3. BACKGROUND KNOWLEDGE

3.1. Offence structure and application of provisions

This section will provide an overview of the offence structure, i.e. conditions which must be fulfilled in order to pass a guilty verdict and the steps which must be taken to verify whether those conditions have been fulfilled in a case or not.

Offence structure or the conditions of conviction

A court shall convict a person if he/she has committed an offence.[1] However, establishing whether a person has committed an offence is not a single-question issue. The legal concept of offence is often much more complex than it may appear. Besides the question of whether a person committed an act (e.g. took something that belonged to another) or caused a consequence (e.g. did something which led to someone's death) specified by the law, it should also be established whether he/she did this intentionally and whether there are grounds for excluding responsibility (e.g. self-defence).

Thus, an analysis of the *elements of an offence* must be carried out first in order to check whether a person's act met all the objective and subjective criteria set out in the law. This must be followed by a *responsibility check*, i.e. verification of whether there were circumstances which may exclude the person's responsibility.

For the sake of simplicity, this text uses the example of inducing (encouraging) a minor to drink alcohol as a crime that has to be analysed following the offence structure. Everything described here, however, applies equally to any crime punishable under the Rome Statute.

Elements[1]

Objective elements

Objective elements are the actual circumstances which establish *whether* the specific person has performed the *specific* act.

Offences are divided into crimes and misdemeanours. As the cases in this simulation only involve the more serious of the two, i.e. crimes, the term „offence" may be replaced with „crime" in this context.

The basic elements of an offence are act and consequence. An offence always involves an act. For instance, manslaughter involves an act which results in another person's death. Even if the act is not specified in the elements (eg causing serious health damage under Estonian criminal law), the act of the person must always be established (eg „stabbing in the shoulder"). Under the law, only a bodily movement of the person himself/herself shall be considered an act. Thus, if person A, who is standing with a knife in hand, is struck by person B and falls on person C who receives a stab wound, A has not performed an act and cannot be convicted for causing bodily injury.

Besides act and consequence, the elements of an offence often include several additional conditions which the offender, object or the act itself must fulfil.

> Section 182 of the Estonian Criminal Code provides: „An adult person who induces a person of less than 18 years of age to consume alcohol shall be punished by a pecuniary punishment or up to one year of imprisonment." This Section provides the following objective elements: 1) the subject is an adult 2) the object is a minor 3) the act: one person induces another to consume alcohol.

The elements of this example include a specific act which must be performed, i.e the act of inducing. Consequence is not required, i.e. conviction does not depend on whether the act of inducing (e.g. persuading the minor) actually led to a consequence (the minor consuming alcohol). Adulthood of the inducer is an additional criterion for the subject and minority is an additional criterion for the object. Thus, a minor cannot be convicted for inducing another minor or an adult to consume alcohol.

1 Delictual elements according to the Rome Statute are given below. Estonian criminal law uses a three-tier structure: elements, unlawfulness and guilt.

Subjective elements

The subjective aspect indicates the person's attitude towards the offence, in other words, what was going on in his/her mind during performance of the act. Although this is not specifically provided in each section of the law (as this would not be practical), the objective criteria of each section are followed by a subjective criterion: intent. This means that on order to convict someone of an offence, the intentional nature of the act must be established.[2]

However, the legal definition of intention differs from its common meaning – that the offender specifically wanted to cause damage to the victim. Intent is also present when a person at least understands that his/her act may result in a specific consequence. This applies even if the person performing an act hopes that such consequence will not occur or is expecting another, positive result.

Intent must be present in all the objective elements. For example, if a person induces another to consume alcohol while assuming that the other person is an adult, he/she has not intentionally committed a Section 182 offence – the intent does not cover the element of object's minority.

Another example: a person grabs another person's suitcase from an airport, thinking it is his/hers as it looks similar to his/her own suitcase. The objective criteria of theft may have been fulfilled, but as there is no intent, the person shall be acquitted.

On the other hand, let us imagine that someone sets fire to a house while assuming there may be someone inside. In that case, if someone in fact dies in the fire, the manslaughter has been intentional – the arsonist was aware there might be someone inside the house.

Another important aspect of intent is that the perpetrator does not need to know that the act is a punishable offence. Intent means the person meant to perform the specific act, not that he/she actually wanted to break the law. I.e. wanted to set the house on fire or have the minor taste some alcohol.

2 This does not mean that a person committing an offence by accident, i.e. without intent, could escape punishment altogether. Many categories of offences are also punishable in case of negligence, i.e. no intent required. However, the Rome Statute does not cover such offences and intent must always be established in order to convict someone under the Statute.

