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Article 31 – Grounds for excluding criminal responsibility

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.

Literature:

Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 9 CRIM. L.F. issue 3 (1999, forthcoming); M. Cherif Bassiouni (ed.), *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT. A DOCUMENTARY HISTORY* (1998); Christopher L. Blakesley, *Comparing the Ad Hoc Tribunal for Crimes against Humanitarian Law in the Former Yugoslavia & the Project for an International Criminal Court*, prepared by the *International Law Commission*, 67 REVUE INTERNATIONALE DE DROIT PÉNAL 139-208 (1996); Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, in: Albin Eser/George P. Fletcher (eds.), *RECHTFERTIGUNG UND ENTSCULDIGUNG - JUSTIFICATION AND EXCUSE. COMPARATIVE PERSPECTIVES*, 17-65 (Vol. 1 1987); Albin Eser, *The Need for a General Part*, in: M.

Cherif Bassiouni (ed.), COMMENTARIES ON THE INTERNATIONAL LAW COMMISSIONS 1991 DRAFT CODE OF CRIME AGAINST THE PEACE AND SECURITY OF MANKIND 43-52 (1993); Albin Eser, "Defences" in *War Crime Trials*, in: Yoram Dinstein/Mala Tabory (eds.), WAR CRIMES IN INTERNATIONAL LAW 251-273 (1996), also published in: 24 ISRAEL Y.B. HUM. RTS. 201-222 (1995); Hans-Heinrich Jeckel, *Zum Stand der Arbeiten der Vereinten Nationen für die Errichtung eines internationalen Strafgerichtshofs*, in: Albin Eser (ed.), FESTSCHRIFT FÜR HARUO NISHIHARA 437-451 (1998); Christiane Nill-Theobald, "DEFENCES" BEI KRIEGSVERBRECHEN AM BEISPIEL DEUTSCHLANDS UND DER USA. ZUGLEICH EIN BEITRAG ZU EINEM ALLGEMEINEN TEIL DES VÖLKERSTRAFRECHTS (1998); Leila Sadat Wexler, MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE'S TEXT TO THE DIPLOMATIC CONFERENCE, ROME JUNE 15-JULY 17, 1998, 76 (1998); William A. Schabas, *General Principles of Criminal Law*, 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. (1998, forthcoming); Edward Wise, *General Principles of Criminal Law*, in: Leila Sadat Wexler (ed.), *Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee*, 13bis NOUVELLES ETUDES PÉNALES 43-53 (1998).

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A. General Remarks/Introduction

1. Scope and genesis of the provision

Although this article of the Rome Statute certainly has its merits, it must be made clear from the very outset that its heading is misleading and its contents incomplete. When speaking of "grounds for excluding criminal responsibility" in such a general way, the provision seems to comprise all defences which may lead to the exclusion of criminal responsibility. This impression is, however, misguided from two countervailing ends: On the one hand, as to be concluded from paragraph 1, article 31 is not the only place in this Statute where grounds for excluding criminal responsibility may be found (*infra* 2); in this respect, the provision has a supplementary function in that it regulates grounds for excluding criminal responsibility not yet recognized in other provisions of this Statute. On the other hand, article 31 is far from providing a complete supplement of all possible defences, as may be seen from the missing list (*infra* 3). Thus this provision in fact solely deals with incapacity (*infra* B.I.2.(a)), intoxication (*infra* B.I.2.(b)), self-defence and defence of property (*infra* B.I.2.(c)), and duress (*infra* B.I.2.(d)). Yet, this deficiency as well is consciously taken into account, firstly in paragraph 2 by giving the Court the power to determine the concrete applicability of the grounds for excluding criminal responsibility (*infra* B.II.), and secondly in paragraph 3 by allowing the invocation and development of further grounds for excluding criminal responsibility by reference to other applicable international and national law (*infra* B.III.).

Beyond being merely supplementary and still incomplete, the manner in which these grounds for excluding criminal responsibility are regulated is ambivalent insofar as it leaves open the question as to whether a specific ground may be considered as a justification of the offence or merely as an excuse of the offender, or whether other – more procedural or political – reasons may lead to a discharge. In this respect, by abstaining from a closer differentiation between various types of exclusionary grounds, as known in most continental-European jurisdictions¹, article 31 appears to have been phrased along common law propositions of a rather broad and undifferentiated concept of "defences". Although this common law point of departure has to be kept in mind when interpreting the defences of the Statute, the question remains whether the future development could aim at different ends (*infra* 3).

