Let's apply this simple principle to a concrete set of facts: Assume X is charged with having assaulted Y. The evidence relied upon by the prosecution to prove the charge reveals that one night while X was walking in his sleep, he trampled upon Y, who happened to be sleeping on the floor. Has X committed assault?

FEEDBACK The answer is obviously “no”, on the following grounds: Because X was walking in his sleep, his act was not voluntary – in other words, while sleepwalking, he was not able to subject his bodily movements to his will or intellect. Because there was no act, he is not guilty of assault. (Or, to make use of the metaphor in the illustration above, there was no table for the boy to use and, therefore, any attempt by him – even with the aid of a chair and a stick – to retrieve his kite would be fruitless.) It is unnecessary to enquire whether, for example, X’s act was unlawful or whether he acted with intention (culpability). From a systematic point of view, it would be unsatisfactory – and proof of unimpressive legal thinking – to say that X escapes liability because he lacked the intention to assault. Such an argument presupposes that there was a voluntary act on the part of X – which is patently incorrect.

TEST YOURSELF

(1) Name the four elements of criminal liability.

(2) Briefly discuss each of the four elements of criminal liability.

(3) Should the investigation into the presence of the four elements of liability follow a prescribed sequence? Explain.

Assume the South African parliament passes a statute in 2004, which contains the following provision: “Any person who commits an act which could possibly be prejudicial to sound relations between people, is guilty of a crime. This provision is deemed to have come into operation on 1 January 1995.” No punishment is specified for the crime. Do you think that this provision complies with the principle of legality?

FEEDBACK You should have considered whether the provision complies with all the rules embodied in the principle of legality. The provision complies with certain aspects of the ius acceptum rule. It is clearly stated in the provision that the conduct prohibited is a “crime”. This means that the provision contains a criminal norm. (Look again at the train-ticket example above if you still do not understand the difference between these norms.) However, the maximum punishment that may be imposed is not prescribed in the provision. Therefore, the ius acceptum rule has not been fully complied with. The provision does not comply with the ius praevium rule because the crime is created with retrospective effect. The provision also does not comply with the ius certum rule because it is formulated in vague and uncertain terms. The phrase “possibly prejudicial to sound relations” is very wide and does not indicate exactly what type of conduct is prohibited. Does it refer to “sound relations” in the family context or in the workplace, or to relations between people of different cultures or races? The ius...
strictum rule further requires that an act that is ambiguous be interpreted strictly. In practice, this means that a court may not give a wide interpretation of the words or concepts contained in the definition of the crime. A provision that is very wide and vague should be interpreted in favour of the accused. It follows that the provision does not comply with the principle of legality.

TEST YOURSELF

(1) Define the principle of legality.

(2) Name the five rules embodied in the principle of legality (refer to the Latin terms).

(3) Discuss the role of the ius acceptum rule in determining whether (a) conduct constitutes a crime in terms of the common law

(b) a statutory provision has created a crime (4) Distinguish between a legal norm, a criminal norm and a criminal sanction.

(5) With reference to the decision of the Supreme Court of Appeal in DPP v Prins, discuss how our courts should determine whether a statutory offence has been created if there is no punishment prescribed for the offence in the particular legislation.

(6) Define the ius praevium rule.

(7) (a) Define the ius certum rule

(b) Is the ius certum rule entrenched in the constitution? Motivate.

(8) Discuss the decision of the Constitutional Court in Masiya.

(9) Discuss the ius strictum rule. (10) Discuss the principle of legality in punishment.

STUDY UNIT 3

1. X, a 62-year-old man, works in a mine. His job is to operate the cocopans. These cocopans are used to transport hard rocks and gravel from the bottom of the mine to the surface. One day, while working, he suddenly experiences a blackout. In his state of unconsciousness, he falls on the lever that controls the movement of the cocopans. A cocopan crashes into another worker, Y. Y is killed instantly. X is charged with culpable homicide. The evidence before the court is as follows: X has been suffering from diabetes for the past year. His doctor had warned him that he may lose consciousness at any time if he fails to take his medication as instructed. On that particular day, X had failed to take his medication. The court finds that X had insufficient grounds for assuming that he would not suffer a blackout on that particular day. X's legal representative argues that X cannot be convicted of culpable homicide because, at the time of the commission of the offence, he was not performing a voluntary act. In other words, the defence raised is that of automatism. You are the state prosecutor. What would your response be to this argument?

