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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
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PROPOSAL BY SINGAPORE

Article ____: Grounds for the exclusion of criminal liability
or the mitigation of punishment¹

The Court may, in accordance with international law,² determine the relevance, application, scope and effect³ of grounds for the exclusion of

¹ This title is intended to be neutral and does not distinguish between whether a ground constitutes a defence or merely goes to the mitigation of punishment. That will be for the Court to determine. It also speaks of the "exclusion of criminal liability" to avoid the problem of having to distinguish between the negation of liability and excuses from liability which would otherwise arise (i.e., defences), since the effect of either is that there will be no criminal responsibility attaching to the individual.

² This phrase has been preferred over "application of international law" because it should be recognized that for a number of these defences/grounds for mitigation, there will not be an existing body of international legal jurisprudence and the Court must have regard to the principles applicable in domestic legal systems. The Court must nevertheless apply these domestic law principles consistently with international law, where applicable, and hence the phrase "in accordance with international law".

³ This empowers the Court to determine issues such as whether a defence can be pleaded in general, whether it can be pleaded in respect of a particular crime or a particular category of crimes, the relevant principles to be applied, the conditions which must be fulfilled for its application and its effect if accepted by the Court i.e., excuse from liability or merely mitigation of punishment.



criminal liability or the mitigation of punishment, including:⁴

- (a) Mistake of fact;
- (b) Mistake of law;
- (c) Insanity and diminished mental capacity;
- (d) Intoxication;
- (e) Self-defence and defence of others;
- (f) Necessity;
- (g) Duress/coercion;
- (h) Superior orders; and
- (i) Military necessity.⁵

⁴ The list is non-exhaustive and the Court may therefore take account of other or even new grounds for the exclusion of liability or the mitigation of punishment, subject to the condition in the chapeau that this exercise must be undertaken "in accordance with international law". "Grounds" for the mitigation of punishment could certainly be wide enough to include relevant factors addressed elsewhere in the Statute, e.g., antecedents. The non-exhaustive formulation is also intended to address this fact.

⁵ The grounds are listed by their familiar names. It is recognized, however, that more precise formulations might, in certain cases, be required.