As to the genesis of article 31, two lines of development are worth remarking. A more principal one concerns the question of whether the Statute should provide grounds for excluding criminal responsibility at all. In this respect, the development leads from almost zero to considerable heights, finally ending on a middle level. If, by neglecting earlier drafts², the ILC's Draft Statute for an International Criminal Court of 1994³ may

¹ Cf. A. Eser, *Justification* at 19 et seq.

² Such as the ILC 1991 Draft Code of Crimes against the Peace and Security of Mankind (Report of the International Law Commission on the Work of its Forty-Third Session, Supp. No. 10, U.N. Doc. A/46/10), in which at least some rudimentary general principles and in rather general terms "defences and extenuating circumstances" had been recognized: cf. A. Eser, *Need* at 58 et seq.

³ Report of the International Law Commission on the Work of its Forty-Sixth Session, Supp. No. 10, U.N. Doc. A/49/10 (1994), in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 657-673.

serve as starting point of the Rome Statute, it must be realized that in this Draft grounds for excluding criminal responsibility are not mentioned at all; this, however, may be explained by the fact that the ILC Draft was by any means rather scarce in pronouncing general principles by merely explicitly expressing the principle of legality (article 39). Thus, in that Draft, solely article 33 which dealt with applicable law, thereby allowing the application of "general international law" or "any (applicable) rule of national law", could have been used as source for excluding criminal responsibility. After this substantial lack of general requirements of and exemptions from criminal responsibility met with considerable criticism, supported by constructive proposals⁴, all further proposals and drafts of UN-Committees contained a certain range of various defenses. This new openness can be observed as early as in the Ad Hoc Committee Report of 1995, where in Annex II a long list of possible defenses can be found⁵. Still more proposals of possible defenses are put forward for consideration in a compilation by the Preparatory Committee of 1996⁶. However, in all further recommendations of the Working Group on General Principles, solely mistake of fact or of law were left as explicitly recognized⁷. The eventually decisive step was then taken by the Preparatory Committee at its December 1997 session, where it accepted the recommendations of the Working Group on General Principles, as here the grounds for excluding criminal responsibility appear for the first time in the form in which it is, in principle, still represented in the present article 31⁸.

- 4 After these recommendations had basically been upheld by the Inter-Sessional Meeting of January 1998⁹ and finally found admittance into the Draft Statute of the Preparatory Committee of April 1998¹⁰ as a formal basis of the Rome Conference, all further modifications were less of principal than of marginal and more formal character. Without wishing to go into details at this point, the Final Draft Statute as presented to the Rome Conference was, regarding defences to an offense, basically structured in the

⁴ Cf., in particular, Updated Siracusa Draft: *Draft Statute for an International Criminal Court. Suggested Modifications to the 1994 ILC-Draft of 15 March 1996*, article 33; several of these rules had been phrased differently by A. Eser/O. Lagodny/O. Triffterer, *Proposals to Amend the "Draft Code of Crimes against the Peace and Security of Mankind"*, in: O. Triffterer, *Annex 2: Acts of Violence and International Criminal Law*, 4 CROATIAN ANN. CRIM. L. & PRAC. 872-881 (2/1997).

⁵ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. Doc. A/50/22 (1995), at pp. 18 et seq., 48 et seq., reprinted in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 617-656, 629 et seq., 655 et seq.

⁶ Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/CRP.9 (4 Apr. 1996), *Annex: General Principles of Criminal Law*. Cf., in addition, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (*Compilation of Proposals*), U.N. Doc. A/51/22 (1996), pp. 79 et seq., in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 441-616, 480 et seq.

⁷ Cf. Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997, U.N. Doc. A/AC.249/1997/L.5 (1997), at pp. 18 et seq., in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 369-383, 377 et seq.

⁸ See articles L-O, in: Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997), at pp. 18 et seq., in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 313-347, 319 et seq.

⁹ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998), at pp. 60 et seq., in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 221-311, 249 et seq.