FEEDBACK You would rely on the decision in Victor 1943 TPD 77, arguing that this is a case of antecedent liability. The voluntary act was performed at the stage when X, fully conscious, started operating the cocopans. What the law seeks to punish is the fact that he (X), while in complete
command of his bodily movements, commenced his inherently dangerous tasks at the mine without having taken his medication. In so doing, he committed a voluntary act that set in motion a series of events that culminated in the accident.

2. Y, a two-year-old child, goes to a nursery school. X, the teacher at the nursery school, often does her washing and ironing while looking after the kids. One day, while ironing, the telephone rings. She runs to answer the phone, failing to switch off the hot iron. While playing, Y accidentally pulls the cord of the iron. The iron falls on top of his body. He is severely injured. X is charged with assault. As state prosecutor, you have to prove that the accused had performed an act in the legal sense of the word. Explain how you would go about proving this.

FEEDBACK You may argue that this is an instance where there was a legal duty upon X to take positive action. More specifically, this duty arose from a previous positive act. In law, this is known as an ommisio per commissionem. See specific instance (6) listed above. The duty may also arise from the fact that X stood in a protective relationship to Y (specific instance 5 listed above).

3. A municipal by-law stipulates that no homeowner may dump his garden refuse in public parks. The conduct prohibited is defined as a crime and is punishable with a maximum fine of R2 000. X is charged with this offence on the grounds that he dumped his garden refuse in a public park. X relies on the defence of impossibility. He alleges that because there are no designated places in the vicinity where he can dump his refuse, it was impossible for him not to commit this offence. Discuss critically the merits of his defence.

FEEDBACK X’s defence has no merit. The defence of impossibility cannot be raised in cases where certain conduct is prohibited by law. The defence may be pleaded only if the conduct that forms the basis of the charge consists in an omission. In other words, if the provision stipulates “You may not …", the defence of impossibility cannot be raised. Conversely, if it stipulates “You must …” the defence may be raised. Students often have difficulty in understanding this. The basis of the charge against X was not a failure (omission) to do something. A positive act (commissio) by X formed the basis of the charge. Also read the leading case in this regard, namely the decision in Leeuw.

TEST YOURSELF

(1) Define the concept of an “act” and provide practical examples of an act in the legal sense of the word.

(2) What is the difference between the meaning of the word “act”, as this word is used in everyday parlance, and the technical meaning it bears in criminal law?

(3) Briefly explain the meaning of the requirement that the act must be a human act.

(4) Fill in the missing words: Conduct is voluntary if X is capable of subjecting his … … to his … or …

(5) Distinguish between the concepts “voluntary” and “willed”.

(6) Name three factors that exclude the voluntary nature of an act.
(7) Explain the meaning of “absolute force”, as well as the difference between this type of force and relative force.

(8) Give examples of muscular movements or “events” that take place in a state of automatism.

(9) Give three examples of automatism from our case law.

(10) X causes an accident while suffering an epileptic fit. The evidence reveals that he has been having epileptic fits for the past thirteen years and that he had insufficient grounds for assuming that he would not suffer one again on the particular day. Could X be convicted of negligent driving? Give reasons for your answer.

(11) Sort the following phrases under the headings “Sane automatism” and “Insane automatism” and write them in the correct columns. (a) State of automatism is due to mental illness or defect. (b) A sane person momentarily acts involuntarily. (c) Onus is on the state to prove that act was voluntary. (d) Onus is on the accused to prove that he suffered from a mental illness or defect. (e) X is acquitted because he is deemed not to have acted.

(f) In terms of section 78(6) of the Criminal Procedure Act 51 of 1977, X is found not guilty, but he loses his freedom in that he is referred to a mental hospital.

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(12) List and discuss the eight instances in which it is assumed in practice that a person has a legal duty to act positively. (13) The law cannot expect somebody to do the impossible. Name the three requirements for the defence of impossibility to succeed. Refer to examples and the case law.

**STUDY UNITS 4**

In each of the following sets of facts, consider whether X’s act is the cause of Y’s death:

(a) Y feels depressed and threatens to commit suicide. X, who harbours a grudge against Y, hands her a loaded firearm, stating that she may shoot and kill herself if she so wishes. Y takes the firearm and shoots and kills herself.

(b) X, who is very poor, reads a newspaper report about a man who had been caught by a crocodile in a river in Botswana. She persuades her uncle Y, who is very rich and whose heir she is, to go on a safari to Botswana. She also encourages her uncle to take a boat trip on the river, hoping that he will be killed by a crocodile. Y undertakes the safari. He also goes out on a canoe on the river. The canoe is unexpectedly overturned by a hippo. Y falls into the water. A crocodile catches and kills him.

