCP are generally flexible. The MCCP adopts a "free system of evidence"; however, there are a number of exclusionary rules. In addition, the MCCP rules favor live testimony in court, subject to certain exceptions.

In some systems, the judge will have had access to all the evidence in the case file in advance of the case and will be familiar with this evidence. In such systems, the trial is normally briefer that an adversarial trial because the judge, as the trier of fact, is already aware of the evidence. Under the MCCP, as discussed previously, the trial is adversarial. Consequently, all evidence must be presented to the court in open court and thus will be entered into the court record for the first time. This should be the first time the judge hears the evidence as well.

Article 228: General Provisions on Evidence

1. The rules of evidence contained in Part 3 apply to all proceedings before the court.
2. The court must admit and consider all evidence that it deems is relevant and has probative value with regard to the specific criminal proceeding, subject to other provisions of the MCCP providing for the exclusion of certain evidence.
3. The court has the authority to assess freely all evidence submitted in order to determine the evidence's admissibility and probative value.

Commentary

Paragraph 2: The general rule of evidence contained in Paragraph 2 is based on that contained in the Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia (Rule 89[C]) and the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (Rule 89[C]). The elements of this rule on evidence are also found in many domestic jurisdictions. Consequently, the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda on the meaning of these rules helps explain their meaning.

The general trend at the international tribunals is to admit any relevant and reliable evidence that has probative value, leaving the court to decide on the weight to be accorded such evidence in the context of all evidence admitted (see *Prosecutor v. BlaŠkić,* Judgment, Trial Chamber [March 3, 2000], paragraph 34). *Relevant* means there must be a nexus between the evidence and the subject matter (see *Prosecutor v. Tadić,* Decision on Defense Motion on Hearsay [August 5, 1996], paragraph 18; and *Prosecutor v. Musema,* Judgment, Trial Chamber [January 27, 2000], paragraph 39). The definition of *probative value* is not as simple. In *Prosecutor v. Tadić,* Judge Stephens opined that probative value is a "quality of necessarily very variable content and much will depend on the character of the evidence in question." The probative value of evidence depends on whether it tends to prove an issue that is relevant to the proceedings (*Prosecutor v. Delalić et al.,* Decision on the Prosecutor's Oral Request for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample [January 19, 1998], paragraph 29).

In addition to the twin requirements of relevance and probative value, evidence must also be reliable (*Prosecutor v. Delalić et al.*). The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized in *Prosecutor v. Kordić and Cerkez* (Decision Regarding Statement of a Deceased Witness, Appeals Chamber [July 21, 2000]) that reliability should be assessed at the admissibility stage rather than at the end of the trial, when the judges are apportioning weight to all admitted evidence. Reliability has to be assessed in the context of the facts of each particular case and requires a consideration of the circumstances under which the evidence arose, the content of the evidence, and whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence (see *Prosecutor v. Musema,* paragraphs 38–39).

Article 229: Refusal to Allow Irrelevant or Repetitive Evidence

The court must refuse to allow the introduction of certain evidence where:

(a) the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge;

(b) the fact to be proven is irrelevant to the decision or has already been proven;

(c) the evidence is wholly inappropriate or unobtainable; or

(d) the evidence is submitted only to prolong the proceedings.

Article 230: Exclusion of Evidence Obtained in Violation of the MCCP or in Violation of the Rights of the Accused

1. The court must not base any of its decision on evidence that must be excluded in accordance with the present article.
2. The court must exclude:
   (a) evidence obtained in violation of Article 115 where a particular investigative measure was carried out without a warrant, where a warrant is required under the MCCP;
   (b) evidence obtained in violation of Article 115 where a particular investigative measure was carried out without a warrant, where such a measure was permissible under the MCCP but where no validation of the warrantless measure was received from a judge as required under Article 115;
   (c) any statement that is established to have been made as a result of torture or cruel, inhuman, or degrading treatment as provided for in Article 232;
   (d) evidence of privileged communications made with persons not required to testify before the court as provided for in Article 233;
   (e) evidence of privileged information, documents, or other evidence of the International Committee of the Red Cross as provided for in Article 234; and
   (f) evidence of sexual conduct as provided for in Article 235.
3. A confession or other incriminating statement must be excluded where:
   (a) the provisions of Articles 106–109 of the MCCP were not complied with;
   (b) the confession or statement was made otherwise than in the presence of a lawyer, where the presence of a lawyer is required under the MCCP; or
   (c) the confession or statement was made otherwise than in the presence of a lawyer by a person who waived his or her right to have a lawyer present but where the waiver was not made voluntarily.

4. Paragraph 3 applies to the statements of suspects, accused persons, witnesses, or expert witnesses.
5. In addition to the exclusion of evidence under Paragraphs 2 and 3, the court must exclude a certain piece of evidence where such evidence has been obtained in violation of the MCCP or the applicable law and:
   (a) the circumstances in which the evidence was obtained casts substantial doubt on its reliability; or
   (b) regarding all the circumstances, including the nature of the violation and the circumstances in which the evidence was obtained, its probative value is outweighed by the need to ensure the integrity and fairness of the proceedings and the rights of the accused.
6. Evidence derived from evidence that must be excluded under Paragraphs 2 and 3 must also be excluded where:
   (a) a causal link exists between evidence in question and evidence that was obtained in violation of the MCCP or the applicable law; and
   (b) the evidence in question was obtained by active exploitation by the police or the prosecution of the initial violation.
7. The decision of the court to exclude evidence under Article 230 may be appealed by way of interlocutory appeal under Article 295.

Commentary

The scope of exclusionary evidence rules varies from state to state. Some states possess very detailed and strict exclusionary rules, whereas other states possess relatively few. In order to draft the provisions on exclusion of evidence, the drafters of the MCCP examined criminal procedure laws from around the world in addition to the criminal procedure rules of the international tribunals (the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) and the International Criminal Court. The drafters also looked at international conventions, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that contain provisions on the exclusion of evidence.

The drafters of the MCCP strongly supported the inclusion of exclusionary rules in order to preclude the use of evidence in court that was obtained unfairly, illegally, irregularly, or in violation of the human rights of an accused.

Paragraph 2(a) and 2(b): Reference should be made to the commentary to Article 115 for a discussion of both of these grounds for exclusion of evidence.

Paragraph 2(c): Reference should be made to the commentary to Article 232 for a discussion of the exclusion of evidence obtained through torture or cruel, inhuman, or degrading treatment.

Paragraph 2(d): Reference should be made to the commentary to Article 233, which discusses the exclusion of privileged communications.

Paragraph 2(e): Reference should be made to Article 234 and its accompanying commentary on the exclusion of evidence obtained from the International Committee of the Red Cross.

Paragraph 2(f): Only certain evidence of prior sexual conduct may be included in evidence. Reference should be made to Article 235 and its accompanying commentary for a full discussion of this exclusionary rule.

Paragraphs 3 and 4: Paragraph 4 applies to both confession evidence and other incriminating statements.

Regarding confession evidence, in many states, there is a history of relying exclusively, or almost exclusively, on confession evidence to secure a conviction against an accused person. In some instances, the extraction of confessions through torture, coercion, threats, or other cruel, inhuman, or violent acts is routinely carried out. In many post-conflict states, particularly those that were previously subject to dictatorial or oppressive regimes, forced confessions may have been routine. Although confessions may be an important element of the evidence in a criminal case, post-conflict states should develop criminal investigation capacities beyond a simple confession. This will require training in criminal investigation means and methodologies and adequate resourcing of the police and the prosecution service. It is also important that, if it existed, the culture of tolerance and impunity for forcibly extracted confessions be addressed. In doing so, the rights of the suspect will be protected (e.g., the right to freedom from coercion, threat, torture, or cruel, inhuman, or degrading treatment contained in Article 58 of the MCCP and the rights to silence and to freedom from self-incrimination under Article 57).

The issue of forced confessions may be addressed on one level by training and by awareness campaigns both within the criminal justice system, especially the police force, and beyond it (i.e., the general public). The police and the public should understand the rights that a suspect has and that a suspect cannot be forced to make a confession or to answer any allegations posed by the police or the prosecutor. Beyond training and awareness campaigns, the applicable law should adequately address the problem of forced confessions. One way to do this, which was favored by the drafters of the Model Codes, is to provide for a specific exclusionary rule that requires the automatic exclusion of improperly obtained confession evidence. This exclusionary rule is set out in Article 230.

There is some overlap between the various exclusionary rules contained in the MCCP. A confession may, for example, be excluded under Article 232 if it was deemed to be obtained through torture or cruel, inhuman, or degrading treatment or under

Article 230(5)(b) if its probative value is substantially outweighed by the need to ensure the integrity and fairness of the proceedings and the rights of the accused.

As stated in Paragraph 4, Article 230 applies not only to suspects or accused persons who make a confession but also to other persons questioned by the police or the prosecutor who make an incriminating statement. Thus, where a witness makes a statement in an interview with police that tends to show that the witness or another person is guilty of a criminal offense, this statement must be excluded from evidence where the police did not follow the correct procedures for questioning a person set out in the MCCP.

Paragraph 5(a): This paragraph contains a general exclusionary rule applying to all violations of the MCCP and the applicable law. Paragraphs 2 and 3 set out a number of specific violations of the MCCP that lead to an automatic exclusion of evidence, for example, where a statement was elicited through torture. Paragraph 5, in contrast, addresses any other violation of the MCCP or the applicable law—large or small—and provides the judge with guidelines on how to address evidence obtained in contravention of the law. In assessing whether or not to exclude evidence obtained in violation of the MCCP or the applicable law, the court must assess the evidence to determine whether the circumstances in which the police or the prosecutor got the evidence "casts substantial doubt on its reliability." The court must also assess and balance the probative value of the evidence (this concept is discussed in the commentary to Article 228) against the need to ensure integrity and fairness in the proceedings, coupled with the need to ensure the rights of the accused. Where a judge finds that a piece of evidence has probative value but where the inclusion of such evidence would damage the integrity of the proceedings, then the evidence must be excluded by the judge.