¹⁰ Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute and Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1 (14 Apr. 1998), at pp. 66 et seq., in: M.Ch. Bassiouni, *DOCUMENTARY HISTORY* 119-210, 145 et seq.

following way: Whereas mistake of fact or mistake of law (article 30) as well as superior orders and prescription of law (article 32) were regulated in special provisions and later merely renumbered to articles 32 and 33 respectively, article 31 was at that stage partly broader due to its recognition of a sort of necessity, paragraph 1 (d), partly narrower due to its not yet containing defense of property in case of war crimes (originally to be regulated in a specific article 33, now within article 31 para. 1 (c)), and by treating the present paragraph 3 of article 31 as "other grounds for excluding criminal responsibility" in a special article 34. Whereas the chapeau of article 31 as well as paragraph 1 (a) and paragraphs 2 and 3 remained almost unchanged in their substance, paragraph 1 (b), (c) and (d) underwent various modifications in the course of the Rome Conference. Why, when and in which way this happened, must be seen in connection with the analysis of the respective grounds for excluding criminal responsibility (*infra* B).

2. Exclusion of criminal responsibility outside of article 31

As early as in its very first words "in addition to", article 31 indicates that it possesses a supplementary function, firstly in recognizing grounds for excluding criminal responsibility already provided for in other provisions of this Statute, and secondly by additional ones. Thus, in order to get a full view of possible grounds for excluding criminal responsibility, such grounds outside of article 31 must at least be listed, though not commented on here. Provided that in this first analysis of a brand new Statute, one or the other exclusionary rule was not overseen, the following grounds for excluding criminal responsibility provided for in the Statute outside of article 31 can be named:

a) Abandonment, article 25 para. 3 (f)

According to this provision, a person shall not be held liable for the attempt to commit a crime if he or she abandons the effort to commit the crime or otherwise prevents the completion of the crime, provided that he or she gives up the criminal purpose completely and voluntarily (article 25 para. 3 (f) sentence 2). Although in some countries, such as France, abandonment is considered part of the definition of attempt¹¹, it is at least a negative and, thus, an excluding factor of criminal responsibility¹².

b) Exclusion of jurisdiction of persons over 18, article 26

Although, due to the inability of the delegates to find an consensus on the age of responsibility¹³, this exclusion is phrased in procedural terms by excluding jurisdiction, the essential reason behind this is the lack of criminal responsibility under a certain age. Therefore, this exclusion can, in substance, be considered as a ground for excluding criminal responsibility as well¹⁴.

¹¹ Cf. G. Stefanie/D. Levasseur/B. Boulloc, *DROIT PÉNAL GÉNÉRAL* at 203 (16th ed. 1997).

¹² For details of the various requirements of abandonment cf. K. Ambos, article 25, margin No. 34.

¹³ Cf., in particular, Draft Statute of the Preparatory Committee, *supra* note 10, at pp. 60 et seq., in addition K. Ambos, *Principles* at III.A.

¹⁴ For more details see O. Triffterer, article 26.

c) Mistake of fact or mistake of law, article 32

- 8 As mentioned, even in phases where the drafters of the Statute were hardly prepared to recognize any grounds for excluding criminal responsibility, at least mistake of fact and, to a lesser degree, mistake of law were kept as reasons for excluding, or at least mitigating, criminal responsibility¹⁵. Remarkably, both mistake of fact (article 32 para. 1) and mistake of law (article 32 para. 2) are explicitly denoted as grounds for excluding criminal responsibility, albeit under the condition that the mistake (of fact or law) negates the mental element of the crime or that the mistake of law can be traced back to a superior order or a prescription of law according to article 33. Although both the structure and contents of these mistake rules may be questionable in various respects¹⁶, it was certainly a decisive step regarding mistake of law to recognize this still worldwide highly controversial ground for excluding criminal responsibility at all¹⁷.

d) Superior orders and prescription of law, article 33

- 9 Another highly controversial ground for excluding criminal responsibility is obedience to a superior order. Although not recognized in principle, article 33 of this Statute provides certain exceptions under which a person may be relieved of criminal responsibility if he or she acted pursuant to an order of a Government or of a superior. Although, again, the structure and scope of this provision may be disputable¹⁸, it attempts to find a middle way between entirely disregarding and partly recognizing obedience to a superior as a ground for excluding criminal responsibility¹⁹.

