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PREPARATORY COMMITTEE ON THE ESTABLISHMENT  
OF AN INTERNATIONAL CRIMINAL COURT  
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INFORMAL GROUP ON GENERAL PRINCIPLES OF CRIMINAL LAW

Proposed new Part [III bis] for the Statute  
of an International Criminal Court

General principles of Criminal Law

Notes

This paper neither represents a text agreed upon among delegations nor suggests that every item should be included in the Statute. This paper identifies possible elements to be included and examples of some possible texts. The order of the articles as well as the headings are only of an indicative character and have not been finally agreed upon.

Delegations should bear in mind, wherever appropriate, the need to check the consistency of the texts in the present document with those of existing international instruments.

A. Substantive issues

Article A

Nullum crimen sine lege/non-retroactivity

Proposal 1

1. [Provided that this Statute is applicable in accordance with articles 21, 22 or 23] a person shall not be criminally responsible under this Statute:

96-21749 (E)



(a) In the case of a prosecution with respect to a crime referred to in articles 20 (a) to (d), unless the conduct in question constituted a crime [under international law] [under the definition of the crimes of this Statute] [or by national law which is in accordance with international law] at the time that the conduct occurred and such conduct occurred after the entry into force of this Statute;

(b) In the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

2. Paragraph 1 [1 (a)], above, shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

3. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.

#### Note

A question was raised as to whether the term "international law" in paragraph 1 (a) needed to be clarified. Is it clear that the Statute's definition of a crime would be sufficient and exclusive for the purpose of establishing "a crime under international law" within the meaning of paragraph 1 (a), and that for the purposes of determining whether conduct constitutes a crime for this article, no reference need or should be made to other sources of international law, such as other conventions or customary international law? If it is not clear, should the paragraph refer to crimes as defined by the Statute?

Is a reference in paragraph 1 (a) to national law necessary if all crimes within the jurisdiction of the Court are defined by the Statute?

Should paragraph 1 (b) also be qualified by the addition of the words "and such conduct occurred after the entry into force of this Statute", as in paragraph 1 (a)?

#### Proposal 2

This Statute applies only to a conduct that is done after the entry into force of this Statute, and no conduct shall be punished by this Court unless it is an offence under the definition of the crimes of this Statute.

[2. The Statute shall describe precisely and unequivocally the punishable conducts under its competence and shall not leave doubts about their prohibition.

3. Punishable conducts shall not be construed and sanctions shall not be applied by analogy.]

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Proposal 3

Jurisdiction racione temporis

1. The Court has jurisdiction only in respect of acts committed after the date of entry into force of this Statute.

When a State becomes party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession.

A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.

2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal.

The Security Council may, however, decide otherwise.

Article B

Individual criminal responsibility

(a) Personal jurisdiction

Proposal 1

1. The International Tribunal shall have jurisdiction over [natural] persons pursuant to the provisions of the present statute.

2. A person who commits a crime under this statute is individually responsible and liable for punishment.

[2 bis. Criminal responsibility is individual and cannot go beyond the person and his/her possessions.]

3. The fact that the present Statute provides criminal responsibility for individuals does not [prejudice] [affect] the responsibility of States under international law.

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Proposal 2

Physical persons and juridical persons

1. The Court shall be competent to take cognizance of the criminal responsibility of:

(a) Physical persons;

(b) Juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

2. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of physical persons who are perpetrators of or accomplices in the same crimes.

3. These provisions shall be without prejudice to the responsibility of States with respect to international law.

Note

Some delegations indicated that the expression "juridical persons" should extend to organizations lacking a legal status.

Some delegations expressed doubts about including the criminal responsibility of juridical persons into the Statute.

It was proposed as an alternative the possibility of referring to the "responsibility" of the juridical persons without including the word "criminal".

(b) Principle of criminal responsibility

Criminal responsibility of principals

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

(a) Commits the conduct specified in the description (definition) of the crime;

(b) Causes the consequences, if any, specified in that description (definition); and

(c) Does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

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[3. A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without mens rea.]

Note

This article establishes the general principle regarding the liability of principal perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles G and H.

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in articles B (c), I and J [and C] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles and avoids the need to elaborate defences within the Statute that merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependent upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements).

