

## General Part Draft 1996

by Albin Eser, Otto Triffterer, Otto Lagodny, Dorean Koenig *with the assistance of* Kai Ambos and Hans Vest

to be included in:

Association Internationale de Droit Pénal (AIDP)/International Institute of Higher Studies in Criminal Sciences (ISISC)/Max Planck Institute for Foreign and International Criminal Law (MPI) et al., *1994 ILC Draft Statute for an International Criminal Court with suggested modifications (updated Siracusa-Draft)*, prepared by a committee of experts, Siracusa/Freiburg/Chicago, 15 March 1996.

**First Draft**, 19 January 1996

**Second Draft**, 6 February 1996: corrections and modifications by

- *Koenig*, 27 January
- *Triffterer*, 29 January, 3 and 5 February
- *Eser*, 5 February
- *Ambos*, 5 February

**Third Draft**, 9 February (telephone conversation Eser, Triffterer, Ambos; telephone conversation Eser, Lagodny) last modifications in italics

### **[Reference to ILC-Draft Statute 1994:**

**Old Art. 33 to be replaced by the modified Art. 33 and the new Arts. 33 a - q to be included after Article 33]**

#### **Art. 33** Applicable Law

(1) The Court shall apply this Statute and, insofar as not contradictory to it, the principles and rules of general international law and special treaties.

(2) In addition to and under the conditions stated in sect. 1, the Court shall apply the national law of the territory in which the crime has been committed, provided that it does not contravene general principles of law recognized by the community of nations.

(3) Without prejudice to the fundamental rights of the defendant, the Court shall pay particular attention to the law granting rights to the victim in his or in the state of the defendant, especially with regard to compensation.

#### **Art. 33 a** Nullum crimen sine lege

(1) An act may be punished under this Statute only if, prior to its commission, it has been made punishable by international law or by national law which is in accordance with international law.

(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.

**Art. 33 b Individual and State Responsibility**

- (1) A person who commits a crime under this Statute is individually responsible and liable for punishment.
- (2) The official position of an individual who commits a crime under this Statute and particularly the fact that he acts as head of state or government or as a responsible government official does not relieve him of criminal responsibility nor mitigate punishment.
- (3) The fact that a crime under this Statute was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, *under the circumstances of the time*, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.
- (4) The fact that the present Statute provides criminal responsibility for individuals does not prejudice the responsibility of states or corporate liability under international law.

**Art. 33 c Age of Responsibility and Mental Capacity**

- (1) A person under the age of fourteen at the time of the commission of a crime shall not be responsible under this Statute.
- (2) A person between the age of fourteen and twenty-one at the time of commission of a crime shall be evaluated as to his maturity whether he is responsible under this Statute.
- (3) A person is not responsible under this Statute when at the time of the commission of a crime he suffered from a serious mental or psychotic disorder which made him substantially unable to understand the wrongfulness of his conduct or to conduct himself according to such an understanding.
- (4) A mental disorder resulting from/caused by intoxication may exclude criminal responsibility only if not procured voluntarily.

**Art. 33 d Omission**

An omission of an act is punishable under this Statute if the person was under a preexisting legal duty to prevent the harm. Such a duty can in particular arise out of a statutory or contractual responsibility for the safety of the person concerned, or from antecedent dangerous and illegal conduct.

**Art. 33 e Causation**

Criminal responsibility under this Statute presupposes that the harm required for the completion of a crime is caused by and accountable to the perpetrator's act or *omission*.

**Art. 33 f Mens Rea**

- (1) Criminal responsibility under this Statute cannot be based on strict liability.

(2) Unless provided for otherwise, crimes under this Statute are punishable only if committed intentionally.

**Art. 33 g Attempt**

(1) In the case of an incomplete crime, the person is punishable for an attempt if he, with the intent to commit the crime, engages in conduct constituting a substantial step towards the accomplishment of that crime.

(2) If the person abandons his effort to commit the crime or otherwise prevents the accomplishment of the crime, he is not punishable if he completely and voluntarily has given up his criminal purpose.

