GENERAL RULES OF CRIMINAL LAW

(Contribution by the Dutch representative dr G.A.M.Strijards, senior legal advisor of the Ministry of Justice)

1. The concept of an International Criminal Court with universal jurisdiction is, in our view, only sustainable on the basis of a flexible and concise Statute. The conciseness of the Statute is, in our opinion, in this respect a decisive factor.

2.1. What our PrepCom has to fear is the real risk of an overdensity of regulations. Especially in Part V of the ILC-Draft, containing rules and provisions both substantial and procedural, concerning the trial to be held before ICC.

2.2. The more density in this respect, the more the current difference between the common law approach and the civil law system will be noticeable. In the end, that difference could easily turn out to be a rift, an obstacle preventing ICC to function as a factor of progression in the international public worldorder. Our basic working hypothesis should be that an osmosis between common law, civil law and other law-massives, for example islamic-law, is attainable for procedural issues and substantial matters as well. Therefore, while elaborating the ICC-draft-statute, we have to avoid terminologies and constructions implying a specific and undeniable choice for one of two conflicting systems of law. In this respect the draft of an ICC-Statute should be a neutral one. In this respect we have our doubts whether the ILC has succeeded to do so properly. We think that Part V of the ILC-Draft contains a lot of common law-elements in certain matters, which could be avoided by a certain conciseness.

3.1. Therefore, my delegation tends to think that the ICC-statute should contain only the main principles of substantive and procedural law.

3.2. Therefore the Statute should contain a general clause mandating to the Court to complete the Statute in a flexible way by subsidiary regulations. My delegation suggests therefore to add a mandating clause with this purport to the Statute. Two objections have already been made to such a clause.

3.3.1. First, a mandating clause is not compatible with the well known principle of substantive legality, in other words, the nulla poena sine praevia lege poenali-maxime.

3.3.2. My delegation is of the view that that incompatibility depends on the exact wording of such mandating clause. In the clause should be expressed that the lower regulations, to be launched by the Court, should be of a subsidiary nature. "Subsidiary" means: supplementary, in complete accordance with the provisions of the Statute. Art. 20 of the draft Statute, offering the jurisdictional scope of the Court, is one of those provisions, listing the crimes over which the Court shall have competence. The definitions of these crimes are binding for the Court. It will have no power to alter or amend those definitions. The same applies to the article, in which the substantial descriptions of the incomplete forms of crimes are listed exhaustively, such as attempt, solicitation, incitement and conspiracy, as well as to the article in which the limits of responsibility are regulated.

3.3.3. The same goes for the article, offering the definitions of the subjective and objective elements of each crime, like mens rea and the actus reus itself. The rule of legality is confined to the substantial elements of the crime, its legal definition and the variety of acts which could cause -- in abstracto -- criminal responsibility or accountability. The rule does not apply to the variety of defences available to the accused, whether they are of substantive or procedural, nature nor to their legal definitions. Neither does that rule apply to the formal conditions of jurisdiction, obstacles to prosecution or regulations of time limitations. In this respect the Court should have a certain supplementary power to work out the Statute in proper details in order to maintain a certain indispensable flexiblity.

3.3.4. The second objection to a mandating clause is that such an overall mandating clause would encroach on the internal sovereignty of a State. A State could be confronted with a rule of law within its territorial jurisdiction without having consented whatsoever. According to this objection that would be incompatible with the principle of sovereignty. The answer of my delegation can only be that the ratification of a Statute, instituting a legal judicial body with inherent universal jurisdiction, implies by nature a certain renouncement of state sovereignty.

4.1. Back to the aforementioned principle of legal neutrality: the Statute should not contain such a number of common law elements that countries with a different legal system or legal tradition, by the mere ratification of the Statute, surrender themselves to a common law-system just for crimes attracting the attention of the whole world.

4.2.1. The fundamental procedural rules have been fixed in article 38 of the ILC-Draft-statute. In that article, para. 1 sub d. the ILC introduces -- regulating the rules of trial before the ICC -- the well known fundamental distinction between a "plea" and a "fight". According to that article, the Trial Chamber allows the accused to enter a plea of guilty or not guilty at the commencement of every trial.

4.2.2. If we are not mistaken -- oriented as we are to the civil law system -- in a case of a "plea" the accused acknowledges his guilt of the alleged crime. So, in this case, the Prosecutor has been discharged from the onus to establish the guilt by collecting persuasive evidence. The "plea of guilty" itself is a decisive and irrefutable production of evidence. In the case of a "fight" the accused denies his guilt. Therefore the Prosecutor has to collect sufficient evidence to prove the guilt of the fact mentioned in the indictment. Here we have a typical common law distinction. A distinction running counter to several civil law systems, in which a judge in criminal matters has the duty to look for sufficient evidence, by virtue of his office, in every presented case, no matter what the accused states or stipulates about his guilt. In the final verdict, containing a condemnation, the judge has to motivate his decision and his motivation that the accused confessed guilt on trial is insufficient by legal regulation. It is one of the basic and essential elements of the criminal system in the Netherlands. Of course, by making this reference to the Dutch domestic law, I introduce an argument with little persuasiveness, but nevertheless, the wording of article 38 constitutes a rift which can not easily be dealt with, so far as my delegation is concerned. I fancy that other civil law-delegations will have the same problem. A problem that easily can be avoided by the mere deletion of this distinction in the Statute.

4.3. Besides, the ILC turns out not to be very consistent by introducing this distinction. In article 40 of its Draft the presumptio innocentiae has been fixed as an overall principle, obviously both substantial and procedural. The onus of proof is on the Prosecutor in every case. That means, substantially, that irrebutable presumptions of mens rea or of causation are not allowed, and in this way the provision has its significance for articles of the Statute in which the definitions of mens rea and necessary objective elements are to be worded.