Paragraph 5(b): This paragraph sets out a general exclusionary rule that allows the court, at any point, to exclude a particular piece of evidence where its probative value is substantially outweighed by its prejudicial effect. (The meaning of probative value is discussed in the commentary to Article 228.) Under this paragraph, the court must employ a delicate balancing act, balancing the probative value of the particular piece of evidence against the effect that this piece of evidence may have on the fairness of the trial. The court must determine whether the level of unfairness about how the evidence was obtained is so significant as to merit exclusion of a piece of evidence of strong probative value (which may be significant and even crucial to the case). The wording of Paragraph 5(b) is purposely broad; it requires the court to look into all the circumstances surrounding the case, including how the evidence was obtained, and determine whether the mode by which the evidence was obtained is such that the evidence would be unfair to the accused. The court may look to a number of factors to determine fairness, for example, whether the evidence was obtained through telling the accused an untruth, through another form of deceit, in some other improper manner, or in violation of the law. Primarily, the court is looking at whether the evidence was obtained in bad faith. With regard to a breach of the law or procedure, the court may find that the evidence may still be admitted despite a breach of the law if that breach was not substantial or significant.

Paragraph 6: Paragraph 6 addresses the question of exclusion of evidence that derives from illegally obtained evidence that has been excluded either under the mandatory exclusionary rule under Paragraphs 2 or 3 or under the "discretionary" (balancing approach) rule under Paragraph 5. In legal theory, such evidence is also known as the "fruits of the poisonous tree"—a doctrine under which evidence that is in itself "legally" obtained but is tainted by the illegal methods in which the preceding evidence was obtained should also be inadmissible. For instance, if a statement or a confession obtained by illegal methods is inadmissible evidence, so must be a weapon found on the basis of such information—even though a search warrant was obtained to seize this weapon.

Similar to the exclusionary rule itself, this doctrine is controversial regarding the scope of its application. However, most states and legal systems recognize it to some extent—with differing exceptions.

The general rule under the MCCP is that the secondary evidence deriving from and tainted by other illegally obtained evidence should be excluded by the court if the circumstances set out in Paragraph 6(a) and (b) are found to exist. The first circumstance is that the evidence in question was obtained as a result of other evidence obtained illegally (e.g., on the basis of information deriving from illegal evidence). In other words, a causal link (sometimes known as a but-for link or a *condition sine qua non*) exists between the evidence in question and evidence that was obtained in violation of the MCCP or the applicable law. This alone does not lead to the exclusion of secondary evidence obtained from illegally obtained primary evidence. The drafters of the MCCP recognized that more was required to merit the exclusion of such secondary evidence. Without providing for an additional element to the exclusion of secondary evidence, for example, an arrested person who was not advised of his or her rights as required by the MCCP or was rejected access to a lawyer made an incriminating statement during interrogation could claim that any later incriminating statement or confession by him or her—even when given in accordance with the MCCP—has a link to initial illegality—is "a fruit of the poisonous tree"—and therefore must be excluded.

Hence, the MCCP introduces a second condition, which must also be found to exist before secondary evidence obtained from evidence that was illegally obtained can be excluded: derivative evidence must be obtained by "active exploitation" of the initial violation. This introduces a flexible standard open to court interpretation (it is also so in many states that adhere to the doctrine of exclusion of derivative evidence). In practice, derivative evidence could be admitted if the prosecution proves: (a) that secondary evidence could be obtained not only by exploiting initial violation but also by a parallel, "independent source" not tainted by illegality (e.g., even when probable cause for a house search was based on forced illegal confession, its results will not be excluded as fruits of such confession when probable cause for the search also existed on the basis of a witness statement or other legally obtained evidence); (b) that the evidence in question would ultimately or inevitably be discovered by lawful means; or (c) that the causal link between the initial violation and the evidence in question was sufficiently attenuated that the secondary evidence is not tainted by the initial violation (e.g., a second confession, given during the questioning conducted in accordance with the MCCP of a suspect whose first confession was illegally obtained, would not be

excluded if the police advised the suspect before the second confession that the first confession could not be used as evidence, or if the suspect were to be released and days after voluntarily gave another statement to the police).

Article 231: Handling of Excluded Evidence

1. When the court rules that certain evidence must be excluded under Article 230, such evidence will be removed from the court file and the court record. Excluded evidence must be sealed and stored separately from the court file.
2. Excluded evidence may be inspected only during an interlocutory appeal on exclusion of evidence under Article 295.

Article 232: Exclusion of Evidence Obtained through Torture or Cruel, Inhuman, or Degrading Treatment

Any statement that is established to have been made as a result of torture or cruel, inhuman, or degrading treatment must be excluded at trial, except at the trial of a person accused of the criminal offense of torture under Article 101 of the MCC.

Commentary

Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that states ensure that any statement that is established to have been made as a result of torture shall not be invoked in evidence in any proceedings, except where those proceedings are against the person accused of torture. Similarly, Article 10 of the Inter-American Convention to Prevent and Punish Torture states that "no statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statements by such means." The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment widens this standard to include "cruel, inhuman and degrading treatment."

Article 12 of the Declaration provides that "any statement that is established to have been made as a result of torture, *or other cruel, inhuman or degrading treatment or punishment,* may not be invoked as evidence against the person concerned or against any other person in any proceedings." The United Nations Human Rights Committee seconded the position taken in the United Nations Declaration, stating that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" (General Comment no. 20, paragraph 12). Similarly, the African Commission on Human and Peoples' Rights' Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa says that states should "ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made" (paragraph 29).

Article 232 introduces these international obligations into the MCCP by providing a complete ban on the inclusion of evidence obtained through torture or cruel, inhuman, or degrading treatment in proceedings against an accused person who has been subjected to this treatment. As such, Article 232 serves also to protect the right of the accused to freedom from torture or cruel, inhuman, or degrading treatment, as contained in Article 58 of the MCCP. In some states, there is almost an automatic recourse to torture as a way to gain evidence, particularly confession evidence. This is clearly bad practice and in violation of international human rights norms and standards. The exclusionary rule contained in Article 232 is thus both a valuable safeguard and a practical deterrent. For a fuller discussion on confession evidence, see the commentary accompanying Article 230(4) and (5). It is worth noting that Article 232 does not just protect the accused but applies to all statements elucidated by means of torture or cruel, inhuman, or degrading treatment.

Article 233: Exclusion of Evidence of Privileged Communications

1. Any written or other records relating to communications with the accused made by any of the persons listed in Article 243 and Article 244(1)(a)–(d) must be excluded from the evidence at trial.
2. Privileged communications under Paragraph 1 may be admitted into evidence at trial where the accused has consented in writing.
3. The content of the communications between the accused and any of the persons listed in Article 244(1)(a)–(d) may be admitted into evidence at trial where the accused has relayed the content of the communications to a third

party, and that third party then gives evidence of what has been relayed to him or her.

Commentary

Articles 243 and 244 list persons who are not required to testify at trial. The evidence of those persons is "privileged," given the nature of their relationship with the accused person. These persons include the family members of the accused, the accused's lawyer, a member of a religious clergy with whom the accused has consulted or confessed to, the accused's psychiatrist or psychologist, and the accused's doctor. Reference should be made to the commentaries to Articles 243 and 244 for further discussion on privileged communications.

Article 234: Exclusion of Privileged Information, Documents, or Other Evidence of the International Committee of the Red Cross (ICRC)

1. Any information, documents, or other evidence of the International Committee of the Red Cross (ICRC) that came into the possession of in the course of, or as a consequence of, the performance of its functions under the Statutes of the International Red Cross and Red Crescent Movement is privileged.
2. Privileged information, documents, or other evidence must be excluded from the evidence at trial.
3. If the trial court determines that the privileged information, documents, or other evidence is of great importance for the case, consultations must be held between the trial court and the ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the following:
   (a) the circumstances of the case;
   (b) the relevance of the evidence sought;
   (c) whether the evidence could be obtained from a source other than the ICRC;
   (d) the interests of justice and of the victim; and
   (e) the performance of the functions of the trial court and the ICRC.

4. The privileged information, documents, or other evidence may be admitted into evidence at trial if, after the consultations detailed in Paragraph 3:
   (a) the ICRC does not object in writing to the admission of the evidence; or
   (b) the ICRC otherwise waives its privilege.
5. Evidence contained in privileged information, documents, or other evidence of the ICRC may also be admitted into evidence at trial where:
   (a) the same evidence has been obtained independently from a source other than the ICRC and its officials or employees; and
   (b) the source obtained the evidence independently of the ICRC and its officials or employees.
6. Information, documents, or other evidence of the ICRC contained in public statements and documents may be admitted into evidence at trial without restrictions.

Commentary

The International Committee of the Red Cross (ICRC) is an independent humanitarian organization (see Article 1 of the Statute of the International Committee of the Red Cross). The ICRC has a number of roles, including those set out under the four Geneva Conventions of 1949. It also acts as a neutral organization that carries out humanitarian work in times of international and other armed conflict or internal strife to ensure the protection of and assistance to military and civilian victims of such events and of their direct results (Article 4, Statute of the International Committee of the Red Cross). Given the nature of its work, the ICRC often meets with both sides of the conflict, including state authorities, and its delegates are privy to sensitive or confidential information. The operation of the ICRC is premised on the notion of confidentiality. This notion is one of the core principles underpinning the ICRC and is the reason why all parties feel safe to work with the ICRC during conflict or internal strife. Given the importance of the work of the ICRC and the importance of confidentiality to the continued success of the ICRC's work, this notion must not be compromised in any way. The issue of testimony of ICRC delegates came up before the International Criminal Tribunal for the former Yugoslavia, where the principle of confidentiality was tested before the court. In the decision of *Prosecutor v. Simic* (UN document IT-95-P), the International Criminal Tribunal for the former Yugoslavia found that the ICRC had an absolute privilege against testifying under international law. Under the International Criminal Court Rules of Procedure and Evidence (Rule 73), this privilege has been restricted somewhat. This restricted privilege has been incorporated into the MCCP. For a fuller discussion on the ICRC privilege, reference should be made to "The ICRC Privilege Not to Testify: Confidentiality in Action," 845 *International Review of the Red Cross* (March 2002) (available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/ 59KCR4).