(c) Participation/complicity

Proposal 1

crimes of principals

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].]

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[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

4. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the other person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal.]

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment] [to the same punishment as provided in this Statute for a person who commits such crime as a principal]}.

#### Note

The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting. An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see article J and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which describe in greater detail the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as a aider and abettor (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

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It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g. aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.

Proposal 2

Criminal solicitation

1. A person is guilty of criminal solicitation, if, with the purpose of making another person decide to commit an offence, he/she commands, encourages or requests another person to engage in specific criminal conduct, when such person did criminal conduct according to such solicitation.

2. The punishment of criminal solicitation shall be the same as that of principals which is provided for in this Statute.

Accessories

1. A person is guilty of accessories if he/she did a conduct that facilitates the commission of an offence.

2. The punishment of accessories shall be reduced.

Proposal 3

Perpetrator and accomplice

1. An accomplice in a crime shall be punished as the perpetrator.

2. An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.

3. An accomplice is also a person who knowingly, by whatever means, plans, incites the commission, orders or assists and encourages the planning, preparation or commission of a crime.

(d) proposal covering both: (b) principle of criminal responsibility and (c) participation/complicity

1. The following shall be considered perpetrators or participants of the crimes defined in the present Statute:

(a) Those who agree or prepare its perpetration;

(b) Those who commit such crimes;

/...

- (c) Those who jointly commit such crimes;
- (d) Those who commit such crimes by means of a third person;
- (e) Those who order intentionally a third person to perpetrate such crimes;
- (f) Those who assist intentionally others in the perpetration of such crimes;
- (g) Those who intervene without prior agreement with other persons in the perpetration of such crimes, when it is not possible to determine the result that each one produced.

2. The persons mentioned above will be liable in proportion to their responsibility.

(e) Irrelevance of official position

Proposal 1

[1. This Statute shall be applied to all persons without any discrimination whatsoever.] The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

2. Immunity

In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

Proposal 2

Official capacity of the accused

1. The official capacity of the accused, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility under this Statute, nor shall it constitute a ground for reduction of the sentence.

2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court.

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Article C

Command responsibility

Responsibility of [commanders] [superiors] 1/ for acts  
of [forces under their command] [subordinates]

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility] [A [commander] [superior] shall be regarded as the perpetrator] 2/ - for crimes under this Statute committed by [forces] [subordinate[s]] under his or her command [and effective control] 3/ as a result of the [commander's] [superior's] failure to exercise proper control where:

(a) The [commander] [superior] either knew, or [owing to the widespread commission of the offences should have known] [should have known] 4/ that the [forces] [subordinate[s]] were committing or intending to commit such crimes; 5/ and

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1/ A significant question is whether the principle of command responsibility should be restricted to military commanders or be extended to any superior regarding the actions of subordinates.

2/ The alternatives highlight the major question under this article of whether command responsibility is a form of criminal responsibility in addition to other modes of participation and complicity, or whether it is a principle that commanders are not immune for the acts of their subordinates. Option 1 takes the former approach, while option 2 takes the latter approach. Option 3 treats the commander as a principal.

3/ A question arises as to whether the commander must have a certain level of de facto control over subordinates at the time of the crime before a duty to act arises.

4/ Alternatively, "had reason to know" could be substituted for "should have known".

5/ The major questions raised by the alternatives are (a) what level of knowledge or foresight is required with respect to actions of subordinates; and (b) what should be the subject of this knowledge.

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(b) The [commander] [superior] failed to take all necessary [and reasonable] measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof]. 5/

#### Article D

#### Non bis in idem

##### Proposal 1

No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

##### Proposal 2

1. Once convicted or acquitted by a final judgement of the Court, a person may no longer be accused on the basis of the same evidence, even for a different offence, either by the organs of the Court or by the judicial authorities of the States parties.

2. However, if new evidence is made known to the prosecutor following acquittal, he may institute new proceedings.

##### Note

The insertion of the above text does not intend to cover all the matters encompassed by article 42 of the Statute of the International Law Commission, but only those pertaining to the principle of non bis in idem stricto sensu, as it does not address the possible application of this principle by the international criminal court in relation to decisions of national courts. It was noted that this aspect was linked to questions of complementarity and procedure, although some delegations had the view that it belonged in the chapter on general principles.