Responsibility

The fact that someone has performed an act fulfilling the elements of a crime does not automatically entail that the person can be punished for the act.

It is therefore necessary to establish the lack of circumstances which may exclude responsibility. This does not imply that all such circumstances should be analysed – only those circumstances need to be covered which might exist in view of the facts (i.e. if it is clear that a person was not coerced to perform an act, it is not necessary to analyse possible duress).

There are two types of circumstances which exclude responsibility: circumstances which exclude the unlawfulness of an act and circumstances which exclude a person's guilt.[3] In the first case, an act fulfils the objective criteria of a crime but is permissible due to special circumstances, e.g. self-defence.

Circumstances excluding guilt are those which exclude the person's Circumstances excluding guilt are those which exclude the person's responsibility due to his/her personal characteristics (i.e. the person is mentally incompetent and cannot be held guilty). Such circumstances are usually the person's age (less than 14 in Estonia, less than 18 under the Rome Statute) or mental disorder.

For example, A is walking down an empty street and encounters B who who flashes a knife and yells „I will kill you!". A punches B in the face and runs away. In this case, both the objective and subjective circumstances of physical abuse have been met, but A cannot be held guilty because of self-defence.

Conclusion

There are 3 steps that need to be taken in order to be convinced that someone should be responsible for a crime: the material element must be fulfilled, the mental element must be fulfilled and there must be no grounds for excluding the responsibility of the person.

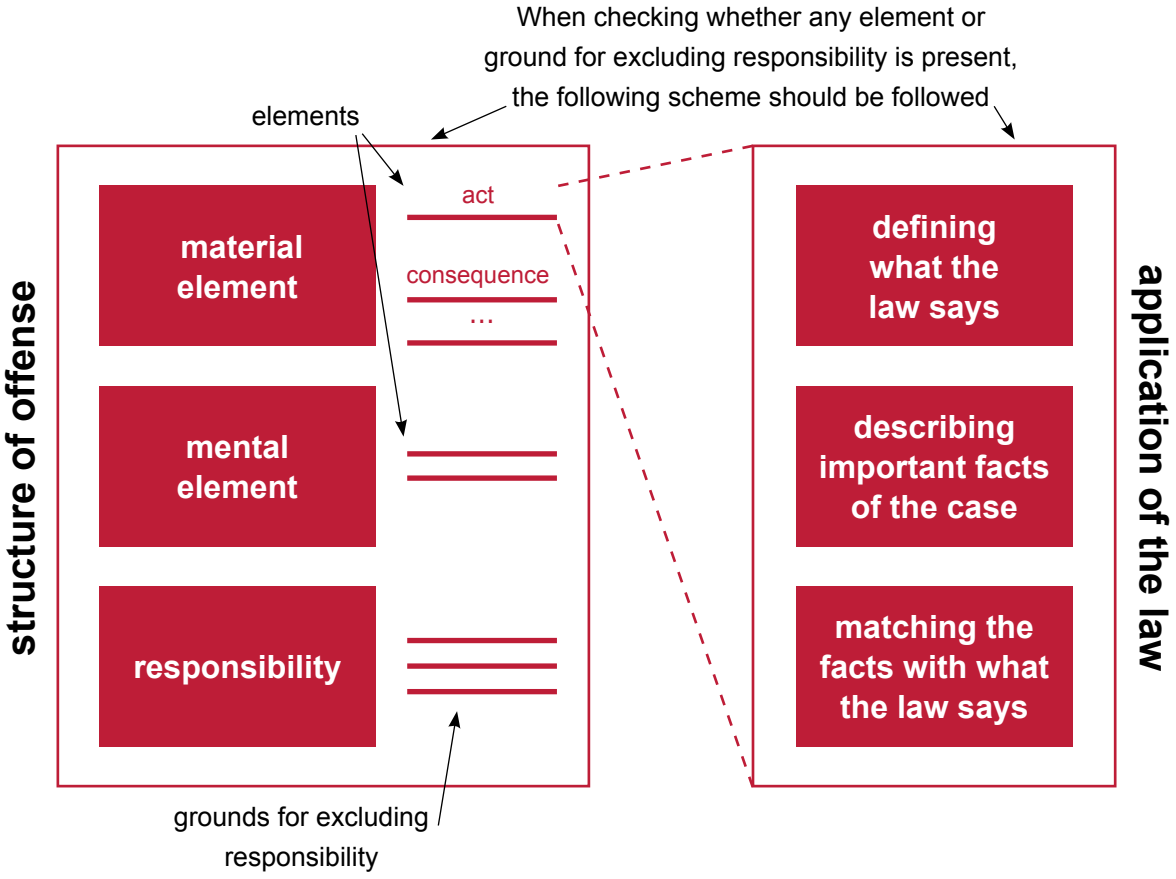
This is true for almost all national legal systems and is also the correct way to approach crimes under the Rome Statute. The material elements of crimes can be found in articles 6, 7 and 8, the mental element is described in article 30 and several grounds for excluding responsibility are found in articles 31 and 33.