Article 235: Exclusion of Evidence of Sexual Conduct

1. In sexual offenses cases, the following evidence of sexual conduct must be excluded at trial:
   (a) evidence offered to prove that the alleged victim engaged in other sexual behavior; or
   (b) evidence offered to prove the sexual predisposition of the alleged victim.
2. In sexual offenses cases, the following evidence is admissible:
   (a) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; and
   (b) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or offered by the prosecution.
3. The party wishing to introduce evidence under Paragraph 2 must file a motion with the trial court prior to submitting the evidence in court.
4. Before admitting evidence under Paragraph 2, the trial court must set a time and date for a closed hearing and inform the prosecutor, the defense, and the victim in accordance with Article 27. The victim, the prosecutor, and the defense have a right to attend and be heard.
5. The closed hearing must be recorded in accordance with Article 37.
6. Information in the record of the closed session must be removed from the court file.
7. The information relating to the hearing and all other information, including the original motion, if any, for inclusion of the evidence of sexual conduct, must be sealed and stored in a secure place, under lock and separately from the court file.

Commentary

The laws surrounding the introduction of evidence of sexual conduct of the victim of a sexual offense vary around the world. In some states, there are no rules permitting the exclusion of evidence, which means that the defense often introduces evidence of the sexual conduct of a victim, for example, to prove that the victim was promiscuous in an attempt to discredit the victim's assertion that the illegal sexual behavior was not consensual. In other states, and under the International Criminal Court Rules of Procedure and Evidence (Rule 70[c]), there is a complete bar on the introduction of evidence relating to the prior sexual history of a victim. In the view of the drafters, neither of these provisions was suitable for inclusion in the MCCP. Allowing the defense to introduce any and all evidence of the sexual history of a victim, however irrelevant, is traumatic for the victim. In addition, even if the victim engaged in other sexual relationships in the past, that behavior often has no bearing on the present criminal trial. Even where a victim had many sexual relationships in the past, that behavior does not have a bearing on the victim's consent to a future sexual encounter. Sometimes victims are implicitly deemed to have consented to a sexual encounter merely because they did so in the past. On the other hand, the exclusion of all evidence of a victim's sexual history may mean that crucial evidence surrounding the victim's sexual history with the accused person may not be permitted, even if it is salient to the question of consent to another sexual encounter between the victim and the accused.

The MCCP adopts an approach between these two positions. The MCCP outright excludes the introduction of evidence of sexual conduct of the victim with anyone other than the accused person except as provided for in Paragraph 2(a). The MCCP also excludes the introduction of evidence relating to the sexual disposition of the alleged victim, for example, that the victim had engaged in many sexual relationships in the past. What may be introduced is evidence to prove that a person other than the accused was the source of semen, injury, or other physical injury. In this case, a party in the case would be alleging that a person other than the accused had sexual relations with the victim, whether lawful or unlawful, or that a person other than the accused injured the victim. The only other exception to the general rule set out in Paragraph 1 concerns evidence of specific instances of sexual behavior by the alleged victim with the alleged perpetrator.

In many post-conflict states, establishing accountability for crimes of sexual violence perpetrated in large numbers during and after the conflict is a sensitive and important societal priority. Putting in place rules and procedures that are protective of victims of these criminal offenses while respecting the rights of the accused is essential.

Evidence of sexual conduct cannot be introduced into court without a motion being filed by the party seeking to introduce it. The motion will be heard in closed session with both parties and the victim present. During the course of the hearing, the court will decide whether the exceptions set out in Paragraph 2 apply. Any evidence that comes from the closed hearing and any other information must be separated from the court record and the case file and securely stored away.

Article 236: Principles of Evidence in Cases Involving Sexual Violence

1. In cases involving sexual violence, where the prosecution or the defense wishes to raise the issue of consent of the victim, the relevant party must file a motion with the trial court in advance of submitting the evidence.
2. The trial court must hold a hearing under Article 237 upon receipt of a motion to introduce evidence related to the consent of the victim in a case involving sexual violence. The victim, and his or her legal counsel, may be present during the closed hearing.
3. In cases involving sexual violence, the trial court must be guided by and, where appropriate, must apply the following principles:
   (a) consent must not be inferred by reason of any words or conduct of a victim where force, threat of force, coercion, or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
   (b) consent must not be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
   (c) consent must not be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; and
   (d) credibility, character, or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim.

Commentary

The wording in Article 236 refers to *sexual violence*, which is taken to include all sexual offenses, including rape. Reference should be made to Section 3 of Part II: Special Part of the MCC on sexual offenses. With regard to the criminal offense of *rape*, as discussed in the commentary to Article 94 of the MCC, the lack of consent of the victim is not a constituent element of the offense. Nor is it an element of other sexual offenses contained in the MCC such as "Violation of the Sexual Autonomy of a Defenseless Person" (Article 96) or "Violation of Sexual Autonomy by Abuse of Authority" (Article 97). In spite of this, the issue of consent may be raised by the defense during a trial involving criminal offenses of a sexual nature. It is for this reason that Article 236 was included in the MCCP. This provision is derived from the Rules of Procedure and Evidence of the International Criminal Court.

Paragraph 3: The principles set out in Paragraph 3(a)–(c) all relate to the consent of the victim. It is important to reiterate that consent is not a substantive element of the criminal offenses set out in Section 3 of Part II: Special Part of the MCC, nor is it a defined defense against criminal offenses of a sexual nature under the MCC. Nonetheless, it may be raised by the accused. Where the definitions of sexual offenses in the legislation of a post-conflict state refer more directly to consent as an element of criminal offenses, such as rape, the principles in Paragraph 3 are an important complementary procedural element of the law.

Paragraph 3 addresses some fundamental issues relating to consent, most particularly where the defense argues that the words, conduct, lack of resistance, or silence of the victim amounts to consent. In some instances, words, conduct, lack of resistance, or silence relating to the sexual act may appear on their face to indicate consent, but closer examination reveals other factors that vitiate any claims that the victim properly consented. External circumstances or conduct such as force, coercion, or the perpetrator taking advantage of a coercive environment (which is particularly relevant where the sexual offense took place in the context of a conflict) may all unduly influence the victim. The court must look at the surrounding circumstances to determine whether the victim gave true consent. As stated in Paragraph 3(a) and (c), consent cannot be inferred from words or conduct where force, threat of force, or coercion was present, where the perpetrator took advantage of a coercive environment, or where the victim is incapable of giving genuine consent. Consent can also not be automatically inferred where the victim was silent or did not actively resist the sexual conduct.

Paragraph 3(d) addresses the issues of witness credibility, character, and predisposition. Often in cases involving sexual violence, the defense attempts to discredit the victim because of other sexual conduct the victim was part of previously or subsequent to the alleged criminal offense. In order to effectively implement this principle, Article 235 provides that all evidence of other sexual behavior (bar two discrete exceptions in Article 235[2]) must be excluded at trial. In addition, evidence of sexual predisposition must also be excluded.

Article 237: Hearing to Determine the Admissibility of Evidence

1. The trial court may, upon the motion of the prosecutor or the defense or of its own accord, order a hearing to rule on the admissibility, relevance, or exclusion of evidence.
2. The trial court must set a time and date for a hearing and inform the prosecutor and the defense in accordance with Article 27. The prosecutor and the defense have a right to attend and be heard at the hearing.

Article 238: Introduction of Books, Records, Documents, and Other Tangible Items into Evidence before the Court

1. Records of crime scene investigation, search of premises or persons, or seizure of items and documents; identity documents; technical recordings; books; records; and other documents that serve as evidence must be introduced during the trial so as to establish their content.
2. Their content must be briefly summarized by the competent judge, or the presiding judge of a panel of judges, for the purposes of the record of proceedings.
3. Other tangible items of evidence that serve as evidence may be introduced during the trial.
4. A description of the item of tangible evidence must be made by the judge, or the presiding judge of a panel of judges, for the purposes of the record of proceedings.
5. Books, records, or documents that are admitted into evidence at trial must, if possible, be submitted in the original.
6. All books, records, documents, or copies of originals submitted into evidence must be attached to the court case file.
7. All tangible items of evidence must be stored by the registry of the competent trial court once they are admitted into evidence before the court.

Commentary

During the course of the trial, both the prosecutor and the defense will call witnesses who will be examined, cross-examined, and reexamined as per Article 224. Each side will be building its case through witness testimony that will be entered into the court record. The court record provides the official record of the trial and all the evidence that was brought before the court during the trial. The judges must rely on the court record in determining the criminal responsibility of the accused. The judge or judges must also base their judgment on the court record. During the course of the trial, other sorts of evidence may also be entered into the court record. Certain documents, of the sort outlined in Paragraph 1, may provide valuable evidence. In order to enter such evidence into the court record, the judge or presiding judge must summarize their content for the record. These documents will move from the possession of the party entering them to the possession of the court, where they will be stored in the

court case file under Paragraph 6. Other tangible pieces of evidence may also be introduced into the court record at trial, for example, the gun or knife in a trial for "unlawful killing." Such pieces of evidence must be described by the judge or the presiding judge and then entered into the record. After this, the court is charged with storing these pieces of evidence as required by Paragraph 7. Provision should be made in each courthouse for the storage of evidence. Rules and procedures will need to be developed around the retention of evidence to determine the length of time evidence should be retained, where it should be stored, who can have access to the evidence, and so on.