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5/ Questions arise as to what type of action, the failure of which leads to liability, should be required of the commander (e.g. necessary or reasonable measures to prevent, repress or punish)? In addition, should the imposition of punishment by the commander alone be sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have but failed to prevent?

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Article E

Age of responsibility

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

2. [A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute.]

Proposal 2

Age of

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in this Statute.]

Note

Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.

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It was observed that, in its article 1, the Convention on the Rights of the Child, defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.

Article F

Statute of limitations

Proposal 1

1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal].]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in articles 27 7/ (a), (b) and (c) shall not be subject to limitation.

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7/ Paragraphs (a), (b) and (c) of article 27 deal, respectively, with the crime of genocide, crimes against humanity and the crime of aggression.

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1. Proceedings before the Court in respect of the crimes referred to in articles 27 g/ (d) and (e) shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) In case of instantaneous crime, from the moment of its perpetration;

(b) In case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) In case of permanent crime from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

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g/ Paragraphs (d) and (e) of article 27 deal, respectively, with serious violations of the laws and customs applicable in armed conflicts and with grave breaches of the four 1949 Geneva Conventions and of article 3 common to the four 1949 Geneva Conventions.]

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Article G

Actus reus (act and/or omission)

Proposal 1

Physical elements of crime

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime under this Statute can constitute either an act or an omission, or combination thereof. <sup>2/</sup>

2. For the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission if:

(a) The omission is specified in the description of the crime, and the person could have, but [intentionally or knowingly] failed to avoid the omission; or

(b) In the circumstances

(i) a. the person is under a [pre-existing] legal obligation (duty) to avoid the consequences specified as an [constituent; material] element in the description of a crime;

[Alternative: (i) a. the person is under a [pre-existing] legal obligation (duty) to avoid the result of a crime;]

b. [or The person is responsible for having created a particular risk or danger that subsequently led to the crime]

(ii) The consequence caused [result realized] by the omission corresponds to the consequence [result] that would be caused [realized] by a commission of such crime by means of an act; and

(iii) The person could have, but [intentionally or knowingly] failed to avoid the consequences [results] of such crime.

[3. A person is only criminally responsible under this Statute if the harm required for the commission of a crime is caused by and accountable to the principal's (perpetrator's) act or omission (conduct).]

Note

The concept of "omission" presents particular problems to various legal systems.

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<sup>2/</sup> New proposal. This paragraph would link the concepts of act and omission with the concept of "conduct" to which reference is made in article 33-4, and would provide a conceptual link for paragraph 2 of article 33-5.

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The extent to which the concept of omission could raise the question of liability may be considered.

Delegations may wish to omit these two elements [i.e., omissions and causation] from the statute.

Regarding paragraphs 2 (a) and (b) (iii), it was questioned whether references to "intentionally or knowingly" were necessary in view of the subsequent article concerning mental elements, which requires proof of intent or knowledge as the general rule. On the other hand, it was noted that it should be made clear that a failure to avoid an omission due to negligence is insufficient for criminal liability, thereby, possibly justifying the retention of these words.

Regarding paragraph 2 (b) (ii), a question was raised as to the origin of the legal obligation or duty to avoid the consequences or result of a crime. Does this obligation arise only by way of the Statute, or might the obligation arise by virtue of other sources of international or national law? Should it be clarified that any legal obligation must be an obligation pursuant to the Statute?

Also regarding paragraph 2 (b), the draft proposals raise the question whether the obligation is to avoid the "consequences" specified in the definition of the crime or to avoid the "result" of a crime (which may be a broader concept and may include crimes of conduct that have no separate consequences)?

Regarding paragraph 3, it was questioned whether the draft should specify that the "act or omission" be voluntary. Others thought that this was not necessary, as voluntariness was addressed by the principles concerning mental elements in article H.

A question was raised as to whether liability in respect of omissions should be limited only to specific crimes as defined by the Statute [see proposals concerning command responsibility].

#### Proposal 2

##### Omission

A person who fails to avoid the result of an offence is responsible for such offence if:

- (a) He/she is under a legal obligation to avoid such result;
- (b) The degree of the unlawfulness realized by such omission corresponds to that of the unlawfulness to be realized by the commission of such offence; and
- (c) He/she could have avoided such result.

