

Public Annex A

INTERNATIONAL
CRIMINAL LAW
SERIES

THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT

Second Revised and Expanded Edition

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ARTICLE 31 GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

ROME STATUTE

Article 31

Grounds for Excluding Criminal Responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be 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 engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The 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;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent 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. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in 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 a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

TEXT TRANSMITTED BY DRAFTING COMMITTEE TO COMMITTEE OF THE WHOLE

Article 30²³⁴

Grounds for Excluding Criminal Responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(c) 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;

(d) 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 engage in conduct constituting a crime within the jurisdiction of the Court;

(e) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against and imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The 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;

(f) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent 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. Such a threat may either be:

²³⁴ Former article 31.

- (i.) Made by other persons; or
 - (ii.) Constituted by other circumstances beyond that person's control
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in 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 a ground is derived from applicable law as set forth in article 20. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

1998 PREPARATORY COMMITTEE

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:²³⁵

(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 [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]],²³⁶ the person shall remain criminally responsible;]

²³⁵ The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

²³⁶ 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

(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 ...²³⁷ use of force] [immediate ...²²⁸ threat of force] [impending ...²²⁸ 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]²³⁸ 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 person acts reasonably to avoid this threat, provided that the person's action²³⁹ [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;²⁴⁰ [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] [there are]²⁴¹ [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]²⁴² 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]²⁴³ and provided that there exists no other way to avoid such threat].

in an intoxicated condition (*aetio libera in couso*). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

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

238 This should be considered together with article 30.

239 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."

240 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".

241 This should, be considered together with article 30.

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

243 This applies more to a military situation.

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2. The Court may²⁴⁴ determine the applicability of the grounds for exclusion of criminal responsibility [listed in paragraph 1] [permitted by this Statute] [to the case before it].²⁴⁵

[Article 33]²⁴⁶

[Possible Grounds for Excluding Criminal Responsibility
Specifically Referring to War Crimes]

...

Article 34

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.²⁴⁷

ZUTPHEN DRAFT

Article 25[L]²⁴⁸

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:²⁴⁹

²⁴⁴ 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.

²⁴⁵ The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

²⁴⁶ It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

²⁴⁷ This article needs to be further considered together with article 31, paragraph 2, and article 20.

²⁴⁸ A/AC.249/1997/L.9/Rev.1, pp. 16–18.

²⁴⁹ The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

(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 [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]],²⁵⁰ 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 ...²⁵¹ use of force] [immediate ...²⁵² threat of force] [impending ...²⁵³ 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]²⁵⁴ there is a threat of [imminent] death or serious bodily harm against that person or another person [or against

²⁵⁰ 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.

²⁵¹ Dots inserted so as not to repeat "[unlawful] [and] [unjustified]" in all three alternatives.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ This should be considered together with article 24[K].

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his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action²⁵⁵ [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided;²⁵⁶ [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]²⁵⁷ [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]²⁵⁸ 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]²⁵⁹ and provided that there exists no other way to avoid such threat];

2. The Court may²⁶⁰ determine the applicability of the grounds for exclusion of criminal responsibility²⁶¹ [listed in paragraph 1] [permitted by this Statute] [to the case before it].²⁶²

²⁵⁵ 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".

²⁵⁶ 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".

²⁵⁷ This should be considered together with article 24[K].

²⁵⁸ It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

²⁵⁹ This applies more to a military situation.

²⁶⁰ There was support, in principle, for two proposals regarding application of international law and nondiscrimination in the interpretation of general principles of criminal law. The first proposal is to insert, after the word "may" the phrase ", in accordance with international law". The second proposal is to add the following provision: "The application and interpretation of the general sources of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender." These proposals relate to both article 14[33] and Part 3. In order to avoid duplication, discussion could take place in the context of those provisions.

²⁶¹ 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.

²⁶² The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION
HELD 1 TO 12 DECEMBER 1997

Article 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:

(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 [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]], 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... use of force] [immediate... threat of force] [impending... 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] 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 person acts reasonably to avoid this threat, 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; [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] [there are] [the person necessarily acts in response to] circumstances beyond that person's control

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Proposal 1

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which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights] 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] and provided that there exists no other way to avoid such threat];

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

[Article N

Possible Grounds for Excluding Criminal Responsibility Specifically Referring to War Crimes]

Article 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 chapter 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 chapter 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 the Court.