(c) X tries to stab Y, intending to murder her. Y ducks and receives only a minor cut on the arm. However, infection sets in and Y visits a doctor. The doctor gives her an injection and tells her to come back the following week for two more injections. The doctor warns Y that she may die if she fails to come back for the other two injections. Y fails to go back to the doctor, reasoning that her body is strong enough to fight the infection. She dies as a result of the infection.
(d) X shoots Y in the chest, intending to murder her. The bullet wound is of such a serious nature that Y will die if she does not receive medical treatment. Y is admitted to hospital, but because the nursing staff is on a general strike, she receives inadequate medical treatment. The wound becomes infected. Although she is eventually treated for the infection, she dies after a period of two weeks.

FEEDBACK (a) You probably recognise these facts as being similar to those in the Grotjohn case. In that case, the Appellate Division held that the mere fact that the last act was the victim’s own voluntary act did not mean that there was no causal relationship between X’s act and Y’s death. X’s act (in the Grotjohn case) was a conditio sine qua non of Y’s death. Y’s last act (her suicide) was not a novus actus interveniens – an unexpected or unusual event in the circumstances. The court ruled that if X’s act was the factual cause of Y’s death, an unusual event that took place after X’s act but before Y’s death cannot break the causal link if X had previously planned or foreseen the unusual turn of events.

(b) X’s act can be regarded as a conditio sine qua non of Y’s death because if X had not persuaded Y to undertake the safari, Y would not have undertaken the trip. Therefore, there was factual causation. However, there was no legal causation. An application of the theory of adequate causation leads to the same conclusion: being killed by a crocodile is not an occurrence that, according to general human experience, is to be expected in the normal course of events during a safari. Merely to hope (as X did) that the disastrous event would take place cannot be equated with the situation where X planned or foresaw the occurrence of the event before it took place. According to the criterion of policy considerations applied in the Mokgethi decision, we may also argue that it would not be reasonable and fair to regard X’s act as the legal cause of Y’s death.

(c) If you have read the Mokgethi case, you will immediately recognise these facts, which were used as an illustration by the court in its judgment. It is clear that X’s act is the factual cause of Y’s death: if X had not stabbed Y, she would never have contracted the infection. In terms of the Mokgethi decision, however, we may argue that X’s act was not the legal cause of Y’s death. Y’s failure to go back to the doctor was unreasonable and created such an unnecessary life-threatening situation that, legally speaking, there is not a sufficiently close link between the original stab-wound inflicted by X and the death of Y.

(d) These facts are similar to those in Tembani. It is clear that X’s act is the factual cause of Y’s death (a conditio sine qua non). According to the court in Tembani, X’s act can also be seen to be the legal cause of Y’s death. X deliberately inflicted an intrinsically dangerous wound to Y, which, without medical intervention, would probably cause Y to die. It is irrelevant whether it would have been easy to treat the wound, and even whether the medical treatment given later was substandard or negligent. X would still be liable for Y’s death. The only exception would be if, at the time of the negligent treatment, Y had recovered to such an extent that the original injury no longer posed a danger to her life.

TEST YOURSELF

(1) Explain the meaning of the term “definitional elements of the crime”.

(2) Distinguish between materially and formally defined crimes and indicate in which of these two groups of crimes the crime of possession of dagga should be categorised.
(3) Discuss the criterion that our courts apply to determine factual causation. (4) Explain what you understand by the concept “legal causation”.

(5) Define and give a critical evaluation of the theory of adequate causation. (6) Define and discuss, with reference to decided cases, the theory of novus actus interveniens.

(7) Discuss the decision of the Appeal Court in the Mokgethi case. (8) Discuss the decision of the Appeal Court in Tembani.

(9) Give a summary of the rules that our courts apply in order to determine causation.

(10) Can X, if she assists Y to commit suicide and is subsequently charged with the murder of Y, succeed with the defence that there was no causal link between her conduct and Y’s death?

**STUDY UNIT 5**

Assume that X, who is sleeping in his home, is woken up in the middle of the night by Y, an armed burglar, who approaches his room or that of a family member. X shoots at Y in order to protect his family. Y dies as a result of the shot. Can X’s conduct be justified on the grounds of private defence?