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Note

It was suggested that the Committee might wish to include in the Statute the classification of instantaneous and permanent crimes.

Article H

Mens rea

Mental elements of crime

Proposal 1

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent [or] [and] knowledge [, whether general or specific or as the substantive crime in question may specify].

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) In relation to conduct, that person means to engage in the act or omission;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means:

(a) To be aware that a circumstance exists or a consequence will occur; or

(b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur.]

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) The person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) The person is aware that the risk is highly unreasonable to take;  
[and]

[(c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]

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Note

The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered.

Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly.

It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex.

It was questioned whether it was necessary in paragraph 1 to make reference to general and specific intent, as in either case the general rule would be that intent or knowledge is required.

Likewise, it was noted that any reference to "motive" should not be included; if relevant, motive or purpose would be an integral element of the definition of a crime.

Proposal 2

At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

Proposal 3

Moral element

There cannot be a crime without the intention to commit it.

Article I

Attempt

Proposal 1

1. A person is criminally responsible and is liable for punishment for attempting to commit a crime if, with the intent to commit that crime, the person

[engages in conduct for the purpose of carrying out that intent which is more than mere preparation to commit the crime]

[engages in conduct constituting a substantial step towards the accomplishment of such crime]

/...

[or concludes all necessary steps within the person's control and according to his or her plan towards execution of the crime]

[commences execution of the crime]

, but fails to complete the commission of the crime due to [circumstances independent of that person's will] [or a fortuitous event], [or the object of the attempt is impossible to achieve].

[2. A person shall only be criminally responsible for attempting to commit a crime where so provided in this Statute.]

3. A person who is criminally responsible for attempting to commit a crime may be liable to [a reduced punishment] [a reduced period of imprisonment].

[4. If the person abandons his or her efforts to commit the crime or otherwise prevents the accomplishment of the crime, the person is not punishable if the person completely and voluntarily has given up his or her criminal purpose before the crime was committed.] [without prejudice to applying the penalties to acts committed or omitted that constitute by themselves crimes.]

#### Note

With regard to paragraph 4 above, it was noted that some jurisdictions do not recognize "abandonment" as a defence. Questions were raised whether the concept of "abandonment" should be included in the definition of "attempt", or should be dealt with separately in the statute.

It was observed that an intervening event might break the chain of causation.

It was observed that the three alternatives in paragraph 1 were not mutually exclusive and could be combined as: "commences execution of the crime by engaging in conduct for the purpose of carrying out that intent, which is more than mere preparation and constitutes a substantial step towards the accomplishment of such crime".

It was questioned whether the three proposed reasons in paragraph 1 for the failure to complete the commission of a crime were mutually exclusive, or could be combined.

It was observed that the offence of attempt could apply generally to all crimes.

A question was raised as to when mitigation of punishment for an attempt was appropriate and whether such mitigation should only be for certain crimes.

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Others thought that it would be retrogressive not to include it since it was a form of liability at the Nuremberg trials.

It was questioned whether, in the situation where the crime agreed upon is actually committed, would the crime of conspiracy merge with the completed crime or remain a distinct and separate crime? If the conspiracy were merged with the completed crime, should a conspirator also be responsible for other foreseeable crimes that may have been committed in carrying out the conspiracy? (If the conspiracy remained a distinct crime, the conspirator would only be responsible (absent any other mode of participation) for a conspiracy to commit the crime that was agreed to be committed, as this is the subject-matter of the unlawful agreement.)

Questions arising from the proposed drafts include: (a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others might be the actual committers; (b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act; (c) what must be the nature of the overt act (e.g. the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement); (d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve; (e) whether conspiracy should be limited in respect of an agreement to commit certain listed crimes; and (f) the appropriate punishment for the crime.

#### Article K

##### Mistake of fact [or law]

##### Proposal 1

##### Mental element

1. At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

2. Even if a person, at the time of a conduct, does not realize its unlawfulness, he/she is criminally responsible in the case unless such error is unavoidable; provided that the sentence may be reduced.

##### Proposal 2

##### Mistake of fact [or of law]

Invincible [Unavoidable] mistake of fact [or of law] shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact [or of law] may be considered in mitigation of punishment.