3.2. Application of law

As described above, convicting a person is subject to fulfilment of certain conditions which must be checked. The following describes the application of law, i.e. how the presence of a condition shall be checked. Application always consists of three stages which may be subject to legal arguments.

The question to be ansswered before reaching any legal conclusion is: *do the factual circumstances correspond to the law?* In other words, does the law cover the specific situation?

The three stages of legal argumentation are dderived from this question. First, it is necessary to establish the meening of *„corresponds to the law"* or the exact contents of the law. Second, it is necessary to establish all factual circumstances, i.e. what happened and how did it happen. Once it has been established what corresponds to the law means in the given circumstances and what the factual circumstances are, we have enough information to answer that question.



Each element and circumstance excluding responsibility must be checked in accordance with this scheme of application

This scheme is the basis for the application of any legal provision. It should be noted, however, that each element may not need to be thoroughly considered if a circumstance is self-evident. For example, it is not necessary to waste time to convince the court that a mobile phone is a thing.

Three stages of legal reasoning

One: interpretation of a provision or what is written in the law?

It may appear that everything has been written in the law, but legal provisions are very general and a word may carry different meanings. Therefore, the first task is to establish what is written in the relevant provision. This is called „interpretation of the law".

> The aforementioned Section 182 of the Estonian Criminal Code provides: „An adult person who induces a person of less than 18 years of age to consume alcohol shall be punished by a pecuniary punishment or up to one year of imprisonment."

What is the meaning of „induce"? Does inducing involve convincing a minor to consume alcohol? Or is it enough to give a minor a bottle and say: „Drink if you want to?" Or if an adult person speaks of his/her love of alcohol in the presence of a minor, could this also be inducing?

The interpretation of laws is facilitated by earlier court judgments, opinions of legal scholars etc. In this simulation, legal policy arguments will be sufficient. A legal policy argument is a justification of an interpretation by its consequences. While all other proof of a given interpretation (e.g. earlier judgments) implies that a given interpretation ***is*** correct, a legal policy argument is one which indicates what the correct interpretation ***should be***.

For example, it may be reasoned that inducing should be construed as not covering the consumption of alcohol in the presence of a minor because this would inappropriately restrict the freedom of adults to consume alcohol without having to constantly worry about minors seeing them. The opposite argument might be that such an interpretation could prevent careless alcohol consumption among adults and thus reduce its

negative effect on minors.

Both of the above are legal policy arguments which justify an interpretation by its social consequences in case of a consistent interpretation of a provision according to one argument or another.

Two: establishing the facts of a case or what really happened?

Prosecution and defence may have different versions of the factual circumstances – in other words, how did the accused behave.

> The prosecution claims that adult X approached 16-year old Y on House Street at 6:35 PM on 04.05.2011, pressed a bottle of beer into his hand and said in a serious voice: „Drink it now!". The defence claims that X did in fact walk that street at that time, but did not speak with Y or hand him a beer bottle.

To establish the truth, the court shall examine both sides' witnesses and review other evidence, taking into account that the accused gets the benefit of the doubt.

In our simulation, this stage will, for both sides, mostly involve finding the relevant facts in the case.

Three: subsumption or do the facts of the case correspond to the provisions of the law?

The question in this stage that with which we started the legal analysis in the first place – ***do the facts correspond to the law?*** It should be noted that the first two stages have already yielded a certain interpretation of the law and a clear picture of the circumstances of the case.

In practice, however, most disputes relate to the interpretation of the law or the factual circumstances. Nevertheless, it is always possible to claim that the established facts do not meet the established interpretation of the law, while agreeing to the other party's positions on facts and interpretation.

> Let's assume that the prosecution is able to prove at the interpretation stage that „inducing to consume alcohol" means that a person gives alcohol to a minor and encourages him/her to drink it; is factually proven that X did in fact press a bottle of beer in Y's hand and said in a serious voice „Drink it now!". Now (at the third stage) the prosecution will have

to point out that beer = alcohol, pressing a bottle in the hand = giving alcohol, and saying „Drink it now!" in a serious voice = inducing.

