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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

The Working Group held one additional meeting, on 29 June 1998, to consider the remaining articles of Part 3. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: [article 23, paragraphs 5 and 6], article 25 and articles 30 to 32. The Working Group also notes the deletion of article 23, paragraph 7 (c), [article 28], [article 33] and article 34.

II. TEXT OF DRAFT ARTICLES

Part 3. General Principles of Criminal Law

Article 23

Individual criminal responsibility

...

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute, 1/ the Court may also have jurisdiction over a juridical person for a crime under this Statute.

1/ This new phrase was inserted to replace former paragraph 6 of article 23 (A/CONF.183/2/Add.1): "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons ..."

The court may render a judgement over a juridical person if:

(a) The charges filed by the Prosecutor² against the natural person mention the juridical person; and

(b) The natural person charged was in a position of control in the juridical person as an agent, a member, a representative or an employee of that juridical person at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted.

For the purpose of this Statute, "juridical person" means a corporation whose concrete and real objective is private ends, and not a State or other public body in the exercise of State authority, or a public international body.³

6. The proceedings⁴ with respect to a juridical person under this article shall be in accordance with this Statute and the Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.⁵

If convicted, the juridical person may incur the penalties referred to in article 76.⁶ These penalties shall be enforced in accordance with the provisions of article 99.⁷

...

²Language will have to be consistent with the eventual language in Part 5.

³The applicable law under this Statute is defined in article 20.

⁴N.B. Footnote 45 on page 41 of A/CONF.183/2/Add.1 states: "The term 'proceedings' covers both investigations and prosecutions."

⁵N.B. The Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia include rule 48, Joinder of Accused: "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." United Nations document IT/32/Rev.9, 5 July 1996; Rule 82 A reads: "In joint trials, each accused shall be accorded the same rights as if he were being tried separately."

⁶Once there is final agreement on articles 76 and 99, references to these articles could be deleted.

⁷Ibid.

Paragraph 7 (c): deleted

Article 25

Responsibility of commanders and superiors^{8 9}

In addition to the other forms of responsibility for crimes under this Statute:

(a) A military commander or person effectively acting as a military commander is criminally responsible for crimes under this Statute committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise properly control where:

- (i) That person either knew or, owing to the circumstances at the time should have known, that the forces were committing or about to commit such crimes; and
- (ii) That person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior is criminally responsible for crimes under this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise properly control, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

⁸The Working Group draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

⁹The Working Group draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

[Article 28]

Actus reus (act and/or omission)

deleted

Article 30¹⁰

Mistake of fact or of law

A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. Mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court is not a ground for excluding criminal responsibility. However, a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime, or as provided in article 32.

Article 31

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:

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

(b) The person is in a state of intoxication 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, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to commit conduct constituting a crime within the jurisdiction of the Court;¹¹

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, that property which is essential for accomplishing a military mission, against an imminent and unlawful use of

¹⁰For mitigation of punishment, see article 77.

¹¹Some delegations have doubts about accepting voluntary intoxication as a ground for excluding criminal responsibility.

force in a manner proportionate to the degree of danger to the person or property protected;^{12 13}

(d) The conduct, which is alleged to constitute a crime within the jurisdiction of the Court, has been caused by duress resulting from:

- (i) A threat made by other persons; or
- (ii) Other circumstances beyond that person's control that constitute a threat

of imminent death or serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat; provided that the person does not intend to cause a greater harm than the one sought to be avoided.¹⁴

2. The Court may determine the applicability of the grounds for exclusion of criminal responsibility permitted by this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 20. The procedures relating to the consideration of such ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Superior orders and prescription of law

1. The fact that a crime referred to in article 5 has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the perpetrator of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question; and
- (b) The person did not know that the order was unlawful; and
- © The order was not manifestly unlawful.

¹²The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph. Some delegations favoured the inclusion of the preceding sentence in the text of subparagraph © itself.

¹³The Working Group draws the attention of the Drafting Committee to the fact that the text of this provision was the subject of extensive negotiations and represents quite delicate compromises.

¹⁴This could include the situation where actual serious bodily harm is occurring.

2. For the purpose of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.¹⁵

[Article 33]

Possible grounds for excluding criminal responsibility
specifically referring to war crimes

deleted¹⁶

Article 34

Other grounds for excluding criminal responsibility

deleted¹⁷

¹⁵Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an appropriately high level of mens rea including knowledge of the gravity and scale of the offence.

¹⁶This matter is addressed in article 31, paragraph 3.

¹⁷This matter is addressed in article 31, paragraph 3.