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Proposal 3

1. [A mistake of law or] a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.

[2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced.]

Proposal 4

Mistake of law

Mistake of law may not be cited as a ground for exemption from criminal responsibility.

Note

Some delegations expressed doubts over including these concepts in the Statute.

Doubts were also expressed as to whether these concepts are negations of responsibility or a defence.

In view of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles B (b) and H), it was questioned whether this defence need be explicitly mentioned as it is merely one example of the various factors that could negate the existence of the required mental element.

Some delegations held the view that mistake of law should not be permitted as a defence.

Article L

Insanity/diminished mental capacity

Proposal 1

1. A person is not criminally responsible [is legally insane] if at the time of that person's conduct that (would otherwise) constitutes a crime, the person suffers from a mental disease or mental defect that results in the person lacking substantial capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to confirm his or her conduct to the requirements of the law [, and such mental disease or mental defect caused the conduct constituting a crime.]"

/...

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person's conduct, the sentence shall [may] be reduced."

Note

The question was raised whether this defence should be included.

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

The question was raised as to what should happen to a person who is found insane. Should the person be released or be detained in a mental institution? If the latter, where? Should provision for this be made in the articles concerning enforcement of sentences by the Court and States Parties?

It was observed that this defence might be more relevant for some crimes (e.g. a war crime, such as killing of a prisoner of war) than for others (e.g. crimes involving the formulation of policy, such as genocide). If the defence is included, possibly it should be available only for some types of crimes?

Proposal 2

Mental disorders

1. A person who, at the time of the facts, was suffering from a mental or neuropsychic disorder that destroyed his judgement or his control over his actions shall not be criminally responsible.

2. When the mental or neuropsychic disorder from which the person was suffering at the time of the facts merely altered his judgement or impeded his control over his actions without destroying such judgement or control, he shall remain criminally responsible. However, the Court shall take such circumstances into account in determining the sentence and the regime under which it shall be served.

Article M

Intoxication

Proposal 1

A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct that would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

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Note

The point was made that there were essentially two questions:

(a) Whether intoxication should be available as a defence or as a negation of mens rea; and

(b) If available as a defence, should it be spelled out in the Statute or elaborated in another way (see section B below).

It was observed that this defence might be relevant for some individual crimes (e.g. a war crime, such as killing a prisoner of war). On the other hand, it was observed that it might be better to leave this defence to be resolved by the Court through its jurisprudence rather than to include such a defence in the Statute.

It was also observed that intoxication is merely a factor relevant to the existence of, or which may negate, a required mental element. In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles B (b) and H), it was questioned whether such a defence need be explicitly mentioned as it is merely an example of one factor that could negate the existence of the required mental element.

Differences exist among national legal systems as to how intoxication is addressed, and other formulations of a defence could equally be suggested.

If the defence is available (either expressly by the Statute or by the Court's jurisprudence), should it be limited to only certain crimes?

Proposal 2

Voluntary drunkenness and narcotic intoxication

A state of drunkenness caused by the voluntary consumption of alcohol or a state of intoxication caused by voluntarily taking a narcotic product may in no case be regarded as grounds for exemption from criminal responsibility.

Article N

Self-defence/defence of others/defence of property

Proposal 1

Self-defence and defence of others

1. A person [is not criminally responsible and] is not liable for punishment if that person acts in self-defence or in defence of others.

2. A person acts in self-defence, or in defence of others, if the person acts [reasonably] [and as necessary] [with the reasonable belief that force is

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necessary] to defend himself or herself, or another person, against a[n] [reasonable apprehension of] [imminent] [present] unlawful force or threatened unlawful force, [in a manner which is reasonably proportionate to the threat or use of force].

[3. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of danger involved or the interest to be protected by the defensive act].

[4. If a persons exceeds the limits of the justifiable defence as described in paragraph 2, the sentence may be reduced.]

#### Note

Several questions were raised: (a) whether a provision relating to defence of property should be included in the Statute; (b) whether self-defence should be used as a defence in response to a threat of unlawful force; (c) whether pre-emptive self-defence is valid; (d) whether self-defence should be limited to certain types of crimes under article 20; and (e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Other questions raised by the draft include the extent to which the availability of the defence should be limited by requirements of reasonableness, necessity and/or proportionality.