Part 4: Power of the Trial Court to Order Additional Evidence

General Commentary

As discussed in the general commentary to Section 2, the level of judicial involvement in the introduction of evidence and examining of witnesses varies from state to state. In some states, the judge, acting as an inquisitor, will have access to the evidence in advance and will essentially lead the trial, leading the questioning of witnesses and introducing evidence. In other systems, the judge is more of a referee and a passive observer of party-led proceedings. Under the MCCP, the parties, namely, the prosecution and the defense, lead the proceedings; however, the judge does not merely have a passive role. Part 4 endows the judge or panel of judges with powers relating to the introduction of evidence, the summonsing of witnesses, and the commencement of other sorts of investigations pertinent to the trial. The judge may adopt a more active role in ensuring that evidence that may be valuable to the accused is introduced. Under Article 239, the court may generally order the introduction of *evidence*, as defined in Article 1(19). It may summons witnesses who have not been called by either side to appear (Article 239), as well as order the reenactment of a criminal offense (Article 240) and the medical examination or the examination of the mental state of the accused (Article 241).

Article 239: Power of the Court to Order the Production of Additional Evidence

1. The trial court has the power to order the production of evidence that it deems relevant to the proceedings.
2. The trial court has the power to summons witnesses to appear before the court, other than those called by the prosecutor and the defense.

Article 240: Power of the Court to Order the Reenactment of a Criminal Offense

1. The trial court may, of its own accord or upon the motion of the prosecutor or the defense, order the reenactment of the criminal offense at the crime scene.
2. Where a reenactment of the criminal offense is ordered, the prosecutor and the defense must be present during the reenactment.

Article 241: Power of the Court to Order a Medical Examination or Examination of the Mental State or Mental Incapacity of the Accused

1. The trial court may, of its own motion, order a medical examination of the accused and appoint a medical expert to conduct the examination.
2. The trial court may, of its own motion, order an examination of the mental state of the accused in accordance with Article 144, or an assessment of the mental capacity of an accused under Article 89.

Commentary

Reference should be made to Articles 89 and 147.

Part 5: Witnesses and Witness Testimony before the Court

Section 1: Obligation on Witnesses to Testify before the Trial Court

Article 242: Obligation on Witnesses to Testify before the Court

Except as otherwise provided for in the MCCP, all witnesses are obliged to testify before the trial court when summonsed by the court in accordance with Article 32 or 33.

Section 2: Persons Not Required to Testify before the Trial Court

General Commentary

It is common practice for domestic criminal procedure laws to lay out certain categories of persons who are not required to testify at trial. These persons are excused because of the nature of the relationship that they have with the accused. These relationships are "protected," and the persons in these relationships are also protected. The most commonly excluded category of persons is family members of the accused and the lawyer for the accused. Religious clergy (e.g., imams, rabbis, priests, or monks) who have a relationship with the accused are also generally considered privileged. The treatment of the relationship between doctors, psychiatrists, and psychologists and the accused varies from state to state. In some states, the relationship is considered sacred; however, over time, other states have moved to end the protection in certain circumstances where public policy reasons outweigh the need to ensure the continuation of this protected relationship. In other states, public policy reasons have led to the amendment of rules on other privileged relationships. For example, in some states, given the public policy need to combat domestic violence, the husband-wife privilege has been obliterated in cases concerning domestic violence against a wife. Privileges have also been obliterated where one party to an otherwise privileged relationship is the victim of the criminal offense allegedly committed by the accused person. The same goes for cases where the accused is charged with very serious crimes. Under the MCCP, a family member may revoke the privilege under Article 243. With regard to other privileged communications contained in Article 244, the privilege may be revoked when

the accused consents or where the accused has relayed information to a third party, who then testifies about the information (see Article 233[3]).

Article 243: Family Members of the Accused Not Required to Testify

1. The spouse, parents, children, and adopted children of the accused are not required to testify against the accused.
2. The spouse, parent, child, or adopted child of the accused may choose to testify against the accused.

Commentary

The privilege set out in Article 243 belongs to the witness, but he or she may revoke it. As provided for in Paragraph 2, the family member may choose to testify against the accused. The drafters of the Model Codes considered a number of variations on the testimonial privilege of family members. In the end, the drafters decided on the most widely accepted formulation. In drafting new provisions on privileged communications, a state may wish to consider aligning with the trend discussed in the general commentary toward diminishing the absoluteness of the privilege. For example, some states have revoked the traditional privilege in the case of serious crimes or where the family member is a victim of the criminal offense.

Article 244: Other Persons Not Required to Testify

1. The following persons are not required to testify at trial about communications with the accused, and may not do so without the consent of the accused:
   (a) defense counsel for the accused, with respect to facts that became known to him or her in his or her capacity as defense counsel;
   (b) a member of a religious clergy, in relation to communications made by the accused in the context of spiritual consultation or sacred confession;

(c) the psychiatrist or psychologist of the accused; or

(d) the doctor of the accused.

2. The accused may consent in writing to his or her counsel, religious counselor, psychiatrist, psychologist, or doctor testifying at trial.

3. Any written records relating to communication with the accused are privileged.

Commentary

In addition to the family members not required to testify during the trial under Article 243, Article 244 contains categories of persons who cannot give evidence at trial without the permission of the accused. The categories of persons who are excluded from testifying in court in the absence of the accused's consent vary from state to state. The categories contained in the MCCP were arrived at after a survey of similar provisions from around the world, followed by extensive discussions by the drafters of the MCCP. What the drafters came up with were a number of generally agreed-upon categories. The use of the term *religious clergy* in Paragraph 1(b) is taken to include priests, monks, imams, rabbis, and other religious or spiritual clergy members.

Paragraph 3 deems that any written records related to communication with the accused are privileged. So, for example, where the accused has had a consultation with a psychiatrist, neither the defense nor the prosecution can request and submit the records of the session into evidence in court, except with the written consent of the accused. Reference should be made to Article 233(3), which provides that evidence of privileged communications may be admitted into evidence where the accused has relayed the information to a third party who then testifies at the trial.

Section 3: Failure of a Witness or Expert Witness to Appear before the Trial Court

Article 245: Consequences of Failure of a Witness or Expert Witness to Appear before the Trial Court

1. If a witness or expert witness who has been summonsed to appear at trial under Article 33 or 34 fails to appear before the court and does not justify his

or her absence, the court may order the witness or expert witness to be brought before the court by way of an apprehension order under Article 35.

2. When a witness is brought before the court as provided for in Paragraph 1, the court may issue an order for noncompliance with a court order under Article 41 against a witness or expert witness who fails to appear before the court when summoned to do so.
3. Where a witness or an expert witness fails to appear before the court, the court may adjourn the trial under Article 225.

Commentary

Where a witness fails to appear before the court when summonsed to do so, the first step the court may take is to issue an apprehension order under Article 35. The police will then be legally empowered to bring the witness or expert witness before the court. Once the witness is brought before the court, the court may issue an order for noncompliance with a court order, under which a person may be detained or fined for noncompliance with the court-ordered summons issued against him or her. As another option, a witness or expert witness who fails to appear before the court when summonsed to do so may be prosecuted for the offense of "failure to respect an order of the court" under Article 197 of the MCC. It falls within the power of the prosecutor, rather than the court, to prosecute a person for this offense, although the court could recommend the prosecutor to do so.

Section 4: The Accused as a Witness

Article 246: The Accused as a Witness

The accused is not obliged to but may appear as a witness in his or her defense.

Commentary

The accused may make a statement after the opening statements of both the prosecutor and the defense. This statement is not made under the solemn declaration that witnesses are required to take under Article 246. Where an unsworn statement is made by the accused under Article 246, the judge or the panel of judges must decide on the probative value of the statement. The unsworn statement made by the accused is not subject to cross-examination by the prosecutor. Obviously, a statement made by the

accused as a witness, which is pursuant to a solemn declaration, and that can be examined by the prosecutor will have higher probative value than an unsworn and uncontested statement.

Section 5: Solemn Declaration of a Witness and Declaration of Preliminary Information

General Commentary

Prior to a witness testifying before the court, he or she must make a solemn declaration or an oath stating officially before the court that he or she will tell the truth. Once the witness has been sworn in, or made the solemn declaration, the witness must answer the questions put to him or her by the prosecutor, the defense, or the judge. This obligation is subject to the other provisions of the MCCP, however; for example, a person does not have to answer any question that would impinge upon his or her right to freedom from self-incrimination as set out in Article 57. In addition, where the person is subject to protective measures or anonymity, the extent of testimony required from the witness may also be limited by the court under Article 254.

Article 247: Solemn Declaration

1. Prior to testifying, a witness must make the following solemn declaration: "I solemnly declare to tell the truth, the whole truth, and nothing but the truth."
2. A witness may use the sacred texts of his or her faith to take the oath.

Article 248: Solemn Declaration of a Child Witness

1. A child who, in the opinion of the trial court, understands the nature of the solemn declaration must make the solemn declaration under Article 248.
2. The trial court may permit a child who does not understand the nature of the solemn declaration to testify without making the declaration where, upon inquiry, the court is of the opinion that the child is sufficiently mature to be

able to report the facts of which the child had knowledge and understands the duty to tell the truth.

3. The trial court must decide on the probative value, if any, of the statement of a child witness who has not made the solemn declaration under Article 247.

Commentary

A child witness, meaning a witness under the age of eighteen years, cannot automatically make a solemn declaration prior to testifying before the court. Where the court is confronted with a child witness, it must assess whether the child understands the nature and implications of making such a declaration. This assessment is usually done by questioning the child. Where the court determines that the child understands the nature of the declaration, the child must make the declaration and will be able to give evidence under oath. Where the child does not understand the nature of the solemn declaration, the court may still allow the child to testify not under oath, if it determines that the child can report the facts that the child has knowledge of and he or she understands the duty to tell the truth. Reference should be made to Article 263, which provides that a person cannot be convicted solely upon the basis of the testimony of a child witness who has not made a solemn declaration.