**FEEDBACK** It would be unfair to expect X first to ask Y to identify himself and state the purpose of his visit in order to decide what, objectively, the appropriate defensive measures would be in the circumstances. It would also be unfair to expect X first to try to arrest Y and then call the police. Experience tells us that even a moment’s hesitation by X in such circumstances might be fatal to X. To deny X the right to shoot in such circumstances is to require him to gamble with his life or with that of the other people in the house. Even if a court holds that X cannot rely on private defence because, objectively, there was a less harmful way in which he could have overcome the danger, the court would, in most cases, refuse to convict X of murder if he shot and killed Y, on the following ground: although X acted unlawfully, he lacked intention because he honestly believed that his life or the lives of his family members were in danger. This means that there was no awareness of unlawfulness on his part and, therefore, no intention. He was mistaken about the unlawfulness of his action and, therefore, lacked intention. This will become clearer later in the guide where, as part of the discussion of intention, we discuss the effect of mistake relating to unlawfulness. However, X may still be found guilty of culpable homicide if the reasonable person would have acted differently in the circumstances. See the discussion in 11.5 hereunder.

**TEST YOURSELF**

(1) When will conduct be regarded as unlawful?

(2) Are there a limited number of grounds of justification? Discuss in view of the decision in Fourie.

(3) Is the following statement true or false: “Conduct is unlawful if it accords with the definitional elements.”

(4) Define private defence. (5) State the requirements with which the attack, as well as the act of defence, must comply in order to form the basis of a successful plea of private defence.
Distinguish putative private defence from actual private defence.

Discuss the question of whether, or in what circumstances, X may act in private defence (a) against a young child (b) against a policeman (c) against an animal (d) in defence of another person (e) in protection of property (f) as punishment for an attack that is already over (g) against another person, who is not the attacker (h) in a situation where it is possible for him (X) to escape (i) in a manner that is more harmful than is necessary to ward off the attack (j) in a situation where he (X) is unaware that his act of defence is directed against an unlawful attack.

Discuss the decision of the Supreme Court of Appeal in the case of Steyn.

STUDY UNIT 6

While walking in the street, X sees a dog attacking Y, an old person. X and Y do not know each other. In order to protect Y, who cannot defend herself, X hits the dog with her walking stick. The dog dies as a result of a head wound caused by the injuries inflicted by X. X is charged with malicious injury to property in respect of the dog. What is the appropriate defence in these circumstances – private defence or necessity?

Feedback: X can rely on the defence of necessity. In a situation of necessity, a person may also protect the interests of somebody else, even though there is no particular relationship between that person and the party who is being protected. If you protect yourself or another person against an animal’s attack, you act in a situation of necessity and not in private defence. Private defence is possible only against an unlawful attack. Only a human being can act unlawfully.

Y participates in a rugby game. According to the rules of the game, a player may be tackled to the ground by an opponent, but only if he is in possession of the ball. In the course of the game, X tackles Y seconds after the latter has already passed the ball to a team-mate. Y has three broken ribs as a result of the tackle. X is charged with assault. You are his legal representative. What defence would you rely on?

Feedback: The appropriate defence is the ground of justification known as consent. X’s act of tackling Y is justified by consent. Somebody who takes part in sport tacitly consents to the injuries that are normally to be expected in the course of that sport. Most authorities agree that voluntary participation in a particular type of sport implies that the participant also consents to injuries that may be sustained as a result of acts that contravene the rules of the game, provided such acts are normally to be expected when taking part in that sport. See Criminal Law 125. There would, however, be no justification if X, for instance, had intentionally assaulted Y so that he would be unable to play rugby for the rest of the season. That would be against the legal convictions of society.

X, a member of the South African Police Service, is charged with assault with intent to do grievous bodily harm. The facts before the court are that she had instructed a German shepherd dog to attack a beggar loitering in a park. The defence argues that X’s act was justified because her superior officer had instructed her to get rid of all the beggars in the park by setting the police dogs on them. You are the state prosecutor. What would your response be to this line of reasoning?
FEEDBACK According to the decision in Mostert, X cannot rely on the ground of justification known as obedience to orders in these circumstances. The order was manifestly unlawful and, therefore, X’s conduct is also unlawful.

TEST YOURSELF

(1) Distinguish between private defence and necessity.

(2) Distinguish between absolute and relative compulsion, and indicate which of the two constitutes necessity.

(3) Name and discuss the requirements for a successful plea of necessity. (4) Discuss whether an innocent person may be killed in a situation of necessity.

(5) May consent constitute a ground of justification in the following circumstances? (a) if X is charged with rape (b) if X kills another person (c) if a rugby player is injured in the course of a match (d) when indecent acts are committed by adults

(6) Name and discuss the requirements for a successful plea of consent as a ground of justification.

(7) Discuss the following grounds of justification: (a) spontaneous agency (b) parental disciplinary chastisement by means of corporal punishment in private homes (c) trifling character of an act

(8) Discuss whether an otherwise unlawful act may be justified because the perpetrator, when she committed the act, obeyed the order of a person to whom she was subordinate.

