

Chapter 7: Provisions Relevant to All Stages of the Criminal Proceedings

Part 1: Proceedings on Admission of Criminal Responsibility

Article 87: Proceedings on Admission of Criminal Responsibility

1. A suspect or an accused may make an admission of criminal responsibility in relation to a criminal offense of which he or she is accused at any stage before the final decision at trial.
2. When a suspect or an accused makes an admission of criminal responsibility, the court in which the admission is made must do the following:
 - (a) ensure that the suspect or the accused understands the nature and consequences of making an admission of criminal responsibility;
 - (b) ensure that the admission of criminal responsibility has been made voluntarily;
 - (c) verify that the admission of criminal responsibility is supported by the facts of the case that are contained in:
 - (i) the charges as alleged in the indictment and admitted by the accused, if an indictment has been presented or confirmed;
 - (ii) any materials presented by the prosecutor that support the indictment and that the suspect or accused accepts; and
 - (iii) any other evidence, such as the testimony of witnesses, presented by the prosecutor or the suspect or the accused.
3. Where the court is satisfied that the conditions under Paragraph 2 are met, the court may consider the admission of criminal responsibility, together with any

additional evidence presented, as establishing all the essential facts that are required to prove the criminal offense to which the admission of criminal responsibility relates, and may declare that the suspect or the accused is criminally responsible for those offenses for which an admission has been made.

4. Where the court finds that any of the conditions set out in Paragraph 2 are not met, the court must consider the admission of criminal responsibility as not having been made and must order that the proceedings continue under the ordinary procedures provided for in the MCCP.
5. Where the court, despite being satisfied that the conditions under Paragraph 2 are met, considers that a more complete presentation of the facts of the case is required in the interests of justice, taking into account the interests of the victims, the court may:
 - (a) request the prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) order that the proceedings be continued, in which case it must consider the admission of criminal responsibility as not having been made.
6. Any agreements between the prosecutor and the suspect or accused regarding modification of the counts in the indictment, the admission of criminal responsibility, or the penalty to be imposed upon the suspect or the accused person are not binding upon the court.

Commentary

Article 87 allows for the entering of an admission of criminal responsibility prior to the final verdict at trial. This mechanism, often known as “entering a guilty plea,” is a common feature of some legal systems. It is viewed as a tool of efficiency. Due to the fact that an admission will preempt the need to try the case in full, implementation of this mechanism saves time and resources and ensures that the court system is not overburdened with cases. In many post-conflict states and territories, such as Kosovo, Bosnia and Herzegovina, and East Timor, that did not previously have such a mechanism, new legislation was introduced to make the admission of criminal responsibility a feature of their justice systems.

The suspect or the accused can make the admission before a judge at any time. Once an admission of criminal responsibility has been made, Article 87 provides a detailed procedure to be undertaken by the judge or judges. It is incumbent upon the judge or judges to assess whether the person making the admission understands the nature and consequences of entering an admission, whether such an admission is given voluntarily, and whether the facts support such a conclusion. When all three criteria are met, the judge may proceed to sentence the person (after hearing any additional evidence of the prosecution or the defense that relates to the issue of penalties), or, if the “interests of justice” so require, the judge may order the continuation of the

trial, notwithstanding the fact that a plea has been entered. Where the mechanism for the admission of criminal responsibility has been introduced into law by post-conflict states, there has been some criticism of the failure of judges to adhere to the stated procedure. It is imperative that a judge not immediately proceed to the determination of penalties upon the admission of criminal responsibility but that the judge look behind the admission to assess the volition of the person making the admission and his or her understanding of the mechanism and its effects.

Sometimes a prosecutor will enter into a plea agreement with the suspect or the accused, which means that the prosecutor will advise the court to impose a lesser penalty because of the admission of criminal responsibility. The court then can consider the advice of the prosecutor and make a determination of whether to follow that advice or not. An admission of criminal responsibility generally serves as a mitigating factor in favor of a lesser penalty. Article 51(1)(j) of the MCC provides that the entering of an admission of criminal responsibility under Article 87 of the MCCP be taken into consideration by the judge, even though the advice of the prosecutor to impose a lesser penalty upon the accused is not strictly binding upon the judge.

Part 2: Variation of Time Limits

Article 88: Variation of Time Limits

1. Upon the motion of the court, the prosecutor, or the defense, any time limits in the MCCP may be enlarged or reduced upon good cause being shown and after consideration of the interests of the prosecutor and the rights of the suspect or the accused.
2. Upon the motion of the prosecutor or the defense, the court may recognize as validly done any act done after the expiration of a time limit prescribed in the MCCP or in an order made by a competent judge. The determination must be made on terms that are just.
3. Paragraphs 1 and 2 do not apply to the time limits set out in Article 172(4) or any of the time limits set out in Chapter 9, Part 2, in addition to other time limits that if extended would unduly impact on the rights of the suspect or the accused.
4. The prosecutor or the suspect or the accused must file a motion for the variation of time limits with the registry of the competent trial court or appeals court.
5. The registry of the competent trial court or appeals court must forward the motion for variation of time limits to the competent judge.
6. Upon receipt of the motion for the variation of time limits, the competent judge must make a determination within a reasonable time about whether or not to make an order for the variation of time limits.
7. The competent judge must release a written and reasoned decision at the same time as the order for variation of time limits, if an order is granted. If an order for variation of time limits is not granted, the decision must be released within a reasonable time of the receipt of the motion for the variation of time limits.
8. The order for the variation of time limits, if granted, and the decision on the variation of time limits must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.