Article 249: Solemn Declaration of a Mute or Deaf Witness

1. Mute witnesses who are literate must take the solemn oath by signing the text of the oath.
2. Deaf witnesses must read the text of the oath.

Article 250: Preliminary Information

1. Subject to any witness protection order or an order for witness anonymity, after the solemn declaration the court must ask the witness to state for the record his or her:
   (a) first name and surname;
   (b) occupation;

(c) address;

(d) place and date of birth; and

(e) relation to the accused or a victim of the criminal offense, if any.

2. The witness must also be warned that he or she must report to the court any change in his or her address.

Section 6: Freedom from Self-Incrimination of a Witness and Warnings Issued by the Court

Article 251: Freedom from Self-Incrimination

1. No witness may be compelled to incriminate himself or herself.
2. A witness is not required to answer any question that would incriminate himself or herself.
3. If it appears to the judge, or to the presiding judge of a panel of judges, that a question asked of a witness is likely to elicit a response that might incriminate the witness, the judge must advise the witness of his or her right not to answer the question.

Commentary

The privilege against self-incrimination is provided for the benefit of the suspect or the accused under Article 47. Article 57 concerns a witness and is therefore distinct. In some states, witnesses do not benefit from the privilege against self-incrimination. This privilege applies only to suspects and accused persons. In other systems, the witness must testify but has the right not to have any incriminating evidence used against him or her in other proceedings (this is known as "use immunity" and is discussed in relation to cooperative witnesses in the commentary to Chapter 8, Part 4, Section 3). In yet other states, the witness has the full privilege against self-incrimination. The drafters of the MCCP chose to include a full privilege against self-incrimination for a witness, which means that when testifying in court, a witness may refuse to answer any question put to him or her if it would violate his or her privilege against self-incrimination. A person other than the suspect or the accused who is being questioned by the police and the prosecutor (and may or may not act as a witness during the trial) is also afforded the privilege against self-incrimination. Reference should be made to Article 110.

Article 252: Warnings Issued by the Court

1. After a witness has made a solemn declaration and after the witness has given the court preliminary information, the trial court must instruct the witness of his or her duty to speak the truth and that he or she may not withhold anything, whereupon the witness must be warned that false testimony is a criminal offense under Article 192 of the MCC.
2. The trial court must instruct the witness that he or she is under a duty to answer any questions posed to him or her subject to Articles 251, 254, and 255.
3. If a witness is anonymous or is subject to a protective measure and is testifying behind a screen, the presiding judge must verify that it is the same witness for which anonymity or witness protection was granted. This verification must be entered in the court record.

Commentary

Paragraph 3: Paragraph 3 is crucial to ensuring that a substitute witness is not placed on the witness stand to testify in lieu of the actual witness.

Section 7: Requirement of Absence of a Witness during Testimony of Another Witness

Article 253: Absence of a Witness during Testimony of Another Witness

1. A witness other than an expert witness who has not yet testified must not be present when another witness is testifying.
2. A witness who has heard the testimony of another witness must not for that reason alone be disqualified from testifying.

Commentary

The purpose in requiring that a witness who is yet to testify not be present during the questioning of another witness is to ensure that the incoming witness is not influenced by the testimony of other witnesses. However, the presence of a witness during the trial, whether accidental or otherwise, cannot be used as a sole ground to disqualify a witness. Where a witness has been present during the testimony of other witnesses, the court may take this into account when determining the probative value of his or her testimony.

Section 8: Measures for the Protection of Witnesses Testifying before the Court

Article 254: Protection of Witnesses during a Trial

1. The trial court must take appropriate measures to protect the safety, physical, and psychological well-being, dignity, and privacy of witnesses during the trial. In doing so, regard must be had for all relevant factors, including age, gender, health, religion, and the nature of the criminal offense, especially where the criminal offense involves sexual or gender violence or violence against children.
2. The trial court may, of its own accord or at the motion of the prosecutor, the defense, or a witness, make an order for protective measures for witnesses under threat or vulnerable witnesses under Chapter 8, Part 4, Section 2 or an order for anonymity for witnesses under threat under Chapter 8, Part 4, Section 2.
3. Where an order for anonymity has been granted under Chapter 8, Part 4, Section 2, the trial court must prohibit all questions the answers to which could reveal the identity of the witness or the restricted information. The defense may, however, examine the witness on all other issues permissible under the MCCP.
4. The trial court must strike from the court record any statements made by an anonymous witness that inadvertently or mistakenly reveals his or her identity in response to a question.

Commentary

The judge or panel of judges presiding over a trial is charged with ensuring the safety, physical and psychological well-being, dignity, and privacy of witnesses during the course of the trial, especially where the criminal offenses involve sexual or gender violence or violence against children. This goal may be achieved, for example, by controlling the questioning to limit the level of harassment or intimidation of the witness as provided for under Article 254. In some instances, the court may need to go further. Under Articles 147–155 and 156–162 of the MCCP, respectively, the court may make an order for protective measures or witness anonymity. Article 254 gives the trial court the power to order these measures of its own accord, where the prosecutor, the defense, or the witness has not filed a motion with the court.

Where an anonymous witness (as defined in Article 156) is testifying during the trial, the court has the responsibility to ensure that no details surrounding the identity or whereabouts of the anonymous witness are revealed to the defense or to the public or press. Thus, the court must play a strict role in overseeing the line of questioning pursued by the defense and the prosecutor and strike from the official court record any statements that might reveal the identity or whereabouts of the anonymous witness.

Article 255: Control of Questioning of Witnesses by the Trial Court

1. The trial court must, whenever necessary, control the manner of questioning to avoid any harassment or intimidation of witnesses.
2. The trial court must forbid repetitious or irrelevant questions, as well as answers to such questions.

Section 9: Measures to Protect Child Witnesses Testifying before the Court

Article 256: Questioning of a Child Witness

1. The court must ensure that a child witness is examined considerately to avoid producing a harmful effect on his or her state of mind.
2. If necessary, a child psychologist or child counselor or some other expert may be called to assist in the examination of a child witness.

Commentary

For a child (meaning a person under the age of eighteen years as defined in Article 1[5]), testifying at a trial can be an overwhelming and traumatic experience. A sensitive approach must be adopted toward child witnesses and victims. According to the *Guidelines on Justice for Child Victims and Witnesses of Crime* (UN document E/2004/INF/2/Add.2, developed by the International Bureau for Child's Rights), "child-sensitive denotes an approach which takes into account the child's individual needs and wishes" (paragraph 9[d]). There are numerous elements to a child-sensitive approach to child victims and witnesses, all of which are set out in the guidelines and should be referred to. These elements may include implementing protective measures for child witnesses. Reference should be made to Articles 147–155 and their accompanying commentary on protective measures for witnesses under threat.

The court must be alert to protecting the rights and interests of children and to protecting them from harm. When a child is testifying, the child has the right to be protected from justice-process hardship, which means that the child should be provided with support throughout the process (see paragraphs 23–26 of the guidelines), including a child psychologist, child counselor, or some other person with expertise in dealing with children. The child psychologist, counselor, or other expert may be provided by the state, although their provision may be difficult in terms of resources in a post-conflict state. Alternatively, the court system may enter into an agreement with a civil society or non-governmental organization specializing in children's rights that may work with the court in the support of child witnesses. In some states, paralegals undertake this role, providing support and assisting in the preparation of child witnesses for court. In terms of lessening the harmful experience of a trial for a child witness, in some states, legal professionals, including judges, are required to remove robes and other formal attire usually required in court in order to make the experience less intimidating. This is not expressly provided for in the MCCP but is a matter of good practice where court personnel are otherwise required to wear formal attire, such as

wigs and gowns. During the questions, the child must be treated with dignity and compassion (paragraph II[A] of the guidelines). Child-sensitive questioning requires questioning the child in a language that the child uses and understands (paragraph 14) and conducting questioning and interviews in a "sensitive, respectful and thorough manner" (paragraph 13).

In addition to the provisions of Article 256 for the protection of child witnesses, the MCCP contains another mechanism to protect children. Under Articles 147–155, a child may be declared a vulnerable witness and protective measures may be ordered for the child witness. The measures that may be ordered in favor of the child witness are contained in Article 147. Reference should be made to Articles 147–155 and their accompanying commentaries for further discussion on the protection of a child witness/vulnerable witness.

Section 10: Testimony before the Trial Court and Its Exceptions

Article 257: General Principle of Live and Direct Testimony of Witnesses

Except as otherwise provided in the MCCP, a witness must be heard directly by the trial court.

Commentary

In some legal systems, witness statements may be introduced into evidence without the witness being present at trial to testify. This occurs mostly where the witness statement was obtained through the questioning of a witness by an investigating judge. The defense may have also been present during the taking of the statement to safeguard the right of the accused. In other legal systems, and in the MCCP, the general rule is that a witness must be heard directly before the court. To put it simply, the witness must come before the court and testify "live." In this way, the prosecutor, the defense, and the court (and counsel for the victim if the court has given the victim the opportunity to participate in proceedings under Article 76) will be able to question the witness in person and directly observe the demeanor of the witness.

There are a number of exceptions in the MCCP to the general principle in Article 257. The first exception involves live testimony that takes place in a location other than the courtroom. Article 174 allows a person who has been declared to be either a witness under threat or a vulnerable witness to testify in a location other than the courtroom. For example, a witness may be subject to protective measures under Article 147(e) that allow the witness to testify from another location by means of closed-

circuit television. The second exception to the general rule in Article 257 involves the introduction of evidence that has been previously recorded. There is the option under the protective measures regime to allow for the introduction of prerecorded videotaped evidence (see Article 147[e]). In addition, a unique investigative opportunity under Article 146 allows a court-ordered examination of a witness prior to trial if obtaining the attendance of the witness at trial is impossible. Where the prerecorded evidence of a witness is being introduced at trial—whether under a protective measure or by way of a unique investigative opportunity—the MCCP requires that both parties be present at the time the testimony is taken to examine the witness. This protects the accused's right to examine a witness against him or her set out in Article 64 of the MCCP. Article 258 provides another exception to the principle of live and direct witness testimony.