(9) May officials occupying a public office, who commit acts that would otherwise be unlawful, rely as a defence on the fact that they are entitled to perform these acts because the acts were performed in the course of their official duties?

STUDY UNIT 7

(1) Define, in a maximum of two sentences, the meaning of “culpability” (as an element of criminal liability).

(2) Complete the following statement: Culpability = ................................................... plus either ................................... or ......................................

(3) The principle of contemporaneity in criminal law means the following: If the unlawful act is committed at a certain time without any ........................., and the culpability is present at a later time without there being an ......................... act at the same time, no crime is committed.

(4) Define the concept of criminal capacity.

(5) Explain the difference between the concepts of “criminal capacity” and “intention”.

(6) Name and explain the two psychological components, or “legs”, of the test for criminal capacity.

(7) Name three defences excluding criminal capacity.
What was the meaning of the concept of non-pathological criminal incapacity before 2002?

Discuss the decision in Eadie, especially the question whether the defence of non-pathological criminal incapacity still exists after this judgment.

STUDY UNIT 8

X, a 13-year-old girl, has no home. Every day, she stands on a corner of a street next to the robot, begging for money. Her 18-year-old friend, Y, tells her that she is wasting her time; she should rather resort to crime. Y also tells her that she can come and stay at her home if she would be prepared to rob the drivers of motorcars of their cell-phones. X decides that she has had enough of begging. The next day, she smashes a car window at the robot and grabs the car-owner's cell-phone. She is caught and charged with robbery. Critically evaluate X’s chances of succeeding with the defence that she lacked criminal capacity at the time of the commission of the offence.

FEEDBACK In terms of section 7(2) of the Child Justice Act 75 of 2008, a child who is ten years or older but under the age of 14 is presumed to lack criminal capacity. However, this presumption can be rebutted by the State. If the State can prove beyond reasonable doubt that X had the capacity to appreciate the difference between right and wrong and could act in accordance with such appreciation at the time of the commission of the robbery, she may be convicted of robbery.

TEST YOURSELF

(1) What are the requirements for successful reliance on the defence of mental illness as set out in section 78(1) of the Criminal Procedure Act? Discuss.

(2) Discuss the pathological leg of the test set out in section 78(1), that is, the requirement that X must have suffered from a mental illness or mental defect.

(3) Discuss the psychological leg of the test set out in section 78(1), that is, the requirement that there should have been a certain psychological incapability on the part of X.

(4) If X raises the defence of mental illness, on whom does the onus of proving that she suffered from mental illness rest?

(5) Discuss the possible orders that a court may issue if X succeeds with her defence of mental illness.

(6) Discuss the minimum age for criminal capacity as provided for in the Child Justice Act 75 of 2008.

STUDY UNIT 9

(1) Define intention.

(2) Name the two elements of intention and explain briefly what each entails.

(3) Name the three forms of intention.

(4) Define each of the three forms of intention and illustrate each by means of an example.

(5) Explain the two components of intention in the form of dolus eventualis in terms of the Humphreys decision. (6) Why is it said that the test for intention is subjective? Explain briefly.
(7) Discuss the following statement: “Intention must be directed at all the requirements of the offence.”

(8) Distinguish between intention and motive. Is X’s motive relevant where it has to be ascertained whether he had intention?

**STUDY 9**

A thief plans to rob a café owner. She takes a firearm with her, and although she sincerely hopes that there will be no resistance, she does foresee a reasonable possibility that she will have to shoot at her victim and, in so doing, could cause the latter’s death. Hoping that the owner of the café would readily hand over the money, she keeps the weapon in her jacket pocket when she confronts her and demands money. At that moment her feet slip from under her and she falls to the floor. The loaded weapon goes off. Contrary to all expectations, the café owner is fatally wounded. X is charged with murder. Do you think that she can succeed with a defence of mistake regarding the causal chain of events?

**FEEDBACK** If you have already studied the Goosen case, you ought to recognise these facts. In the judgment in Goosen, the court used these facts as an illustration of substantial difference between the actual and the foreseen manner of death. X may, accordingly, succeed with the defence of mistake regarding the causal chain of events.