Dispute and arguments in court

For the prosecution, it is most important to guess what issues are likely to become the main subject of dispute. Its objective is to put all the time and energy into argumentation related to those issues. Otherwise, the issues which are crucial for deciding on the guilt of the accused could be overlooked.

Although it may not be necessary to explain each aspect of application of the law according to the scheme, the prosecution will have to convince the judge that all the elements of offence are present and factual circumstances fully meet the criteria provided in the law concerning the crime.

The defence, on the other hand, is not obliged to do anything. The defence may even remain silent throughout the trial and if the prosecution fails to prove the guilt of the accused, the judge will have to acquit the latter even if the defence did not actually contest any of the prosecution's claims. Of course, the defence may contest the claims in all three stages and does not have to accept anything. However, it is more feasible to choose a few crucial facts for which the defence finds the prosecution's claims to be most erroneous, and point out the main reasons why the accused should not be convicted. In short, the defence should focus its time and energy on arguments relating to those crucial issues.

Conclusion

The 3 stages of legal argumentation are always there. Even if you hear somebody in the street shouting "that man is a thief. Capture him!", it can be broken down into these 3 layers. What the shouter means is that a thief is somebody who takes away things that belong to other people and the person running down the street has just taken away somebody's purse and therefore, the facts and the law match.

This is also the way that the Rome Statute should be analysed. When for example the defence and prosecution agree on what happened but still argue over whether the accused was acting under duress, it means that they have different definitions of duress and whoever's definition is the same as the opinion of the judges, should win this particular debate.

3.3. On international law and the Criminal Court

This part of the background knowledge is not necessary to run a successful simulation. This is additional knowledge that the teacher of the course can choose to incorporate in the form of a lecture or workshop simply to give students a better historical understanding of the ICC. It is important to notice that during the simulation, cases from situations that happened before the founding of ICC are discussed as if they were under ICC jurisdiction, in other words as if they had happened today.

International law

National law is a set of rules which regulates the behaviour of persons and is ultimately enforced by the state. Legal norms differ from social and ethical norms in terms of enforceability: the state will guarantee their general observance (including by threat of punishment). In a democratic system, if one does not like a particular legal norm, he/she will be able to convince fellow citizens and politicians to amend it. Until the norm applies, however, he/she will be obliged to follow it or face sanctions.

The mechanism or international law is more ambivalent. The subjects of international law (entities which should follow it) include not only individuals but also states and organisations. While a state with its police force is stronger than any *citizen*, there is obviously no global entity with sufficient military power to force all *states to* follow a norm or punish them in case of violations.

Perhaps closest to being the „world police" is UN Security Council which has the right to impose economic sanctions and use military power against states that threaten international peace and security.

However, this „police" is (at least in its current form) inefficient and not particularly fair: the five permanent members – United States, China, Russia, France ajd United Kingdom – have a veto which essentailly means immunity from sanctions for themselves or their allies.

Of course, individual states may also decide to sever economic ties with or attack another state in order to enforce a contract or established norm. In practice, this is an option for the most powerful countries, while smaller states would only harm themselves by such policy.

If so, how can international law work at all? The advocates of international law believe that some legal norms do not necessarily require enforcement by threat of sanctions. This is based on a notion that human beings are not essentially power-hungry, aggressive and malevolent but

rather peace-loving, just and kind by nature. A peaceful and fair person does not find legal norms to be an unpleasant burden but rather a set of guidelines which he/she is willing to observe. Such persons will then influence their governments to follow international law. As a result, even the most powerful states are bound to act benevolently towards the others.

International Criminal Court

International Criminal Court (ICC) was founded in 1998 and started work in 2002. The Court's activities are based on the Rome Statute which was prepared by 160 states, 33 intergovernmental bodies and 236 non-governmental organisations.

The ICC aims to punish the worst and most inhuman crimes and thereby prevent their repetition. According to the Rome Statute, such crimes include genocide, crimes against humanity, war crimes and aggression. As the parties who adopted the Rome Statute were unable to agree on the definition of aggression, the ICC will not be able to try aggression crimes until at least 2017. Besides the serious nature of those crimes, they are also the ones most likely to involve government members or high officials whom it may be hard to prosecute in their own countries and who should therefore be subject to international trial. ICC's jurisdiction over those types of crimes will only apply in cases where the state affected by the crime cannot or will not prosecute the suspects.

