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Establishment
of an International Criminal Court

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COMMITTEE OF THE WHOLE
Working Group on General Principles
of Criminal Law

REPORT OF THE WORKING GROUP ON GENERAL PRINCIPLES
OF CRIMINAL LAW

I. INTRODUCTION

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on General Principles of Criminal Law, under the chairmanship of Per Saland (Sweden), the following articles:

Article 21. Nullum crimen sine lege;

Article 22. Non-retroactivity;

Article 23. Individual criminal responsibility;

Article 24. Irrelevance of official position, paragraph 2;

Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates];

Article 26. Age of responsibility;

Article 27. Statute of limitations;

Article 28. Actus reus (act and/or omission);

Article 29. Mens rea (mental elements), paragraph 4;

Article 30. Mistake of fact or of law;

Article 31. Grounds for excluding criminal responsibility;

Article 32. Superior orders and prescription of law;

Article 33. Possible grounds for excluding criminal responsibility specifically referring to war crimes; and

Article 34. Other grounds for excluding criminal responsibility.

2. The Working Group held 5 meetings to consider these articles, from 17 to 18 June 1998. The Working Group herewith transmits to the Committee of the

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Whole the following articles for its consideration: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7; article 24, paragraph 2; article X (former article 26); and article 27.

3. The remaining articles will be transmitted at a later stage.

II. TEXT OF DRAFT ARTICLES

Article 21 1/

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, it shall be interpreted in favour of the person being investigated or prosecuted. 2/

3. Paragraph 1 shall not affect the character of such conduct as being criminal under international law apart from this Statute.

Article 22

Non-retroactivity

1. A person shall not be criminally responsible under this Statute for conduct prior to its entry into force. 3/

2. If the law as it appeared at the commission of the crime is changed prior to the final judgement in the case, the law more favourable to the accused shall be applied. 4/

1/ The Working Group may need to consider the inclusion of an additional paragraph if treaty crimes are included within the jurisdiction of the Court. Such a provision could read as follows:

"1 bis. With respect to a crime referred to in article 5, paragraph(s) (...), the treaty in question must be applicable to the conduct of the person at the time that the conduct occurred."

However, this is more of a jurisdictional issue and should perhaps better be dealt with in Part 2.

2/ Attention was drawn to the use of the phrase "the person being investigated or prosecuted" in article 21, paragraph 2, and the phrase "the accused" in article 22, paragraph 2. It was suggested that it may be useful for the Drafting Committee to consider this matter.

3/ This paragraph may have to be revisited depending upon the outcome of the discussion on article 8.

4/ See footnote 2 above.

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court is individually responsible and liable for punishment in accordance with this Statute.
3. deleted.
4. The fact that this Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.
7. In accordance with this Statute, a person is criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (d) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (e) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (f) In respect of the crime of genocide, directly and publicly incites others to commit genocide. 5/

5/ The second paragraph of the definition of the crime of genocide in article 5 which appears between square brackets should be deleted.

(g) Attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the accomplishment of the crime is not punishable under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Article 24

Irrelevance of official position

...

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.

Article X (former article 26) 6/

Non-jurisdiction over minors (provisional title)

The Court shall have no jurisdiction over persons who were under the age of eighteen at the time of the alleged commission of a crime.

Article 27

Statute of limitations

There is no statute of limitations for the crimes within the jurisdiction of the Court. 7/

6/ This article should be transferred to Part 2.

7/ Two delegations were of the view that there should be a statute of limitations for war crimes. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the ICC would still be able to exercise jurisdiction.