**Art. 33 h Complicity**

(1) Any person who plans, instigates, orders, commits or otherwise aids and abets in the attempt or execution of a crime under this Statute shall be individually responsible for the attempted or accomplished crime.

(2) Each party to a crime shall be subject to punishment in accordance with his own individual responsibility apart from the responsibility of other participants.

**Art. 33 i Conspiracy**

A person is punishable for conspiracy when, with the intent to commit a specific crime, he agrees with another to perpetrate that crime.

**Art. 33 j Reasons Excluding Punishment**

(1) The Court shall determine the admissibility of reasons excluding punishment in the light of the character of each crime.

(2) Defences include *but should not be limited to those in Art. 33 k to 33 q*.

**Art. 33 k Self Defence, Defence of Others and Defence of Property**

(1) Self defence excludes punishment if it was necessary to prevent an imminent unlawful attack on oneself or on another.

(2) Self defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of the danger involved or the interest to be protected by the defence act.

**Art. 33 l Necessity/Coercion or Duress**

(1) Necessity excludes punishment when the person, by reason of circumstances beyond his control likely to create an otherwise unavoidable private or public harm, engages in conduct to avoid the imminent greater harm likely to be produced by such circumstances, but not likely to produce death.

(2) Necessity can also result from coercion or duress which a person would reasonably be unable to resist.

(3) Military necessity may exclude punishment only as provided by the international law of armed conflict.

**Art. 33 m** Consent

With regard to the nature of international crimes defined in this Statute, consent of the victim does not exclude punishment.

**Art. 33 n** Mistake of Fact or Law

(1) If the person would not be held guilty of the crime if the circumstances were as he reasonably believed, he is not punishable.

(2) The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced.

**Art. 33 o** Superior Order

(1) A person acting pursuant to an order of a government or a superior is not relieved of punishability, unless such order results in coercion or duress, mistake of fact or law.

(2) A superior order may be considered in mitigation of punishment if justice so requires.

**Art. 33 p** Public International Law Defences

(1) Self-defence as referred to in Art. 51 of the UN Charter excludes punishment for a person acting on behalf of the respective state.

(2) Reprisals may exclude punishment for a person acting on behalf of the respective state, but only insofar as generally recognized under international law.

**Art. 33 q** Statute of Limitation

There is no statute of limitation for genocide, serious war crimes, crimes against humanity (or aggression).

**[Reference to ILC-Draft Statute 1994:  
Old Article 47 to be replaced by the modified Article 47 and the new Arts. 47  
a, b to be included after Article 47]**

**Art. 47** Applicable Penal Sanctions

- (1) The Court may impose on a person convicted of a crime under this Statute one or more of the following penal sanctions: life imprisonment, imprisonment for a time not less than one year, and in addition an appropriate fine.
- (2) The death penalty, flogging and other physical or degrading punishment are excluded.
- (3) The Court may also order the confiscation of the proceeds or of the instruments used for the commission of the crime or the forfeiture of other property.

**Art. 47 a** Assessment of Punishment

- (1) In determining the sentence the Court shall take into account any aggravating or mitigating circumstances, including the substantial cooperation by the convicted person with the prosecutor before or after conviction, and the general practice of the states. The Court shall pay special attention to the penalties provided by the law of the state:
  - a) where the crime was committed;
  - b) of which the convicted person or the victim is a national;
  - c) which had custody of and jurisdiction over the convicted person.
- (2) Credit shall be given to the convicted person for the period, during which he has been detained in custody *for the crime* pending his surrender to the Court or trial or appeal.
- (3) Probation shall be granted only in exceptional cases of mitigating circumstances.

**Art. 47 b** Compensation for the Victim

- (1) In assessing the punishment the Court shall pay due attention to the interests of the victim.
- (2) Proceeds from fines, forfeiture and confiscated property should in principle be transferred by the Court, to one or more of the following in the given order:
  - (a) compensation for the victim *or the victim's family* directly or through a trust fund established by the Secretary General of the United Nations;
  - (b) a state whose nationals are the victims of the crime;
  - (c) the Registrar, to defray the costs of the trial.