1996 PREPARATORY COMMITTEE

Article L

Insanity/Diminished Mental Capacity

Proposal 1

1. A person is not criminally responsible [is legally insane] if at the time of that person's conduct that (would otherwise) constitutes a crime, the person suffers from a mental disease or mental defect that results in the person lacking substantial capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to confirm his or her conduct to the requirements of the law [and such mental disease or mental defect caused the conduct constituting a crime.]”

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person's conduct, the sentence shall [may] be reduced."

[Note. *The question was raised whether this defence should be included.*

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

The question was raised as to what should happen to a person who is found insane. Should the person be released or be detained in a mental institution? If the latter, where? Should provision for this be made in the articles concerning enforcement of sentences by the Court and States Parties?

It was observed that this defence might be more relevant for some crimes (e.g. a war crime, such as killing of a prisoner of war) than for others (e.g. crimes involving the formulation of policy, such as genocide). If the defence is included, possibly it should be available only for some types of crimes?]

Proposal 2

Mental Disorders

1. A person who, at the time of the facts, was suffering from a mental or neuropsychic disorder that destroyed his judgment or his control over his actions shall not be criminally responsible.
2. When the mental or neuropsychic disorder from which the person was suffering at the time of the facts merely altered his judgment or impeded his control over his actions without destroying such judgment or control, he shall remain criminally responsible. However, the Court shall take such circumstances into account in determining the sentence and the regime under which it shall be served.

Article M

Intoxication

Proposal 1

A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct that would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes

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Proposal 1

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requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

[*Note.* The point was made that there were essentially two questions:

(a) Whether intoxication should be available as a defence or as a negation of *mens rea*; and

(b) If available as a defence, should it be spelled out in the Statute or elaborated in another way (see section B below).

It was observed that this defence might be relevant for some individual crimes (e.g. a war crime, such as killing a prisoner of war). On the other hand, it was observed that it might be better to leave this defence to be resolved by the Court through its jurisprudence rather than to include such a defence in the Statute.

It was also observed that intoxication is merely a factor relevant to the existence of, or which may negate, a required mental element. In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles B(b) and H), it was questioned whether such a defence need be explicitly mentioned as it is merely an example of one factor that could negate the existence of the required mental element.

Differences exist among national legal systems as to how intoxication is addressed, and other formulations of a defence could equally be suggested.

If the defence is available (either expressly by the Statute or by the Court's jurisprudence), should it be limited to only certain crimes?]

Proposal 2

Voluntary drunkenness and narcotic intoxication

A state of drunkenness caused by the voluntary consumption of alcohol or a state of intoxication caused by voluntarily taking a narcotic product may in no case be regarded as grounds for exemption from criminal responsibility.

Article N

Self-defence/Defence of Others/Defence of Property

Proposal 1

Self-defence and defence of others

1. A person [is not criminally responsible and] is not liable for punishment if that person acts in self-defence or in defence of others.
2. A person acts in self-defence, or in defence of others, if the person acts [reasonably] [and as necessary] [with the reasonable belief that force is necessary]

to defend himself or herself, or another person, against a[n] [reasonable apprehension of] [imminent] [present] unlawful force or threatened unlawful force, [in a manner which is reasonably proportionate to the threat or use of force].

[3. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of danger involved or the interest to be protected by the defensive act].

[4. If a person exceeds the limits of the justifiable defence as described in paragraph 2, the sentence may be reduced.]

[*Note. Several questions were raised:*

(a) whether a provision relating to defence of property should be included in the Statute;

(b) whether self-defence should be used as a defence in response to a threat of unlawful force;

(c) whether pre-emptive self-defence is valid;

(d) whether self-defence should be limited to certain types of crimes under article 20; and

(e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Other questions raised by the draft include the extent to which the availability of the defence should be limited by requirements of reasonableness, necessity and/or proportionality.