(i) X, a seventeen-year-old girl, goes to a rave at a club in Johannesburg. Her friend gives her a packet of cigarettes. X puts the cigarettes in her pocket, thinking that they are ordinary cigarettes. The police raid the club. X is searched and the cigarettes that they find in her pocket turn out to contain dagga. X is charged with the crime known as “possession of drugs”. X tells you (her lawyer) that although she knows very well that possession of dagga is a crime, she was unaware that the cigarettes in her possession contained dagga instead of ordinary tobacco. What defence would you raise on behalf of X? (ii) X, a 30-year-old illiterate member of an indigenous tribe in a remote area of the Limpopo Province, comes to Johannesburg to look for her friend. This is the first time that she has left her rural home. In the community from which she comes, it is customary to smoke dagga from an early age for medicinal and recreational purposes. X brings dagga along with her to Johannesburg. The taxi that she is travelling in is stopped by the police near Pretoria. All the travellers are searched for drugs. X is found to be in possession of dagga and arrested. X tells you (her lawyer) that nobody had ever told her that it is against the law to smoke dagga. What defence would you raise on behalf of X?

**FEEDBACK** (i) Your defence would be that, owing to a mistake of fact, X did not have the required intention. She did not know that the cigarettes contained dagga, and was therefore mistaken as to the existence of one of the definitional elements of the crime. She was mistaken as to a material fact relating to her possession. (ii) Your defence would be that X lacked intention because she had made a mistake as regards the law. She was under the impression that her conduct did not constitute a crime.

**TEST YOURSELF**

(1) Explain the meaning of the term “mistake”.

(2) Does mistake exclude intention only if the mistake is reasonable? Explain.

(3) Will error in objecto always (without exception) constitute a defence?
(4) Explain the difference between a material mistake and a non-material mistake.

(5) Explain briefly what is meant by a mistake “with regard to the causal chain of events” and indicate whether this form of mistake excludes intention.

(6) Briefly discuss the two approaches followed in legal literature in determining liability in the case of aberratio ictus (going astray or missing of the blow), and indicate which one of these approaches you prefer and why.

(7) Distinguish between error in objecto and aberratio ictus.

(8) Explain, with reference to an example, what you understand by a mistake with regard to the presence of a ground of justification.

(9) Discuss the decision in De Blom 1977 (3) SA 513 (A) critically and indicate its effect on South African law.

STUDY UNIT 11

(1) Define the test for negligence.

(2) Discuss the concept of the reasonable person.

(3) Discuss the first leg of the test for negligence, that is, the question whether the reasonable person would have foreseen the possibility that the particular result might ensue or the particular circumstance might exist.

(4) Discuss the second leg of the test for negligence, that is, the question whether the reasonable person would have taken steps to guard against the possibility of the result ensuing.

(5) How does the test for negligence in formally defined crimes differ from the test for negligence in materially defined crimes?

(6) What is the abbreviated way in which we may refer to negligence?

(7) Name the subjective factors that may be taken into consideration in determining negligence, and give an example of each factor.

(8) (a) When can X be convicted of murder if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss. (b) When can X be convicted of culpable homicide if he killed his attacker in a situation in which he exceeded the bounds of private defence? Discuss.

STUDY UNIT 12

X and Z visit a bar and consume a number of drinks. Upon leaving the bar, pedestrian Y accidentally bumps against X, who by this stage is swaying on the sidewalk. A fight ensues. X holds onto Y from behind and Z kills Y by stabbing her with a knife. X and Z are charged with the murder of Y. The court finds that X and Z have caused Y’s death unlawfully, but that X was so intoxicated during the fight that she was unable to distinguish between right and wrong. The court further finds that at the time of the assault upon Y, Z was able to act and that she had criminal capacity, but that she was so intoxicated
that she lacked the intention to murder Y. X and Z rely on the defence of intoxication. Discuss critically whether X and Z ought to succeed with this defence.

**FEEDBACK** The rules currently applicable to the defence of voluntary intoxication are those enunciated in Chretien, as well as the provisions of section 1 of Act 1 of 1988. The facts in Chretien’s case were briefly as follows: (you can mention the facts in this case briefly). The four basic principles enunciated by the Appellate Division are in the case as follows: (mention the four principles set out above under 12.5.2.) The conclusion reached in Chretien was criticised because the effect of the decision was that a person who was responsible for her own intoxication is treated more leniently than a sober person who had committed the same act. As a result of this criticism, section 1 of Act 1 of 1988 was enacted. This section provides briefly as follows: (briefly set out the contents of the section). The application of the rules laid down in Chretien and in the Act on the present set of facts is as follows: The fact that X was not able to distinguish between right and wrong means that she did not have criminal capacity as a result of the intoxication. In terms of Chretien, criminal incapacity, even if it was the result of intoxication, constitutes a defence. However, the effect of the provisions of section 1 of Act 1 of 1988 is that X will be convicted of the crime created by this section. Z acted with criminal capacity but did not have the intention to murder. Accordingly, Z cannot be convicted of murder or of a contravention of section 1 of Act 1 of 1988. She can, however, be convicted of culpable homicide, as she caused Y’s death negligently. The test for negligence is objective, that is: How would the reasonable person in Z’s position have acted? Such a person would have foreseen that her act would result in death. Please note that although it was not mentioned specifically in the question that X and Z started to drink voluntarily, and although it was not mentioned expressly that they had not started drinking with the exclusive aim of gaining courage, it can nevertheless be assumed that they started drinking voluntarily and that this was not a case of actio libera in causa. These two situations are so extraordinary that, unless specifically mentioned in the question, it can be assumed that the intoxication referred to in the question does not refer to these situations.