Article 258: Exceptions to the General Principle of Live and Direct Testimony of Witnesses

1. The testimony or statements of a witness that are made out of court may be read during the trial where both the prosecutor and the defense consent.
2. In exceptional circumstances, and where a protective measures order in favor of a witness is not in place, the trial court may, upon the motion of the prosecutor or the defense, permit a witness to give testimony by way of live audio or video technology provided that the prosecutor, the defense, and the court have the opportunity to examine the witness.
3. In exceptional circumstances, and where a unique investigative opportunity has not been ordered, the trial court may allow, upon the motion of the prosecutor or the defense, the introduction of:
   (a) previously recorded audio or video testimony of a witness; or
   (b) a transcript or other documented evidence of witness testimony.

Commentary

Paragraph 1: Paragraph 1 provides a general exception to Article 257 where both parties consent to the introduction of witness statements or testimony. Because the accused has consented to the introduction of this evidence, he or she has waived his or her right to examine the witness and therefore it is not a violation of rights to introduce such testimony.

Paragraph 2: Paragraph 2 provides an exception to the requirement that a person give evidence directly before the court. It allows for either side to request the court, exceptionally, to allow a witness (who is not already subject to witness protection measures) to give testimony at another location. This may be because the person is in a foreign location and cannot make it to the trial, for example, or severe logistical issues prevent bringing the witness to court (e.g., a witness who is a dangerous prisoner in a high-security prison). Although it is preferable for the accused that the witness appear directly before the court so that the defense can fully examine his or her demeanor, the giving of evidence by a witness in another location does not severely encroach upon the rights of the accused to examine a witness. This is not to say that the court should automatically grant this measure. This is an exceptional measure, and the party seeking to have its witness testify at another location must make a strong case to the court as to why the witness's presence in the courtroom is not necessary. The party must also demonstrate to the court why it did not seek other measures to achieve this end. For example, where the prosecutor seeks to have a witness testify at another location because the witness is intimidated, the court would be at liberty to question why the prosecutor did not seek a protective measures order instead. The court may require that the prosecutor does so instead of granting the prosecutor's request under this paragraph.

Paragraph 3: The purpose of Paragraph 3 is to address the question of an absent witness, where the witness is absent and a unique investigative opportunity has not already been obtained to preserve the testimony of the person for submission during the trial. A witness may be absent because he or she is dead, is too ill to attend the proceedings, is abroad, or cannot be found. Systems differ as to how they treat absent witnesses. In some systems, there is a general bar on the introduction of the testimony of absent witnesses. Other systems allow the prior statements of absent witnesses to be introduced, but only where such statements are corroborated by other testimony or evidence. Yet other systems have adopted a different position, as discussed in the commentary to Article 257, where prior witness testimony may generally be introduced at trial.

Some experts argue that prior witness testimony should not be introduced at all. First, it is impossible to test the reliability of such statements, and second, it deprives the accused of his or her right to examine the witness as set out in international human rights law (and under Article 64 of the MCCP). In systems that have detailed hearsay evidence ("hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted), the use of prior witness testimony amounts to hearsay and therefore is not, in principle, permissible. That said, even in many states that have hearsay rules, exceptions have been made to allow for the introduction of hearsay evidence. Some experts argue that the evidence of absent witnesses must be allowed to be presented to the court; otherwise, valuable evidence could be lost.

The drafters of the MCCP, in considering what provision to adopt on absent witnesses, debated the various options available. Ultimately, the drafters concluded that there should be a mechanism to deviate from the general principle of "live testimony" in certain defined instances and to allow for the introduction of prerecorded evidence before a court. This measure, however, should be exceptional; where such evidence is introduced, both the prosecutor and the defense should have had the opportunity to examine the witness. The drafters thought that the latter safeguard was essential to

protect the rights of the accused to examine the witness and that it was a vital safeguard to test the reliability of such statements.

Where the court is considering whether to allow the introduction of prerecorded testimony, it must assess whether the testimony could be obtained through less severe measures. For example, where a witness is absent because he or she is in a different state, it may be feasible to provide for testimony by way of live video link instead of prerecorded testimony.

It must also be noted that Article 258 refers to testimonial evidence of witnesses only. Thus, Article 258 relates to the introduction of prerecorded evidence given by the accused in a testimonial capacity. There is no clear definition of what "testimony" is. In some states, a statement is testimonial where the statement is made in an investigative environment in an effort to assist authorities to apprehend and prosecute a suspect. Whether or not the witness is under oath while making a statement will have a great bearing on whether a statement is testimonial; however, a phone call to the emergency services by an absent witness to report the commission of a criminal offense is classified as testimonial in some jurisdictions.

Although a provision that the court must not rely solely or to a decisive extent on the evidence of a sole absent witness to convict a person is not contained in the MCCP, drafters of new criminal procedure laws may wish to consider it. This standard comes from the European Court of Human Rights case of *Unterpertinger v. Austria* (application no. 9120/80), which states that a case should not be entirely based on evidence from an absent witness unless other evidence submitted supports the veracity of the evidence or otherwise corroborates it.

Section 11: Presentation of Prior Statements and Other Evidence to a Witness during the Trial

Article 259: Presentation of Prior Statements to the Witness during the Trial

Statements of a witness made prior to the trial may be used during the trial to refresh the recollection of the witness who made them.

Commentary

A prior statement taken from a witness during the investigation of a criminal offense cannot be entered into evidence as a general rule under the MCCP. Under the principle of live testimony set out in Article 257, the witness is required to come to court and testify before the judge or panel of judges, subject to the exceptions contained in Arti-

cle 258 and elsewhere in the MCCP. During the course of live testimony, the witness may make a statement that is different from what he or she made during the investigation of the criminal offense, or the witness may have forgotten key elements of his or her earlier evidence. In such a case, either party may "refresh the recollection of the witness who made them" by reading the prior statement of the witness. The witness statement will not be entered directly into evidence, but the witness's responses to it and the relevant parts that were read to the witness will. The use of prior statements is central to the impeachment of a witness under Article 261(2)(b).

Article 260: Presentation of Physical or Documentary Evidence to the Witness during the Trial

Physical or documentary evidence collected during the investigation may be presented to a witness during his or her testimony so that the witness can identify such evidence and testify as to its relevance.

Section 12: Impeachment of a Witness

Article 261: Impeachment of a Witness

1. A witness or expert witness may be impeached by any party, including the party calling the witness.
2. A witness may be impeached on the following grounds:
   (a) the witness is biased in favor of one party or the other;
   (b) the witness has made a prior statement that conflicts with his or her testimony at the trial;
   (c) the witness has been induced in testimony to have contradicted himself or herself during his or her testimony in court;
   (d) the witness has a community-recognizable reputation for dishonesty; or
   (e) the witness is suspected or accused of another criminal offense.

Commentary

Witness impeachment refers to a deliberate act by either the prosecutor or the defense to discredit a witness by calling into question the witness's credibility. Impeachment can be done by introducing evidence through the cross-examination of the witness whose credibility has been called into question, or even by introducing testimony of another witness. Paragraph 2 incorporates the most commonly recognized grounds of impeachment contained in domestic criminal procedure codes around the world. Under Paragraph 2(a), a witness may be impeached because they are biased against one party or in favor of another. In addition, a witness may have a personal interest in the outcome of the case. For example, the defense may try to impeach a prosecution witness who has entered into a plea agreement with the prosecutor. The testimony of an impeached witness will carry less weight with the court than the evidence of a witness whose credibility has not been called into question.

Section 13: Compensation of Witnesses Summonsed before the Trial Court

Article 262: Compensation of Witnesses

A witness who is summonsed to appear before the trial court must be compensated for his or her reasonable expenses.

Commentary

The compensation of witnesses should be done through the registry of the court and should be regulated by a standard operating procedure or a circular issued by the president of the courts in the state concerned.

Part 6: Deliberations and Judgment

Article 263: Deliberations of the Trial Court

1. After the hearing is declared over, the judge or panel of judges must deliberate in private.
2. In the deliberations of a panel of judges, each judge must vote separately on each count contained in the indictment. If two or more accused persons are tried together under Article 193, separate findings must be made for each accused person.
3. The accused must not be convicted of a criminal offense that was not included in the indictment.
4. A lesser included offense of a criminal offense stated in the indictment is deemed to be included in the indictment.
5. A verdict of "criminally responsible" or "not criminally responsible" on each count in the indictment must be rendered by a majority vote.
6. A verdict of "criminally responsible" on a count in the indictment must not be rendered by a judge or panel of judges unless the judge or panel of judges is certain that criminal responsibility has been proven by the prosecutor beyond reasonable doubt with respect to that count.
7. In reaching a decision on the criminal responsibility of the accused, a judge or panel of judges must not find the accused criminally responsible based solely or, in the absence of corroborating evidence, to a decisive extent on:
   (a) the evidence of a sole anonymous witness;
   (b) the evidence of a sole cooperative witness;
   (c) the evidence of a child, where the child testified without making a solemn declaration; or
   (d) a statement or confession given to the police or the prosecutor.

Commentary

After the procedures set out in Part 5 have been completed, the judge or panel of judges must begin deliberations. Ultimately, the purpose of deliberations is to render a verdict on whether the accused person is "criminally responsible" (i.e., guilty) or "not criminally responsible" (i.e., not guilty). The judge or panel must go through the indictment charge by charge and vote on whether they believe that the prosecutor proved beyond a reasonable doubt that the accused committed the criminal offense. Where there is a panel of three judges, the votes of two judges will suffice to convict.