The question also arises as to whether the defence should be available only if the defensive action is actually necessary or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the defensive action is necessary. The degree of responsibility and punishment for excessive use of force in self-defence also arises as an issue.]

Proposal 2

Legitimate defence

1. A person who, in the face of an unjustified attack on himself or another person, carries out at that same time an act dictated by the necessity of legitimate self-defence or defence of another person shall not be criminally responsible except when the means of defence use is incommensurate with the seriousness of the attack.

2. The argument of legitimate defence cannot be accepted when the unjustified attack which the person cites in accordance with the preceding paragraph constitutes only an attack on property.

Article O

Necessity

Proposal 1

1. A person [is not criminally responsible and] is not liable for punishment if that person acts due to necessity.

2. A person acts due to necessity if:

(a) [The person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to [or a threat to the freedom of] that person or another person;

[alternative: (a) Circumstances beyond a person's control are likely to create an unavoidable private or public harm];

(b) [The person acts reasonably to avoid the threat] [there exists no other way to avoid the threat]; and)

(c) [The person acts only to avoid greater imminent harm] [the interests protected by such conduct exceed the interest infringed by such conduct].

[3 This defence does not include the use of deadly force.]

4. A person does not act due to necessity if [the circumstances are (within) not beyond a person's control] [(or if) that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity].]

5. If a person exceeds the limitation of the justifiable defence as described in paragraph 2 [this article], the sentence may be reduced.]

[Note. The question was raised as to the crimes to which the defence of necessity might apply. The question was also raised whether the defence of necessity should include the use of deadly force. It was questioned whether the defence of necessity should apply to the crimes of genocide and crimes against humanity.

Other questions arising from the proposed drafts include:

(a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable);

(b) the nature of the threatened harm to be avoided (e.g. serious bodily harm, death, freedom, or private or public harm);

(c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists;

(d) whether the accused need only act reasonably to avoid the threat if there is more than one equally harmful means of avoidance or must there be no other way to avoid the threatened harm other than by the accused's acts;

(e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; and

(f) what factors (such as voluntary exposure to the risk or control of circumstances) should deny the availability of the defence, and whether these are mutually exclusive or could be conjunctive.]

Proposal 2

1. A conduct done, in the present danger for life, body or freedom to avoid such danger of himself/herself or any other person, is not punishable, if (a) there exists no other way to avoid such danger, and (b) the interest protected by such conduct exceeds the interest infringed by such conduct.

2. If a person exceeds the limitation of justifiable defence of paragraph 1, the sentence may be reduced.

Article P

Duress/Coercion

1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.

2. A person acts under duress or coercion if:

[(a) [[the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] [unlawful] force or use of such force against that person or another person];

[(b) [the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to that person or another person];

(c) [the person acts reasonably in response to that threat] [the threat could not reasonably have been resisted by [an ordinary] [the] person]; and

[(d) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be avoided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].

[*Note. Questions arising from the proposed drafts include:*

(a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable);

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Proposal 1

(b) the nature of the threatened harm to be avoided (e.g. force serious bodily harm, death), and whether it need be unlawful;

(c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists;

(d) whether the accused need only act reasonably to avoid the threat or whether no reasonable person could have resisted the threat;

(e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused;

(f) whether causing death is a permitted response to a threat; and

(g) what factors (such as voluntary exposure to the risk) should deny the availability of the defence.]

Article R

Possible Defences Specifically Referring to War Crimes and Grave Breaches of the Geneva Conventions of 1949

Such defences might include:

- Military necessity;
- Reprisals.]

[*Note. It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to interstate relations. It was also questioned which set of rules governing reprisals should apply.*

As regards the question of Article 51 of the Charter of the United Nations, it was suggested that a savings clause could be included in reference to the rights and duties of States under the Charter and the functions and powers of the principal organs of the United Nations under the Charter. Such a clause should not necessarily be in a chapter on General Principles.

It was questioned whether such defences could be dealt with in connecting with the definition of war crimes and grave breaches of the Geneva Conventions of 1949.]

Article S

Exhaustive or Enumerative List of Defences

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