Commentary

Paragraph 6: The drafters of the MCCP did not specify a particular time limit within which the judge must determine the motion. Instead, the term “reasonable time” is used. Ideally, a decision will be made within a matter of days rather than months, but what is “reasonable” will depend upon the circumstances.

Part 3: Mental Incapacity of a Suspect or an Accused

Article 89: Mental Incapacity of a Suspect or an Accused

1. If an accused is deemed to be mentally incompetent after the commission of the criminal offense, the court must adjourn or terminate proceedings in accordance with Article 89.
2. A person may be declared mentally incompetent where he or she does not possess:
 - (a) a sufficient and present ability to consult with his or her defense counsel with a reasonable degree of rational understanding; or
 - (b) a rational and factual understanding of the proceedings against him or her.
3. The prosecutor and the defense may file a motion for a declaration of mental incompetence with the registry of the competent trial court at any time after the confirmation of the indictment under Article 201. The motion must be accompanied by a written statement setting out the facts upon which the motion relies.
4. Where a motion for a declaration of mental incompetence is filed by the prosecutor or by the defense, the court must order a psychiatric forensic evaluation of the person where there is a bona fide doubt about the mental competence of the suspect or the accused.
5. The court may also, on its own motion, make an order for a psychiatric forensic competency evaluation of the accused.
6. The psychiatric forensic competency evaluation must be conducted by a psychiatrist or a psychologist with experience in forensic psychiatry or forensic psychology.
7. A competency evaluation report must be submitted to the court.
8. Upon receiving the competency evaluation report, the competent judge or panel of judges must set a date and time for a competency hearing.

9. The competency evaluation report must be served on the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27, along with notification of the date and time of the competency hearing.
10. The court must consider whether the accused person is mentally incompetent as defined in Paragraph 2 in light of the competency evaluation report. The court is not bound to follow the findings of the competency evaluation report.
11. The standard of proof at the competency hearing is the balance of probabilities.
12. The prosecutor and the defense may make submissions at the competency hearing as to the competence or incompetence of the accused.
13. Where the court finds that the accused is mentally competent, the proceedings must continue.
14. Where the court finds that the accused is mentally incompetent, and where it is determined that there is no substantial likelihood of the person obtaining competency, the proceedings must be terminated. The order of the court to terminate proceedings must be stayed for ten days, during which time a civil committal hearing must be scheduled.
15. Where the court finds that the accused is mentally incompetent, and where it is determined that there is substantial likelihood of the person obtaining competency, the court must adjourn the proceedings and order treatment of the accused. Treatment should be administered in the least restrictive manner. Only accused persons deemed to be dangerous to themselves or to others may be committed to an institution for the care of mentally ill persons.
16. The competency of the accused must be reviewed at a competency hearing every ninety days.
17. The treatment provider or chief of the institution for the care of mentally ill persons must provide the court with a written report on the mental competency of the accused prior to the hearing. The report must be served upon the prosecutor, the suspect or the accused, and his or her counsel prior to the hearing in accordance with Article 27.
18. The prosecutor, the suspect or the accused, and his or her counsel must be notified of the time and date of the competency hearing, and notice must be served upon the parties in accordance with Article 27.
19. If the court determines at the competency hearing that the accused has recovered and is mentally competent, the order for adjournment of the proceedings must be terminated.

20. If the court determines at the competency hearing that the accused is still mentally incompetent as defined in Paragraph 2, the person will be remitted to treatment and the issue will be reviewed again in another ninety days.
21. An accused person who is deemed mentally incompetent but with a substantial likelihood of obtaining competency may, under Paragraph 17, remain under the court's jurisdiction for a reasonable period of time. If after a reasonable period of time, the accused person has not regained mental competency, the competent court must terminate proceedings. The order of the court to terminate proceedings must be stayed for ten days, during which time a civil committal hearing should be scheduled.

Commentary

Article 89 allows the court to suspend or terminate criminal proceedings against an accused person (meaning a person against whom an indictment has been confirmed under Article 201) where the person is found, upon evaluation, to be mentally incompetent. The issue of mental incompetence may be particularly relevant in post-conflict states where many members of the community may suffer traumatization due to the conflict and as a consequence may be suffering from mental illness.