4.4. However, the wording of article 40 is not compatible with the afore mentioned distinction between a "plea" and a "fight". Article 44 -- offering general rules of evidence -- has not been worded in accordance with that distinction either. That very distinction has its consequences for the system of defences to be pleaded on trial, the rights of the accused on trial and his competence to ask for an application for appeal and review.

4.5. Therefore my delegation would like to suggest that the present wording of Part V of the ILC-Draft should be scrutinized with regard this aspect.

5.1. To that end, it would be feasible to divide part V of the ILC-Draft into two seperate sections:
--- one of substantial or material nature
--- and one of mere procedural nature.
Such a distinction is a well established one on the international level -- for example in treaties on mutual assistance and legal cooperation -- and would prompt more pinpointed texts, because the drafters have to bear in mind what sort of item they are dealing with: a substantial or a procedural fenomenon.

5.2. In the substantial section general issues should be fixed concerning the basic principles of criminal responsibility under the ICC-Statute, the subjective and objective elements of every crime in general, the thresholds and obstacles for prosecution, the possible defences to be pleaded and their definitions as well the variety of penalties to be inflicted by the Court. Here a detailed and overall definition of the issue of "criminal intent" should be fixed. My delegation welcomes the very workable definition expressed by the Canadian delegation earlier this week. We are prepared to offer a definition as well, but inventing the wheel is not exactly our proper sport and therefore we would like to join proposals tabled already or to be tabled by other delegations.

5.3. In the projected procedural section of the Statute the basic principles concerning the criminal trial should be fixed, for example the possibility of holding trials in absentia, the rules of collecting evidence etc.

5.4. To that end article 33 of the ILC-Draft, giving general rules on the application of law should be reworded in accordance with this distinction. The present article 33 makes the Court competent to rely on other sources of law than the Statute itself. The article is drafted in general terms, without distinction whatsoever applicable both on substantial and procedural laws. It has been stated that the ICC, apart from its statute, shall apply applicable treaties and principles and rules of international laws, and, as complementary source, rules of national law.

5.5. My delegation is of the view that such an overall referral to national laws will turn out to be ineffective and will prompt an injustified difference, especially on the procedural level. The article should be redrafted in such a way that the reference to national law is allowed for substantive matters exclusively and -- of course -- only in so far as such is compatible with the principles of the ICC-Statute. Of course, the principle of universality implies

substantial unification of criminal law. As far as procedural rules are concerned, we think that referral to national regulations should be forebidden by the Statute itself. The Statute itself ought to offer the overall basis for the procedure to be observed by the Court and its organs. In this respect another explicit principle of legality seems to be valid: no criminal procedure, no procedural act or competence, without a firm and explicit basis in the Statute. This principle -- of statutory legality -- should be fixed in the Statute itself in the same way as the present article 39 expresses the substantive principle of legality.

5.5. In this respect there seems to be a gap in the Statute by not mentioning a elaboration of the principle of procedural legality and its legal consequences. It is compatible with such principle that the Statute provides in the erea of procedures a certain competence of the Court to elaborate in detail the main procedural rules given in the Statute by way of additional regulations. Such additional regulations could entail the way to deal with matters of publicity -- does the Court have the right to hold sessions in camera? -- the priority of examinations and interrogations on trial, the way of swearing in witnesses, experts, and, as the case may be, the accused himself -- the legal reasons for discontinuation of procedures, the proper time for the pleas to be held by the accused and the maximum length of each session.

6. The Updated Siracusa-Draft offers in the view of my delegation an excellent and well-elaborated framework for Part V of the ILC-Draft. In this Updated Siracuse Document article 33 has been divided in several subarticles, giving substantial provisions concerning responsibility, definitions of incomplete crimes as attempts, incitement and solicitation. The articles 36 through 47 have been redrafted in such a way that those articles are focused exclusively on procedural matters, without any possibility of a referral to national law. Accordingly the Court itself has the competence to give additional regulations on certain procedural items. We tend to think that in this respect the possibilities for the Court should be enlarged.

7.1. So far as substantial matters are concerned, the Siracusa-Draft does not provide for a competence of the ICC to rely on national sources. First because that would cause unjustified territorial differences in criminal responsibility. Secondly because such a referral to national sources would overburden the Court: it would have to become expert in many different national systems, at the risk of misapplying the national law.

7.2. We think that those arguments are not convincing. It depends on the exact wording of the article referring to national law whether unjustified differences can be excluded. A certain differentiation seems to be unavoi-

dable. For example the acceptability of a so called plea of mistake of fact or of a so called plea of mistake of law -- the well known error iuris-exception --, presented on behalf of the accused on trial is by legal definition dependent on the applicable legal system. Those systems have their differences. As far as the ability of our hypothetical ICC-judges is concerned, my delegation tends to think that beginning by underestimating them would be a false start. In the practice of mutual assistance and judicial cooperation, the judges of the requested states turn out to be perfectly able to interpret the national law of the requesting states, for example in extraditional matters. I myself happen to be a judge in extradition-cases in the Hague-court. Therefore I regularly have to interpret the substantional criminal laws of the requesting parties, given the condition that the application for extradition is only sustainable in case the request concerns a criminal act of a certain severity according to the criminal law of both the requesting state and the requested party. Until now, our Court has not received many complaints of other states related to the misinterpretation of their laws. But perhaps international courtesy was the main reason for this. In that case, I hope the distinguished representatives will be convinced of my preparedness to receive their complaints in this respect.