Paragraph 4: A "lesser included offense" is an offense that is composed of some, but not all, of the elements of a more serious crime. For example, to unlawfully kill or murder someone, it is necessary to commit an assault on that person. Assault is an element of unlawful killing under Article 89 of the MCC but the offense goes beyond assault. Where a person is charged with "unlawful killing" but the judge or panel of judges finds that all the elements of unlawful killing set out in Article 89 are not proven, the judge or panel may still find the person guilty of the lesser included offense of assault. This option is available even where the prosecutor did not expressly charge the person with assault. Thus, if a person is charged with unlawful killing, it is presumed that he or she can be convicted of assault, without this being written into the indictment.

Paragraph 7(a): As discussed in the commentaries to Articles 156–162, where a court orders the use of anonymous witnesses, it must do so with the utmost respect for the rights of the accused person. The use of anonymous witnesses involves a delicate balancing act between the rights of the accused to confront a witness against him or her (Article 64 of the MCCP) and the rights of the witness or victim to be protected during the proceedings. One of the safeguards in the use of anonymous witnesses that has been elaborated by the European Court of Human Rights is that the testimony of a sole anonymous witness may not be used to convict an accused person. In the cases of *Unterpertinger v. Austria* (application no. 9120/80 110 ECHR, ser. A [1986] [November 24 1986]) and *Kostovski v. The Netherlands* (166 ECHR, ser. A [1989]), the European Court found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms where the accused was convicted on the basis of a sole anonymous witness.

Paragraph 7(b): The use of cooperative witnesses, as with that of anonymous witnesses, must be undertaken carefully with full respect for the rights of the accused. The cooperative witness mechanism provided for in Articles 163–168 has the potential to be abused. Therefore, it should be carefully regulated, and sufficient safeguards should be introduced to ensure that the rights of the accused are not unduly compromised through its use. In much the same way as for anonymous witnesses, the MCCP provides that the evidence of a sole cooperative witness may not be used on its own to secure the conviction of an accused person.

Paragraph 7(c): A child who has testified without making a solemn declaration will have been found to not understand the declaration's nature but will have been found

to understand the facts as per Article 248 and to understand his or her obligation to tell the truth. Given that this testimony comes from a child who has not taken an oath, the testimony should not be given the same weight as testimony delivered under oath. Paragraph 7(c) provides that the evidence of a child who has not taken a solemn oath must not be used as the sole basis for a conviction.

Paragraph 7(d): As discussed in the commentary to Article 232, the drafters of the MCCP sought to ensure that the MCCP contained sufficient safeguards to protect the right of the suspect and the accused to be free from any potential torture or cruel, inhuman, or degrading treatment (as contained in Article 58) or any acts of coercion that may impinge upon the rights of the suspect or the accused to freedom from self-incrimination (as provided for under Article 57). In many states, automatic recourse is often made to torture or cruel, inhuman, or degrading treatment or other means of coercion to secure a confession. A person may then be convicted on the sole basis of an illegally obtained confession. Article 232 requires that all evidence obtained through torture or cruel, inhuman, or degrading treatment be excluded from evidence. In order to reinforce this protection, to deter this sort of practice, and to protect the accused, Paragraph 7(d) requires that the judge or panel of judges not base any conviction solely on the basis of a confession.

Article 264: Pronouncement of the Judgment

1. The judge or panel of judges, after reaching a verdict during deliberations, must set a date and time for the pronouncement of the judgment in the case.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a child require otherwise, as provided for in Article 62.
4. The judgment must be pronounced in the presence of the accused, subject to Article 214.
5. The judgment must be pronounced by the judge, or the presiding judge, who must read aloud the indictment to the accused and must indicate in open court whether the accused has been found "criminally responsible" or "not criminally responsible" on each count of the indictment.
6. Where the accused person has been found "criminally responsible" of a criminal offense or offenses, the judge or the presiding judge must set a time and date for a separate hearing on penalties. The prosecutor and the defense must

be notified of the date and time of the hearing in accordance with Article 27. Notice must also be served upon the victim in accordance with Article 75(1).

7. When the accused is found "not criminally responsible" of a criminal offense, the court must order the person released immediately subject to Article 265. Any restrictive measure imposed upon the person must also be cancelled under the order of the trial court.

Commentary

Paragraph 4: The accused person has the right to be present during the trial, including at the pronouncement of the judgment. This right, and its exceptions, are set out in Article 214.

Paragraph 6: The MCCP provides for a bifurcated procedure, meaning that the trial and the pronouncement of penalties occur at different hearings. This was introduced as a means to protect the rights of the accused. The bifurcated nature of proceedings is discussed in more detail in the commentary to Article 267.

Article 265: Status of an Acquitted Person

1. If, at the time of pronouncement of a judgment of "not criminally responsible," the prosecutor advises the trial court in open court of his or her intention to file an appeal statement under Article 277, the trial court may at the request of the prosecutor issue a warrant for the detention of the accused, for bail, or for restrictive measures other than detention, if the conditions under Articles 177, 179, or 184 are met.
2. A warrant for detention, bail, or restrictive measures other than detention takes effect immediately.

Commentary

Where an accused person is acquitted at the pronouncement of the judgment under Article 264, technically he or she is no longer an accused and therefore should be released from detention or allowed to continue to remain free, as the case may be. There is a slight exception to this general rule. Article 274 of the MCCP allows the prosecutor to appeal a decision of the trial court that finds the accused person to be "not criminally responsible." Where the person acquitted of the criminal offense has been detained or subject to detention, bail, or restrictive measures other than deten-

tion prior to and during the trial, the prosecutor, after making a declaration in court that he or she intends to appeal the decision of the court under Article 277, may ask the court to continue the detention, bail, or restrictive measures. As discussed in the commentaries to Article 172 and Article 184, the purpose of these measures is to ensure the appearance of the accused before the court. The use of detention under Article 177 has a slightly broader application and serves not only to potentially ensure the presence of the accused at trial but also to protect the integrity of the evidence, any witnesses or other persons, or more generally public safety. In order to ensure that the acquitted person appear before the court during the appeal, that he or she not interfere with evidence or witnesses, or that he or she not cause a danger to public safety pending the appeal, the court may order the continuation of detention, bail, or restrictive measures other than detention. The order will take effect immediately, which in practice means that an acquitted person may be detained or subject to bail or restrictive measures up until the appeal.

Article 266: Final Judgment

1. A judgment becomes final once the period for filing an appeal has expired and where none of the parties has filed an appeal.
2. Where an appeal has been filed by either of the parties under Chapter 12, the judgment becomes final when the appeals court issues a new judgment affirming, reversing, or amending the judgment of the trial court under Article 284.

Commentary

Paragraph 1: The question of when a judgment becomes final is relevant to the issue of double jeopardy, or *ne bis in idem*, which is contained in Article 9 of the MCC. Reference should be made to Article 9 and its accompanying commentary for further discussion. Reference should also be made to Article 277, which sets out the relevant time limits for filing an appeal.

Paragraph 2: Where either party files an appeal, the judgment of the trial court will not become final until the end of the appeal, when the appeals court, having deliberated on the substance of the appeal, makes a decision on the validity of the trial court judgment. The appeals court under the MCCP has the power to affirm, reverse, or amend the judgment of the trial court upon appeal. Reference should be made to Article 284.

Part 7: Imposition of Penalties and Orders

Article 267: Hearing and Determination of an Appropriate Penalty or Order

1. At the time and date set under Article 264(6), the trial court must conduct a hearing to determine the appropriate penalty or orders to be imposed on the convicted person.
2. The prosecutor and the defense may present additional evidence to the trial court before the penalty or orders are determined.
3. The victim may also make a statement to the trial court at the hearing.
4. Once the trial court has heard the evidence of the prosecutor, the defense, and the victim, it must enter into deliberations to determine the appropriate penalty or order.
5. The applicable procedure set down in Sections 12–14 of the General Part of the MCC must be followed by the trial court in determining the penalties.
6. Where a person is convicted and is required to serve a penalty of imprisonment, any time spent in detention prior to and during the trial must be deducted from total term of imprisonment imposed by the trial court.

Commentary

Under Article 227, after closing arguments by both parties at the trial, the hearing must be declared closed. The purpose of the trial is to determine the criminal responsibility of the accused person. Under Article 263, the judge or panel of judges must then enter into deliberations. At the end of the court's deliberations, the court will then pronounce its verdict. When a person is found "criminally responsible" by the court, the next step is to determine what penalties will be imposed.

Before making a decision, the court must hold a sentencing hearing under Article 267. The rationale for holding a separate sentencing hearing is clear. It would be grossly

unfair to make the accused person present evidence at trial that he or she was not criminally responsible and then to make him or her also present evidence to mitigate his or her criminal responsibility. Evidence of the latter is generally premised on the fact that the applicable penalty should be mitigated for various reasons (such as those set out in Article 51 of the MCC on mitigating and aggravating factors to be taken into account in determining a penalty).

During the sentencing hearing, the prosecution and defense will present evidence before the court. The victim of the criminal offense may also present evidence. The evidence presented is not the same as that presented during the trial, the purpose of which was to prove or disprove the criminal responsibility of the accused person. Instead, the evidence during the sentencing hearing relates to the type of penalties that should be imposed upon the convicted person and the length of the penalties. Much of this evidence may show the presence of aggravating or mitigating factors set out in Article 51 of the MCC. For example, the victim may testify to the violence he or she incurred during the criminal offense (Article 51[2][c] of the MCC), or the prosecution may present evidence that the convicted person cooperated with the court (Article 51[1][h] of the MCC).

Once the court has heard evidence from the convicted person, the prosecutor, and the victim, it must deliberate upon the appropriate principal penalty or alternative penalty and on any additional penalties. It must also determine whether there are grounds to confiscate any proceeds of crime or property under Section 13 of Part I: General Part of the MCC.