Upon the ICC's creation, a group of states led by Canada and Scandinavian countries sought to give the Court the privilege to prosecute any person committing the crimes under its jurisdiction anywhere in the world. However, resistance from other countries was so strong that the advocates of universal jurisdiction had to accept a compromise. As a result, the Court only has jurisdiction in the following cases:

1. the accused person is a national of a state party of the Rome Statute;

2. the crime was committed on the territory of a state party of the Rome Statute;

3. UN Security Council adopts a decision that certain events should be subjected to ICC's jurisdiction to ensure peace and security.

This means that if a crime was not committed on the territory of a state party or by a national of a state party, the Court may prosecute it only if the UN Security Council provides the Court a mandate on crimes committed on a given territory during a given period. Subject to an application, each state may separately issue to the Court a mandate to investigate crimes committed on its territory or by its nationals.

ICC enthusiasts initially feared that such conditions would render the Court incapable of prosecuting any crimes as countries facing serious conflicts would never voluntarily subordinate to the Court. Those fears were proven unsubstantiated, at least in part. To the surprise of many, the Rome Statute was in early 2000s ratified by a number of countries with a recent history of armed conflict, including Fiji, Sierra Leone, Cambodia, Macedonia and DR Congo.

As of June 2011, the Statute had been ratified by 116 states, including Estonia in 2001. The ICC has so far opened six official investigations regarding events in Uganda, DR Congo, Central African Republic, Sudan's Darfur province, Kenya and Libya. As for Uganda, DR Congo, Central African Republic and Kenya, those states are parties to the Rome Statute and therefore subject to investigation. Sudan and Libya have not ratified the statute and the mandate to investigate crimes on their territories has been provided by the UN Security Council.

3.4. Basic principles of criminal law

This part of the background knowledge is not necessary to run a successful simulation. This is additional knowledge that the teacher of the course can choose to incorporate in the form of a lecture or workshop simply to give students a better understanding of criminal law. It is important to notice that during the simulation, cases from situations that happened before the founding of ICC are discussed as if they were under ICC jurisdiction, in other words as if they had happened today.

Presumption of innocence

Presumption of innocence is a fundamental principle of criminal law, which is generally accepted in Western countries and many others and is an essential requirement of what we call a fair judicial system.

Presumption of innocence means that no person may be convicted of an offence unless his/her guilt is beyond doubt.

An exhaustive definition of „beyond doubt" is, however, not possible. Any legal system always involves some compromise: if convicting is too easy, the risk of innocent people being punished becomes too great, yet if the prosecution's burden of proof becomes too heavy, too many criminals are left unpunished.

Presumption of innocence also represents the main difference of criminal proceedings from civil proceedings where all parties are equal. Prosecution must prove the guilt of the accused and the defence will only have to create reasonable doubt in order to avoid conviction. The defence does not even have to present the „facts of innocence", it is enough if it can undermine the prosecutions claim that such facts did not occur. In both cases, the court must accept the facts as true.

As a result, the prosecution's burden is much heavier than that of the defence. The prosecution must seek out the relevant provisions and present the evidence. The defence may remain silent at the trial. Of course, it does not have to, but in that case it does not have to prove innocence but merely cast reasonable doubt on the prosecutor's arguments.

Nullum crimen, nulla poena sine lege

(in latin, literally: no crime, no punishment without a law)

This is another principle deeply rooted in the Western legal systems and concepts of justice. This principle basically means that noone shall be punished for anything that was not prohibited by the law at the time.

Since Hitler and his *Nationalsozialistiche Deutsche Arbeitspartei (NSDAP)* committed the most heinous crimes, which were apparently in accordance with the laws of the time, the principles of natural law are being cited as a limitation of the maxim. In our era, for example, rape is deemed to be a punishable crime even in countries where a dictator has revoked the laws prohibiting it. Except for most serious crimes which directly breach the fundamental human rights like the right to life or human dignity, the *nullum crimen, nulla poena sine lege* principle is a citizen's safeguard against arbitrary prosecution.

The *nullum crimen, nulla poena sine lege* principle covers two main aspects:

first, the sources of criminal law, i.e. the provisions establishing which act is an offence, shall not apply retroactively. For example, if abortion was criminalised today, the law could not be used to punish persons who had it performed yesterday when the law did not exist and they could therefore not have foreseen the consequence.