**TEST YOURSELF**

(1) Discuss the Chretien case and indicate the possible effects that intoxication may have on criminal liability in terms of this decision.

(2) Discuss the requirements of the crime created in section 1 of Act 1 of 1988 and explain in which circumstances a person may be convicted of this offence.

(3) Discuss the possible effects that provocation may have on criminal liability.

(4) X enters a room where he discovers Y having sexual intercourse with his wife. X is enraged and kills Y. On a charge of murder, discuss X’s chances of success with a defence of provocation.

(5) Discuss the possible effect of a defence of provocation where X is charged with assault with intent to do grievous bodily harm.
STUDY UNIT 13

(1) Explain the meaning of the term "strict liability".

(2) Explain the meaning of vicarious liability.

(3) Distinguish between a natural person and a corporate body, and name a few examples of the latter category.

(4) Fill in the missing words: Section 332(1) provides that an act by a director or servant of a corporate body is deemed to be the act of the corporate body itself, provided the act was performed by such a person ... or in the ... as a director or servant, or if the director or servant was ... or ... the interests of the corporate body.

(5) Can a corporate body be guilty only of a statutory crime?

(6) State in one paragraph why the current South African model of corporate criminal liability is criticised.

STUDY UNIT 14

X1, X2 and X3 are members of a criminal gang. Their main activities are to steal motor vehicles at shopping centres. X1, the leader, is not involved in the actual stealing of cars. He only tells X2 and X3 what to do. X2 and X3 always carry firearms and knives with them when they engage in their criminal activities. Because of the dangerous nature of their activities, all the members of the gang realise that somebody may get killed. In fact, the gang leader (X1) has instructed them to kill anyone who interferes with their activities. One evening, while X2 and X3 are attempting to steal a car parked in an underground parking garage, Y, the owner of the car, arrives at the scene. Upon seeing the robbers, she screams for help, but X2 and X3 force her into the boot of her car. They drive 20 kilometres out of the city to a desolate area in the bush. X2 rapes Y and then cuts Y’s throat. During all these events, X3 holds Y down. They (X2 and X3) then leave the scene of the crime. Y, who is mortally wounded, screams for help. X4, a passerby, hears her screams. X4 is not a member of the gang. He has never even met any of the members of the gang. He also rapes Y and, intending to kill her, hits her with a stick over the head. Fifteen minutes after being raped and assaulted by X4, Y dies. The autopsy report reveals that Y died as a result of blood loss incurred by the throat-cutting. In the report, it is also stated that the head injury did not hasten her death. You are the state prosecutor. Explain which crimes (if any) X1, X2, X3 and X4 have committed and the legal grounds upon which the liability of each will be based.

FEEDBACK We will first deal with the murder of Y. X1, X2 and X3 are guilty of having murdered Y in terms of the general principles of liability. The actions of each of them qualify as the cause of Y’s death. There is no doubt that the act of X2 was the direct cause of Y’s death. Because the definition of the crime of murder is very wide, the acts of the gang leader, X1, as well as those of X2 and X3, are the cause (conditio sine qua non and legal cause) of Y’s death. X1 instructed the members of the gang to kill anybody who interferes with their activities, and X3 held Y down so that X2 could cut her throat. All three of them are perpetrators of murder. X1 is an indirect perpetrator and X2 and X3 are direct perpetrators. See the discussion in 14.3.2 above. All three accused (X1, X2 and X3) had at least
foreseen the possibility of an innocent person being killed during the course of their criminal activities. In other words, all of them had at least dolus eventualis in respect of Y’s death. The alternative basis upon which X1, X2 and X3 may be convicted of having murdered Y is to rely on the doctrine of common purpose. In terms of this doctrine, the state need not prove the element of causation in respect of each accused. Instead, the acts of each of the participants in the execution of the common purpose are imputed to the others. The leading cases in this regard are Safatsa and Mgedezi. Keep in mind, however, that the state still has to prove that each accused acted with intention. Since, according to the autopsy report, X4’s act did not causally contribute to Y’s death, X4 cannot be convicted of murder. As regards Y’s rape, X2 may also be convicted of this crime. X2 is the perpetrator of rape and X3 is an accomplice to rape. The reason why X3 cannot be convicted of rape as a co-perpetrator is that he never performed an act of sexual penetration on Y. His conduct does not fall within the definition of rape. By holding Y down to the ground, X3 nevertheless furthered the commission of the crime by somebody else (X2) and, therefore, he (X3) is an accomplice to rape. X1 cannot be convicted of rape because he never performed an act of sexual penetration on Y and did nothing to further the crime. Presumably, he never even anticipated that X2 and X3 would have sexually penetrated a woman without her consent. X4 is guilty of rape and attempted murder in respect of Y. As regards the crime of attempted murder, X4 is a typical example of a joiner-in. The leading case in this regard is Motaung.

