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PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
16 March-3 April 1998

TEXT OF THE DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 15[A]

Nullum crimen sine lege

1. Provided that this Statute is applicable in accordance with article 6[21], 7[21 bis], 8[21 ter], 9[22] or 10[23] a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 5[20] [(a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article [5[20] (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

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

Article 16[A bis]

Non-retroactivity

1. Provided that this Statute is applicable in accordance with article 15[A], a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

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{2. 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.}¹

Article 17[B.a to d]

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

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

{3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.}²

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

{5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.}³

N.B. In the context of paragraphs 5 and 6, see also articles 69[47 bis] (Penalties applicable to legal persons) and 88[59 ter] (Enforcement of fines and forfeiture measures).

¹ This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

² This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

³ There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

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7. [Subject to the provisions of articles 19[C], 22[G] and 23[H],] a person is criminally responsible and liable for punishment for a crime defined [in article 5[20]] [in this Statute] 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;

[(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 19[C];]

(d) [with [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission;⁴

(e) either:

(i) [intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];]^{5,6}

(f) [directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

⁴ It was pointed out that the commentary to the ILC Draft Code of Crimes (A/51/10, p. 24, para. (12)) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the ICC. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

⁵ In addition to the two types of conduct described in para. (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

⁶ The inclusion of this subparagraph gave rise to divergent views.

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(g)⁷ [with the intent to commit such a crime,] 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.⁸

N.B. This article should be re-examined as to the references to the mental element in view of article 23[H] (Mens rea (mental elements)).

Article 18[B.e]

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

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.⁹

⁷ Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

⁸ A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

⁹ Further discussion of paragraph 2 would be required in connection with international judicial cooperation.

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Article 19[C]

Responsibility of [commanders] [superiors]¹⁰ for acts of
[forces under their command] [subordinates]¹¹

[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]¹² for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) the [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(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].

Article 20[E]

Age of responsibility

N.B. In the context of this article, see also article 68[A] (a) (Applicable penalties).

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.]

¹⁰ Most delegations were in favour of extending the principle of command responsibility to any superior.

¹¹ One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.

¹² The alternatives highlight the question whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.

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Proposal 2

[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 the Statute.]¹³

Article 21[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.]

¹³ 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 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.

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Proposal 2

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

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 article 5[20] (a), (b) and (d) shall not be subject to limitation.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 5[20](c) 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.

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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.]

N.B. The proposals under this article have not been consolidated.

Article 22(G)

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) the omission is specified in the definition of the crime under this Statute; or

(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute¹⁴ to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].¹⁵

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]¹⁶

¹⁴ Some delegations questioned whether the source of this obligation is wider than the Statute.

¹⁵ Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

¹⁶ Some delegations thought that a provision on causation was not necessary.

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Article 23(H)

Mens rea (mental elements) of crime

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 and knowledge.

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 to be aware that a circumstance exists or a consequence will occur.

[4.¹⁷ ¹⁸ 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.]]

N.B. The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.

¹⁷ Further discussion is needed on this paragraph.

¹⁸ A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.

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Article 24(K)¹⁹

Mistake of fact²⁰ or of law

Option 1

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility 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.

Option 2

1. A mistake of fact shall be a ground for excluding criminal responsibility only 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. Mistake of law may not be cited as a ground for excluding criminal responsibility [, except where specifically provided for in this Statute].²¹

Article 25(L)

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:²²

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her

¹⁹ There were widely divergent views on this article.

²⁰ Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.

²¹ Some delegations felt that paragraph 2 of option 2 still left some ambiguity, and an alternative approach could read as follows:

"Mistake of law as to whether a particular type of conduct is a crime under this Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility. However, a [reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime."

²² The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

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conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) the person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],²³ the person shall remain criminally responsible;]

(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent ...²⁴ use of force] [immediate ...²⁵ threat of force] [impending ...²⁶ use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];

(d) [the person reasonably believes that]²⁷ there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the

²³ There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable ground for excluding criminal responsibility, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If this text were to be retained, the ground for excluding criminal responsibility would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (actio libera in causa). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

²⁴ Dots inserted so as not to repeat "[unlawful] [and] [unjustified]]" in all three alternatives.

²⁵ Ibid.

²⁶ Ibid.

²⁷ This should be considered together with article 24[K].

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person acts reasonably to avoid this threat, provided that the person's action²⁸ [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;²⁹ [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [the person reasonably believes that there are]³⁰ [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights]³¹ and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death]³² and provided that there exists no other way to avoid such threat].

2. The Court may³³ determine the applicability of the grounds for exclusion of criminal responsibility [listed in paragraph 1] [permitted by this Statute] [to the case before it].³⁴

Article 26[M]

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the person

²⁸ A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".

²⁹ A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided" with "employing means which are not disproportionate to the risk faced".

³⁰ This should be considered together with article 24[K].

³¹ It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

³² This applies more to a military situation.

³³ The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in part 7.

³⁴ The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

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of criminal responsibility [(if) [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful].³⁵

[The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations.]^{36 37}

[Article 27(N)]³⁸

[Possible grounds for excluding criminal responsibility specifically referring to war crimes]

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Article 28(O)

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground:

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

(b) deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of Procedure and Evidence.³⁹

³⁵ An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.

³⁶ This subparagraph should be considered together with article 25[L], paragraph 2.

³⁷ For the question of mitigating circumstances, see part 7.

³⁸ It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

³⁹ This article needs to be further considered together with article 25[L], paragraph 2, and article 14[33].