The same principle applies to providing more severe punishments for existing crimes – in this case a person having committed the offence before the amendment should receive the less severe punishment stipulated in the law in force at the time of the offence. On the other hand, it has been accepted that retroactive application is obligatory in cases where the punishment for an offence has been reduced. Once it has been decided that an act should result in a lesser punishment, there is no reason to apply a more harsh punishment to some persons.

The other aspect of *nullum crimen, nulla poena sine lege* is the principle of specification. This means that punishable acts ***must be clearly defined in the law.***

For example, the Soviet-era Civil Code provided criminal punishment for acts harmful to the society. Such a vague formulation paved the way for massive judicial abuse by apparently legal means. The principle of specification includes the prohibition of the use of analogy in criminal proceedings. In civil proceedings, a judge may fill legal gaps by means of analogy, i.e. conclude that although a law does not provide the rule for a specific case, its circumstances are equivalent to some other case and the provisions regarding the other case may therefore be applied. In criminal proceedings, punishing a person on the basis of analogy is excluded because people cannot be expected to foresee such analogies. A punishment may only be applied if an act is expressly prohibited.

It may sometimes be hard to adhere to the principle of specification – the world is complex and detailed description of all possible circumstances may not be possible. Generalisations are unavoidable.

The *nulla poena, nullum crimen sine lege* principle not only limits punishment to the specific acts provided in the law but also the measure of punishment. This means that an accused person may only receive a punishment expressly provided in the law.

During MICC cases are discussed hypothetically as if they had happened today, after the founding of ICC and entering into force of the Rome Statute. If the ICC was to try cases that happened before 2002 in real life, it would be a clear breach of the *nullum crimen, nulla poena sine lege* principle as it would then apply a statute that was adopted after the crimes were committed.

Ne bis in idem

(literally: not twice in the same)

This principle means that a person shall not be tried for the same offence twice. Like the previous one, it also covers two main aspects.

First, if a person has been prosecuted, he/she shall not be prosecuted for the same cause again. This means the prosecution will only have one chance to bring the charges. Other circumstances established at a later stage which might change the judgment to the detriment of the convict will not have any effect. An exception to this is the case of circumstances which could not have been revealed earlier.

This principle is increasingly important in today's international law as national courts exist side by side with new international courts and the jurisdiction of the two may sometimes be overlapping. An international court cannot assign a punishment to persons already punished by national courts. However, international courts may serve as courts of appeal for the judgments of national courts. In such case, an international court may issue a ruling on the correctness of the previous judgment.

The International Criminal Court also follows the principle of reviewing only those criminal matters which the involved state/states are unable or unwilling to prosecute. In this context „unwillingness" shall cover not only the lack of an appropriate judicial institution but also cases where criminal proceedings in a state lead to an obviously incorrect punishment.

If, however, a person is convicted in both national and international courts, the latter's punishment shall be reduced by the time already served. For example, if a genocide convict is sentenced to 2 years of imprisonment at an unfair trial and the International Criminal Court imposes a 10-year prison sentence, the person will have to serve 8 additional years.

The other important aspect of ne bis in idem is that a person shall not be punished for several crimes if he/she actually committed only one act. For instance, if a person stabs another in the back, causing an internal bleeding which leads to the victim's death the next day, this act includes the elements of physical abuse, causing severe health damage and manslaughter. The punishments for those crimes will not be summarised and the most serious charge – killing – will include the other two. Thus, the person shall only be punished for manslaughter.

Right to fair trial

All the principles of criminal law are aimed at achieving fairness in the judicial system – a state should not abuse any person by arbitrary actions or acts which are otherwise contrary to public sense of justice. The right to fair trial is provided additionally as a separate principle. This covers the formalities of judicial proceedings which have to be carried out in a fair manner. This principle relates to several aspects:

- Each person has a ***right to defence***. For persons who are unable to procure legal aid, a public defence counsel will be provided in most countries.

- ***The judge must be independent***. This means that he/she must not have a personal conflict of interest. In the Republic of Estonia, this is safeguarded by judges' salary, which significantly exceeds the average, and the prohibition of certain activities (for example, judges may not belong to political parties or own or manage companies). The requirements on judges' education are strict and each judge must complete an obligatory special training programme. All this is to guarantee that judgments reflect applicable law and not the personal opinion of an average person.

- Another aspect of the right to fair trial is ***the right of appeal***. Estonia has a three-level judiciary system: – county courts, circuit courts and Supreme Court. If the Supreme Court decides to review a case, it may revoke the earlier judgment and return the case to the previous instance or reject the appeal after initial review. Judgments of the Supreme Court may be appealed on European level.