The question also arises as to whether the defence should be available only if the defensive action is actually necessary or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the defensive action is necessary.

The degree of responsibility and punishment for excessive use of force in self-defence also arises as an issue.

#### Proposal 2

##### Legitimate defence

1. A person who, in the face of an unjustified attack on himself or another person, carries out at that same time an act dictated by the necessity of legitimate self-defence or defence of another person shall not be criminally responsible except when the means of defence use is incommensurate with the seriousness of the attack.

2. The argument of legitimate defence cannot be accepted when the unjustified attack which the person cites in accordance with the preceding paragraph constitutes only an attack on property.

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Article O

Necessity

Proposal 1

1. A person [is not criminally responsible and] is not liable for punishment if that person acts due to necessity.

2. A person acts due to necessity if:

(a) [The person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to [or a threat to the freedom of] that person or another person;

[alternative: (a) Circumstances beyond a person's control are likely to create an unavoidable private or public harm];

(b) [The person acts reasonably to avoid the threat] [there exists no other way to avoid the threat]; (and)

(c) [The person acts only to avoid greater imminent harm] [the interests protected by such conduct exceed the interest infringed by such conduct].

[3. This defence does not include the use of deadly force.]

[4. A person does not act due to necessity if [the circumstances are (within) not beyond a person's control] [(or if) that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity].]

[5. If a person exceeds the limitation of the justifiable defence as described in paragraph 2 [this article], the sentence may be reduced.]

Note

The question was raised as to the crimes to which the defence of necessity might apply.

The question was also raised whether the defence of necessity should include the use of deadly force.

It was questioned whether the defence of necessity should apply to the crimes of genocide and crimes against humanity.

Other questions arising from the proposed drafts include: (a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); (b) the nature of the threatened harm to be avoided (e.g. serious bodily harm, death, freedom, or private or public harm); (c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; (d) whether the accused need only act reasonably to avoid the threat if there is

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more than one equally harmful means of avoidance or must there be no other way to avoid the threatened harm other than by the accused's acts; (e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; and (f) what factors (such as voluntary exposure to the risk or control of circumstances) should deny the availability of the defence, and whether these are mutually exclusive or could be conjunctive.

#### Proposal 2

1. A conduct done, in the present danger for life, body or freedom to avoid such danger of himself/herself or any other person, is not punishable, if (a) there exists no other way to avoid such danger, and (b) the interest protected by such conduct exceeds the interest infringed by such conduct.

2. If a person exceeds the limitation of justifiable defence of paragraph 1, the sentence may be reduced.

#### Article P

##### Duress/Coercion

1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.

2. A person acts under duress or coercion if:

[(a) [the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] [unlawful] force or use of such force against that person or another person];

[(a) [the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to that person or another person];

(b) [the person acts reasonably in response to that threat] [the threat could not reasonably have been resisted by [an ordinary] [the] person]; and

[(c) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be avoided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].

#### Note

Questions arising from the proposed drafts include: (a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); (b) the nature of the threatened harm to be avoided (e.g. force serious bodily harm, death,), and whether it need be unlawful; (c) whether the defence should

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be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; (d) whether the accused need only act reasonably to avoid the threat or whether no reasonable person could have resisted the threat; (e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; (f) whether causing death is a permitted response to a threat; and (g) what factors (such as voluntary exposure to the risk) should deny the availability of the defence.

## Article Q

### Superior orders

#### Proposal 1

1. The fact that a person acted pursuant to an order of a Government or of a superior, [whether military or political] shall not relieve the person of criminal responsibility [if the order appears to be manifestly unlawful] [and the person has a greater risk to himself or herself no alternative but to obey, or has no other moral choice].

2. Where the person has acted pursuant to an order of a government or of a superior in the circumstances as described in paragraph 1, the sentence may be reduced having regard to the circumstances [this fact may be considered in mitigation of punishment if the court determines that justice so requires].

#### Note

Three questions were raised:

(a) Should those troops who obey what appears to them at the time to be a manifestly lawful order, be criminally responsible if it transpires that their commander was acting illegally in giving the order?

(b) Should those troops who receive an order which is not manifestly lawful but simply lawful, be criminally responsible if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order?