Article 268: Pronouncement of the Penalty or Order

1. A date and time must be set by the trial court for the pronouncement of the penalty or order to be imposed upon the convicted person.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The penalty or order must be pronounced in public and in the presence of the convicted person, subject to Article 62(2).

Commentary

Article 62 protects the right of the accused person to be present at the pronouncement of his or her sentence. Article 268 upholds this right. The only exception to the presence of the accused at the pronouncement of the judgment is contained in Article 62(2).

Article 269: Preparation and Release of a Written Judgment

1. A written and reasoned judgment must be prepared by the trial court after the trial and the hearing to determine the appropriate penalty or order to be imposed upon the convicted person.
2. The written judgment must contain, at a minimum, the following elements:
   (a) the name of the accused person who was on trial;
   (b) the name of the trial court, the judge or judges who heard the case, the prosecutor, and the defense;
   (c) the date of the judgment;
   (d) the criminal offense, or offenses, for which the accused is on trial;
   (e) an account of the factual circumstances on which the case rests;
   (f) an account of the facts that the trial court considers have been proven and those that have not been proven;
   (g) legal findings based on the facts proven and the reasons for the legal findings;
   (h) a finding in relation to the criminal responsibility of the accused in relation to each count in the indictment;
   (i) the relevant penalty and order to be imposed upon the convicted person, if any;
   (j) in the case of imprisonment, any time spent in detention prior to and during the trial;
   (k) the duration of the penalty or order, including any deduction from the term of imprisonment for time spent in detention prior to and during the trial;
   (l) in the case of a fine or a payment of compensation to a victim, the amount and the date upon which the payment must be made and the fact that the payment should be made through the registry of the trial court;
   (m) the person or body responsible for executing or supervising the penalty or order;
   (n) where the person is found not criminally responsible, and where a warrant for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities used in, or destined for use in, crime was

made against the person, the judgment must contain an order that all the property be returned to the owner or possessor, where it has been taken into custody or control. Where the warrant for the temporary seizure prohibited the transfer, destruction, conversion, disposition, or movement of property, the judgment must contain an order that all restrictions on dealing with the property be lifted; and

(o) the signature of the judge or panel of judges.

3. The trial court may release the written judgment when the penalty or orders are pronounced under Article 268.
4. The written judgment must be released within a maximum of thirty working days from the date of the pronouncement of the penalty under Article 268.
5. The prosecutor, the accused, and his or her counsel must be served with a copy of the written judgment in accordance with Article 27.
6. The judgment must be entered into the court file.

Article 270: Appeal of Errors and Miscalculations in a Written Judgment

1. The prosecutor and the defense may, within ten working days of the date of service of a written judgment, file a motion with the trial court claiming miscalculations or typographical errors in the judgment.
2. Where the trial court finds that there has been such an error, it must order immediate correction of the judgment.

Part 8: Execution of Penalties and Orders

Article 271: Execution of Penalties and Orders

1. Any penalty or order of the trial court must be executed immediately upon the pronouncement under Article 268.
2. Where the penalty imposed upon the convicted person is a term of imprisonment, the convicted person must be imprisoned immediately. The trial court must remand the convicted person to the custody of the detention authority for transfer to the detention center.
3. A written order for imprisonment must be made by the trial court, if the written judgment has not yet been released. Upon the completion of the written judgment, it must be given to the detention authority.
4. If a penalty of imprisonment is imposed upon the convicted person, the person must be released immediately if the time spent in detention prior to the hearing exceeds the applicable penalty of imprisonment.
5. Where the penalty imposed upon the convicted person is a fine or a payment of compensation to a victim, the fine or compensation must be paid to the trial court through the registry at a date to be pronounced by the court in the written judgment.
6. The court may issue an order for a stay of execution of a penalty or order if the defense indicates that it intends to file an appeal under Article 274. A stay of execution is effective until the end of the appeal or until the appeal is discontinued, whichever comes first.

Commentary

Article 271 provides some general guidance on the execution of penalties at the end of a trial. In many states, specific legislation is dedicated to regulating the execution of penalties; a post-conflict state may wish to consider drafting and implementing such legislation.

The general principle espoused in Article 271 is that penalties should be executed, or in other words put into effect (e.g., a person must begin to serve a penalty of impris-

onment), immediately upon their pronouncement under Article 268 (which may not coincide with the release of the written judgment). If under Article 268 the court imposes a penalty of imprisonment, the convicted person must be imprisoned immediately (unless the person has already served the full term of imprisonment during pretrial detention). Article 271 provides that the detention authority be provided with the judgment or, if the judgment is not available, with a written order for imprisonment. This clause is important so that the detention authority can put the order in the convicted person's file and make sure that he or she is released at the appropriate date in the future. In many post-conflict states, the keeping of records has been deemed to be substandard; this flaw has resulted in persons being imprisoned well beyond the term of imprisonment imposed by a court. For this reason, in Article 271 and elsewhere throughout the MCCP, there is a strong emphasis on ensuring that written records be properly maintained.

With regard to fines, under Article 269(2)(l), the judgment of the court should set out both the amount of the fine and the date upon which it should be paid. Details regarding the payment of fines are set out in Articles 50 and 60 of the MCC. Article 50 deals with the payment of a fine as a principal penalty, whereas Article 60 deals with the payment of a fine as an additional penalty. Where a person defaults on the payment of a fine as a principal penalty, Article 50(6) provides that the person in default may receive a term of imprisonment not exceeding three months or an alternative penalty may be imposed upon him or her. Under Article 60(5), where a person defaults on a fine that was an additional penalty, the person may be brought before the court to explain his or her nonpayment and a penalty of imprisonment not exceeding three months may be imposed.

Where either the prosecution or the defense indicates to the court that it intends to file an appeal under Article 274, the court has the discretion to stay, or temporarily suspend, the execution of the order. This means that if the accused person was not in pretrial detention pending trial, the person would remain free until the appeal ended or was discontinued. If the appeals court finds that the verdict and the penalty of the trial court were correct, the sentence of imprisonment will commence at the end of the appeal. The court may, however, refuse to stay the execution of the penalty, in which case a person who is sentenced to imprisonment must be taken into custody by the detention authority.

Part 9: Supervision of Imprisonment and Conditional Release

Article 272: Supervision of Imprisonment

1. All matters relating to the supervision and execution of a penalty of imprisonment, except conditional release after trial set out in Article 273, must be decided by the trial court that pronounced the penalty.
2. In the event that the judge or panel of judges of the competent trial court are no longer available or otherwise unable to exercise their functions, the judge administrator of the trial court must designate another judge or judges to supervise the imprisonment of the convicted person.
3. The convicted person may file complaints or requests relating to the execution of the penalty of imprisonment, in writing, with the competent judge or panel of judges responsible for supervising his or her imprisonment.

Article 273: Conditional Release after Trial

1. After the convicted person has served two-thirds of his or her penalty of imprisonment, the convicted person may make a motion to the president of the courts to convene a conditional release panel.
2. When the president receives a request for the convening of a conditional release panel, the president must convene a panel consisting of three judges.
3. The purpose of the conditional release panel is to determine whether the convicted person may be released from imprisonment before the expiration of the term of imprisonment imposed upon him or her.
4. The conditional release panel must set a time and date for a hearing to determine whether the convicted person may be released from imprisonment.

5. Notice of the hearing must be served upon the convicted person and the prosecutor in the case in accordance with Article 27. Notice must also be served upon the victim in accordance with Article 75(1).

6. The convicted person, the prosecutor in the case, and the victim may be heard during the course of the hearing.

7. Conditional release may be granted only where:

   (a) two-thirds of the term of imprisonment has been completed;

   (b) a favorable report on the conduct of the convicted person has been presented to the conditional release panel by the detention authority; and

   (c) credible evidence has been presented that the convicted person poses no danger to public security or safety.

8. An order for conditional release may include any measure that promotes the peaceful reintegration of the convicted person into society, including one or more of the following:

   (a) a prohibition on the convicted person from appearing in specified places;

   (b) a prohibition on the convicted person from associating with persons identified in the order;

   (c) a prohibition on the convicted person from leaving the jurisdiction of the trial court without previous authorization from the conditional release panel and the confiscation of the convicted person's passport; or

   (d) a requirement that the convicted person appear regularly before the conditional release panel or another appointed body or person for a certain period of time.

9. Conditional release must be terminated if the convicted person commits a subsequent criminal offense or violates any of the conditions established in the order for conditional release. Upon termination of conditional release, the convicted person must immediately continue his or her original term of imprisonment until its completion.

10. A motion may be filed with the president of the courts to convene a conditional release panel where a doctor determines that the convicted person is terminally ill.

11. The conditional release panel must set a time and date for a hearing, and notice of the hearing must be served in accordance with Paragraph 5.

12. The conditional release panel may order that the convicted person who is terminally ill be conditionally released on humanitarian grounds.

13. The conditional release terminates on the day on which the convicted person would have been eligible for unconditional release if the entire term of imprisonment had been completed.

Commentary

Most states have established a system of *conditional release* or *parole* that allows a convicted person, in certain circumstances, to be released prior to fully completing his or her penalty of imprisonment. Article 273 provides a mechanism for the establishment of a conditional release panel to determine this issue. A *conditional release panel* is known as a parole board or a probation board in some states. In some legal systems, a parole board is composed of appointed individuals who may not be judges. Under the MCC, the conditional release panel is convened by the president of the courts and is composed of three judges.

A person may also file a motion with the president of the court for conditional release where he or she is terminally ill. The conditional release board may release the convicted person on humanitarian grounds where a doctor finds that the person is terminally ill.

Most states with a system for conditional release or parole have implemented laws on the establishment of a parole or probation service to supervise the conditional release of a convicted person. Convicted persons may be required to report to the parole service at set intervals as set out in Paragraph 8(d). The parole/probation service may also play a role in supervising convicted persons who are serving an alternative penalty of semiliberty or community service or a suspended sentence. A post-conflict state implementing provisions on conditional release should consider establishing a probation/parole service.