TEST YOURSELF

(1) Distinguish between a participant and a non-participant in a crime.

(2) Distinguish between a perpetrator and an accomplice, and give an example of each.

(3) Give a definition of each of the following: a perpetrator, an accomplice, and the doctrine of common purpose.

(4) Explain in one sentence why an accessory after the fact does not qualify as a participant in a crime. (Write the answer here.)

(5) If more than one perpetrator is involved in the commission of a crime, is it necessary to identify one of them as the principal perpetrator?

(6) Explain the meaning of “direct perpetrator” and “indirect perpetrator”. Is there any difference between these two categories of perpetrators as far as their liability for the crime is concerned?

(7) Summarise the rules pertaining to the doctrine of common purpose.

(8) Discuss the judgment in Safatsa 1988 (1) SA 868 (A). Briefly mention the facts in this case, as well as the points of law decided by the court.

(9) Briefly discuss the judgment of the Constitutional Court in Thebus 2003 (2) SACR 319 (CC).

(10) (a) What do you understand by the term “joiner-in”? (b) Explain whether there is any difference between a joiner-in and a co-perpetrator, and give reasons for your answer. (c) What crime does the
joiner-in commit? (d) What is the leading case on the liability of the joiner-in and what was decided in this case? (11) Discuss the circumstances in which our courts may find that a person has dissociated herself or withdrawn from a common purpose.

STUDY 15

(1) Name and discuss the requirements for liability as an accomplice (as opposed to a perpetrator).
(2) Discuss the accessory character of accomplice liability.
(3) Is it possible to be an accomplice to murder? Give reasons for your answer.
(4) Define an accessory after the fact. (5) Discuss the requirements for liability as an accessory after the fact.
(6) Discuss the decision in Gani relating to the accessory character of the liability of an accessory after the fact.

STUDY 16

X thinks that to commit adultery is a crime. In reality, it is not criminal. (It may only result in certain civil-law or private-law consequences, in that it may give the spouse of an adulterous party a ground for suing for divorce.) Believing adultery to be a crime, X commits adultery. Does X commit any crime?

FEEDBACK X does not commit any crime. More particularly, he cannot be convicted of an attempt to commit adultery. The impossibility “lies in the law, not in the facts”.

X is charged with theft. The crime of theft cannot be committed in respect of res derelictae (i.e. property abandoned by its owners with the intention of ridding themselves of it). X, a tramp, sees an old mattress lying on the pavement. The mattress was left by its owner next to his garbage container in the hope that the garbage removers would remove it. X appropriates the mattress for himself. X knows that the owner had meant to get rid of the mattress. However, X erroneously believes that the crime of theft is defined by law in such a way that it can be committed even in respect of property that has been abandoned by its owner (a res derelicta). Does X commit attempted theft?

Since the mattress was, in fact, a res derelicta, it was impossible for X to steal it. The set of facts therefore describes a situation of an attempt to commit the impossible. X was not mistaken about any facts, but only about the contents of the law. This is a case of a putative crime, that is, a crime that exists only in X’s mind. The “rule in Davies” (i.e. the rule that impossible attempts are punishable) does not apply to putative crimes. Therefore, X cannot be convicted of attempted theft.

TEST YOURSELF

(1) Define the most important rules relating to the crime of attempt.
(2) Name the four forms of criminal attempt and briefly explain what each entails.
(3) Discuss, with reference to examples and decisions, the difference – in the case of an interrupted attempt – between acts of preparation and acts of consummation.
(4) Explain the rules relating to an attempt to commit the impossible.

(5) What is meant by a putative crime? Explain.

(6) Is voluntary withdrawal a defence to a charge of attempt? Explain.

(7) Discuss the crime of conspiracy.

(8) Discuss the crime of incitement.