(c) What rules of law govern the legality or otherwise of an order? It was also suggested that the defence not apply to the crimes of genocide and crimes against humanity. Should the defence be limited to only some types of crimes?

#### Proposal 2

##### Prescription by law, and orders of the legitimate authority

1. With regard to genocide, crimes against humanity and the crime of aggression, the perpetrator or accomplice in one of these crimes may not be exempted from his criminal responsibility by the sole fact that he carried out

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an act prescribed or authorized by legislation or regulations or an act ordered by the legitimate authority. However, the Court shall take this circumstance into account when determining the sentence and its severity.

2. With regard to the crimes referred to in articles 31 and 32, <sup>10/</sup> a person who carries out an act ordered by the legitimate authority shall not be criminally responsible except when such an act is manifestly illegal or in conflict with the rules of international law applicable in armed conflicts or with duly ratified or approved international conventions.

3. However, persons who have carried out acts ordered by the Security Council or who have acted on its behalf and in accordance with a mandate issued by it shall not be criminally responsible and may not be prosecuted before the Court.

[Article R

Possible defences specifically referring to war crimes and grave breaches of the Geneva Conventions of 1949

Such defences might include:

- Military necessity;
- Reprisals.]

Note

It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to inter-state relations. It was also questioned which set of rules governing reprisals should apply.

As regards the question of Article 51 of the Charter of the United Nations, it was suggested that a savings clause could be included in reference to the rights and duties of States under the Charter and the functions and powers of the principal organs of the United Nations under the Charter. Such a clause should not necessarily be in a chapter on General Principles.

It was questioned whether such defences could be dealt with in connecting with the definition of war crimes and grave breaches of the Geneva Conventions of 1949.

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<sup>10/</sup> Articles 31 and 32 deal, respectively, with "serious violations of the laws and customs of wars" and with "grave breaches of the Geneva Conventions".

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Article S

Exhaustive or enumerative list of defences?

Proposal 1

Other defences

1. At trial the Court may consider a defence not specifically enumerated in this chapter if the defence:

(a) Is recognized [in general principles of criminal law common to civilized nations] 11/ [in the State with the most significant contacts to the crime] 12/ with respect to the type of conduct charged; and

(b) Deals with a principle clearly beyond the scope of the defences enumerated in this chapter and is not otherwise inconsistent with those or any other provisions of the Statute.

2. If an accused wishes to raise such a defence, he must notify the Court and the Prosecutor a reasonable time prior to trial. The Court shall give the Prosecutor the opportunity to be heard and shall issue an order deciding the matter. An accused who has failed to provide adequate notice shall be precluded from asserting the defence at trial; except that, where compelling circumstances exist, the Court may instead grant the Prosecutor a reasonable postponement to prepare for the issue at trial. 13/

3. Denial of a request under this article shall not preclude an accused from seeking consideration of the basis of the asserted defence as a grounds for mitigation of punishment to the extent otherwise permitted by this Statute.

Proposal 2

The Court shall determine the admissibility of reasons excluding punishment in view of the character of each crime.

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11/ This text represents the approach of Article 38 (c) of the Statute of the International Court of Justice.

12/ This approach draws upon principles applied in international private law matters and would presumably require the Court to craft a test for determining which State's contacts are most significant.

13/ The Rules of Procedure could provide further clarification regarding the conduct of any hearings required by the Court prior to ruling. The Statute or Rules might also permit interlocutory appeal by the Prosecutor of an adverse ruling.

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Note 1

Different views were held as to whether the finally agreed upon list of defences in the Statute should be exhaustive or enumerative. This leads to the question under section B below.

Note 2

It was noted that if the nature of a defence was really the negation of a mental element, there was no need to specify that defence in the Statute. Further, it could be applicable by means of the savings clause as proposed in this article.

Article T

Presumption of innocence

An accused shall be presumed innocent [until] [unless] [proved guilty] [convicted] in accordance with [this Statute] [law]. [The onus is on the prosecutor to establish the guilt of the accused [beyond reasonable doubt].]

Note 1

The presumption of innocence is also a procedural matter.

Note 2

Presumption of innocence [also] constitutes a substantive right of the accused.

