

PROPOSAL BY THE DUTCH DELEGATION dd the 2nd april 1996

Article 33bis (to be inserted in Part V of the ICC-Statute)

#### Age of responsibility

1. A person under the age of [twelve, sixteen] is deemed not to know the wrongfulness of his acts or omissions at the time stated in the indictment [mentioned in article 27] and shall therefore not be responsible [under this Statute] unless the contrary has been proven by the Prosecutor.
2. A person who is deemed due to his age [by the Presidency /the Court] not to know the wrongfulness of his acts or omissions at the time stated in the indictment [mentioned in article 27] shall not be responsible [under this Statute].

Article 33tres (to be inserted in Part V of the ICC-Statute)

Notwithstanding the foregoing articles on defences the Court shall have the competence to take into account other defences, recognised by the country in the territory of which the alleged crime has been perpetrated or by the law of the country the nationality of which the accused had at the time of the perpetration [commission].

#### Comments

In the Statute should be fixed an explicite bar to prosecution of persons with a certain age justifying the exclusion of criminal responsibility whatsoever.

Three systems are available.

First: the Statute stipulates in abstracto that persons, at the time of the act not of full age, shall be deemed to be not responsible for their acts and omissions under article 20 of the ICC-Statute. The question which criteria are relevant to decide about the full age is left to the judges who have to choose between the sytem of the State of nationality of the accused or the lex loci delicti commissi; the Court has the full discretion to develop jurisprudence on this issue.

Second: the Statute stipulates that persons with a certain well defined age -- for example the age of twelve or sixteen years -- are not responsible for their acts or omissions perpetrated under that specified age. The problem could be that the age is deductible from universal standards across the world and that those data are available at the Courts discretion without difficulties at a preliminary stage. This problem can also occur under the firstly mentioned system.

Third: the Statute introduces a right-or-wrong-criterion: A person who, due to his age is deemed not to know the wrongfulness of his acts or omissions under the Statute shall not be responsible under the ICC-Statute. This is an open ended construction, leaving to the judges the final discretional

power to implement via jurisprudential criteria that right-or-wrong-criterion. The Dutch delegation favors the latter solution. The Dutch delegation proposes to insert such an explicit regulation to that effect in an article 33bis. The insertion should be fixed just after the articles defining the mens rea-conditions. The advantage of this open ended construction in the second paragraph of that article 33bis is that in this way also a solution has been provided in case a person should not stand trial because of his advanced age. We recall in this context the problems of the Nuremberg-Tribunal with the indictment versus Alfred Krupp, who was not even capable to read or hear his indictment by the mere deficiency of his sense-organs. In the first paragraph the rebuttable presumption of law has been introduced that a person of a certain, statutory-fixed age [of twelve, sixteen years] is not capable of knowing the wrongfulness of his acts or omissions, unless the contrary has been proven by the Prosecutor in an early stage of the trial. This preliminary decision has to be taken by the presidency because it has to do with the initial decision whether or not there is a justification to let the accused stand the ordeal of public trial.

The delegation of the Netherlands is in favor of an open ended clause concerning the possible defenses to be pleaded on trial as well. Therefore it suggests the insertion of an article 33-tres, after the substantive summing up of the possible defenses as provided in the suggested texts of the Japanese or Canadian delegation. If the accused had a defense at his disposal by virtue of the law of the country in which territory the alleged crime has occurred, the Court should have the competence to take into consideration the *lex loci delicti commissi* in that respect. The same applies to the law of the country of the active nationality. It is a well established rule of international law that the laws of the country the nationality of which the accused had at the time of the act or omission could be taken into consideration (*lex ossibus inherens*). Of course, the rule is not a peremptory one, but for the sake of flexibility, the Court should have this possibility.