Incompetency to stand trial must be distinguished from a plea of insanity as a defense under Article 23 of the MCC. Where a person pleads insanity, the plea relates to his or her mental competence to commit a criminal offense at the time of commission. In contrast, when a person pleads mental incompetency to stand trial, the court will look at the accused's mental competency in the present moment. A person may have been mentally competent at the time of the commission of the offense but may have subsequently become mentally incompetent. Where a person is deemed mentally incompetent, the standard practice around the world is to suspend the proceedings until the person recovers or to terminate the proceedings indefinitely where the person has no prospect of recovering. Where the trial is suspended or terminated, the person is generally placed under supervisory care.

The question of competency to stand trial might arise in the case of an accused person who is a juvenile (see the definition of juvenile contained in Article 1[26]). The same standards and processes for assessing the competency to stand trial of adults apply to juveniles. However, compared to adults, juveniles have a higher likelihood of mental disorders, developmental immaturity, and other characteristics that may predispose them to be incompetent to stand trial. Generally, juveniles are less competent decision makers than adults and may not understand the consequences of their actions, the charges against them, the role of their lawyer, or the trial proceedings. For this reason, judges and lawyers should exercise extra care to assess the competency of an accused juvenile to stand trial. As discussed in Article 326, the criminal justice system should emphasize the rehabilitation and reintegration of juveniles into society. In the case of accused juveniles found to be incompetent, treatment should emphasize rehabilitation and social reintegration, focusing on the juvenile as a patient with a mental disorder rather than attempting to restore the competency of the juvenile to stand trial.

Many post-conflict states have experienced difficulties in dealing with mentally incompetent accused persons. Unfortunately, these states often experience a high incidence of mental health problems but have very little medical capacity to address them. Often there are no fully functioning institutions or facilities for the care of mentally ill persons. In some post-conflict locales, mentally incompetent persons who enter the justice system have been put in prison simply because there were no other facilities in which to place them. Also, mentally ill persons have been tried for offenses while mentally incompetent and even have been convicted when the person was not of sound mind when the criminal offense was committed. In order to address the needs of mentally ill accused persons, criminal law must provide for the defense of insanity, as does Article 23 of the MCC. In addition, provisions such as Article 89 should be contained in the law to allow for the adjournment or termination of proceedings against mentally incompetent persons. Beyond this, the domestic laws on civil committal must be adequate and up to date, in line with best practice standards, and sufficient resources and facilities need to be provided for the treatment of mentally ill persons.

Paragraph 2: This paragraph defines what is meant by mental incompetence and provides the test that the court should adhere to in determining whether to suspend or terminate proceedings.

Paragraph 6: A psychiatric evaluation of an accused must be carried out by a forensic psychologist or psychiatrist, who must conduct an in-depth evaluation of the person's mental competency. Unfortunately in many post-conflict states, there is no forensic psychology capacity. In East Timor, for example, a number of cases arose in which accused persons were apparently mentally incompetent. The court experienced great difficulty in finding experts to evaluate their competency and had to rely on experts outside the country. For those conducting psychiatric evaluations, reference may be made to the Specialty Guidelines for Forensic Psychologists that were developed by the Committee on Ethical Guidelines for Forensic Psychologists of the American Psychological Society.

Paragraphs 14 and 15: In a post-conflict state, not only is the criminal justice system likely to be in poor condition but so too is the health care system, including hospitals and facilities for the care of the mentally ill. Dealing with mentally ill accused persons is therefore challenging. Post-conflict reconstruction efforts often encompass the rebuilding of hospitals and other health care facilities. In order for Article 89 to operate effectively, adequate facilities to house persons who have been found to be mentally incompetent and a danger to themselves or others must exist. Mentally ill persons must not be placed in prisons in lieu of proper treatment facilities. If necessary, because of resource constraints, a separate wing may be set up in a prison to house mentally ill prisoners. In addition, proper treatment facilities with qualified personnel should be provided.

The term *stay* used in Paragraph 14 means that the execution of the order is suspended temporarily and will not begin to take effect until the expiration of the time limit set out in this Paragraph.

Paragraph 21: In ascertaining the appropriate period of time that a person deemed mentally incompetent but capable of recovery should spend under court jurisdiction, the drafters of the MCCP considered giving the court jurisdiction over the person until the expiration of the maximum penalty of imprisonment for the crime of which the person was accused. The drafters decided, however, that this was too harsh and that the court should instead retain jurisdiction over the person for a “reasonable period of time.” This standard is contained in many criminal procedure codes around the world. Courts have interpreted reasonability for the length of treatment differently. In no case should treatment exceed the maximum penalty that could have been imposed upon the person had he or she been convicted of the offense. In most cases, two years or less of treatment has been determined reasonable. The determination of reasonability should consider the restrictive nature of the treatment, the seriousness of the alleged offense, the likelihood that the accused committed the offense, and the probability of restoring competency in the foreseeable future.