B. Further elaboration by the Court of general principles of criminal law, including the question of applicable law

Note

The question was raised as to whether the Court should be empowered to elaborate/legislate further the general principles of criminal law that are not written in the Statute. (Please note that the draft ILC Statute contains a provision on this question in article 19.):

(a) If so, one of the possible solutions may be found in the proposal by one delegation concerning article 20 (big), which reads as follows:

"1. Subject to paragraphs 2 and 3, the judges may by absolute majority elaborate the elements of the crimes set out in article 20 and elaborate principles of liability and defence that are not otherwise set out in, and that are not inconsistent with, the elements and principles in the Statute or in annex B. In elaborating elements and principles, the Court shall not create any new offences or crimes.

/...

"2. The initial elements and principles elaborated by the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that an element or principle subsequently elaborated under paragraph 1 should also be submitted to a conference of States parties for approval.

"3. In any case to which paragraph 2 does not apply, elements or principles elaborated under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

"4. An element or principle may provide for its provisional application in the period prior to its approval or confirmation. An element or principle not approved or confirmed shall lapse."

Note should be taken of the link to the choice of sources of law in connection with possible further elaboration of general principles of criminal law by the Court.

(b) It was stated by some delegations, however, that the Court should not be empowered to legislate general principles of criminal law. In this case, a possible solution is found in the proposal by another delegation on article 33, which reads:

"1. The Court shall apply this Statute.

"2. When the Court cannot find the necessary provision to be applied, the Court may apply:

(a) The national law of the State where the crime was committed;

(b) If the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(c) If the laws of the States mentioned in (a) and (b) do not exist, the national law of the State of nationality of the accused, or if the accused does not have any nationality, the national law of the State of permanent residence of the accused; or

(d) If the laws of the States mentioned in (a), (b) and (c) do not exist, the national law of the State which had custody of the accused, as far as these laws are consistent with the objectives and purposes of this Statute."

Note should be taken of other proposals submitted on article 33, which are:

(a) Proposal submitted by one delegation

"1. The Court shall apply:

/...

(a) The Statute, including annexes A and B, rules adopted pursuant to article 19, and elements of crimes and principles of liability and defence elaborated pursuant to article 20 bis;

(b) Applicable treaties and the principles and rules of general international law; and

(c) Principles of law developed by the Court from national law.

"2. In developing principles of law as referred to in paragraph 1 (c), the Court shall [conduct and] take into account [a survey of] the national laws of States representing the major legal systems of the world, where those laws are not inconsistent with international law and internationally recognized norms and standards.

"The Court shall only apply paragraph 1 (c) to the extent that a matter is not covered by paragraphs 1 (a) or (b)."

(b) Proposal submitted by another delegation

"The Court shall apply:

(a) Its Statute, including the annexes thereto;

(b) The other relevant rules of international law;

(c) General principles of criminal law identified by it and approved by States parties to the statute;

(d) Rules of national law, to the extent authorized by the Statute, and

(e) Its Rules of Procedure and Evidence."

(c) Proposal submitted by another delegation

"1. This Statute (and the rules promulgated thereunder) shall be the primary source of law for the Court.

"2. To the extent not inconsistent with the above, the Court may apply principles and rules of law that are generally recognized in national legal systems as a subsidiary source of law.

"3. To the extent not inconsistent with the above, the Court may apply specific rules of applicable national law, or applicable treaty provisions, where necessary to the determination of a specific question that is governed by such law or treaty, or where the application or interpretation of such specific law or treaty is in fact at issue in the case."

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Proposal submitted by another delegation

Applicable law

The Court shall apply:

- (a) In the first place, this Statute and the treaties to which it makes reference;
- (b) If necessary, the principles and rules of general international law;
- (c) Failing that, and provided that such action does not conflict with the provisions mentioned above, the internal law of the State in whose territory the crime has been committed and, on a subsidiary basis, the internal law of the State of which the accused is a national.

Proposal submitted by another delegation

The Court may apply principles and rules of law enunciated in its previous decisions.

Note

Article 33 obviously has a bearing on many parts of the Statute. The fact that it is taken up here does not imply that it should be placed in the part dealing with the general principles of criminal law.

Delegations are invited to look at page 26 of document A/AC.249/L.4.

The question of penalties is not included in this document.

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