3. Missing defences

- 10 In comparison to national penal codes and case laws where the fulfillment of the definitional elements of an offense may be negated by a wide range of justificatory, exculpatory or other grounds of excluding punishability²⁰, the list of possible defenses to international crimes in this Statute is rather limited. This may partly be explained by the fact that crimes penalized and prosecuted by inter- and *supranational* law are, in principle, of such infeasible dimensions that any attempts to justify or excuse them appear obscene and, therefore, are met with psychological reservations. Nevertheless, in the same way that a murderer's act may be justified by self-defence or a rapist excused by insanity, in trials of international crimes it cannot be precluded either from the very outset that the elements of an offense, although all given, may be counteracted by a valid defense²¹. Otherwise it would not have been possible to recognize grounds for excluding criminal responsibility as described *supra* at 2 and *infra* at B. Yet the ques-

¹⁵ Cf. *supra* A.2 at margin No. 7.

¹⁶ For alternative phrasing cf. article 33-15 of the Updated Siracusa Draft, *supra* note 4.

¹⁷ For more details see O. Triffterer, article 32.

¹⁸ As an alternative cf. article 33-16 of the Updated Siracusa Draft, *supra* note 4, respectively the proposal by A. Eser/O. Lagodny/O. Triffterer, *supra* note 4, article 10, at 879.

¹⁹ For more details see O. Triffterer, article 33.

²⁰ Cf. in general A. Eser, *Justification* at 46 et seq. or, for instance with regard to German Criminal Law, cf. Th. Lenckner, in: A. Schönke/H. Schröder, STRAFGESETZBUCH §§ 32 et seq. pre-notes 29 et seq. (at 484 et seq.) (25nd ed. 1997).

²¹ Cf. A. Eser, "Defences" at 252 et seq.

tion still remains as to whether or not there might be further grounds for excluding criminal responsibility. The answer requires a distinction between two groups of possible defenses:

a) Explicitly rejected defences

In declaring official capacity irrelevant, particularly that of a Head of State or Government, article 27, the Statute explicitly excludes a defense which was formerly practiced commonly and tacitly almost as a "matter of course", which has been rejected, however, since at least as early back as the Nuremberg trials²². Since quite recently once more invoked by Pinochet, this Statute's explicit exclusion of "official capacity" as a defense will hopefully clarify this controversial question and set a preventive signal towards government-supported crimes²³. 11

The same holds true for the non-applicability of the statute of limitations, article 29. 12
With the explicit rejection of this defence, any speculations on playing with the passage of time are made illusory²⁴.

b) Non-addressed defences

Aside from grounds for excluding criminal responsibility which are either statutorily recognized (*supra* 2 and *infra* B) or explicitly rejected (*supra* 3.a), a wide range of defences remains which may be recognized as grounds for excluding criminal responsibility by various national laws, but which are not explicitly addressed in this Statute, neither in a positive nor in a negative way. Although certain defenses recognized by national criminal law, by its very nature may not be acceptable within the context of international crimes, such as for instance educational privileges of parents or teachers, quite a few defenses remain which have already been discussed and partly even considered for this Statute, but which in the final end were neither explicitly recognized nor rejected. Without pretending to be exhaustive, this refers to: 13

- consent of the victim,
- conflict of interests,
- reprisals,
- general and/or military necessity,
- the *tu quoque* argument, or
- immunity of diplomats²⁵.

As several of these defenses are highly controversial, partly in principle and partly at least with regard to the character of international crimes²⁶, it appears understandable that the Statute followed a center line by not explicitly recognizing these defenses, and, 14

²² For more details see K. Ambos, *Principles* at III.A.

²³ For more details see O. Triffterer, article 27.

²⁴ For more details see W.A. Schabas, article 29; for possible conflicts with national statutes of limitation cf. K. Ambos, *Principles* at III.A.

²⁵ Cf. the compilation of the Preparatory Committee in Annex, *supra* note 6, at pp. 19 et seq., and, with special regard to war crimes, A. Eser, "Defences" at 254 et seq., Ch. Nill-Theobald, "DEFENCES" at 55 et seq.

²⁶ Cf. A. Eser, "Defences" at 245 et seq.

on the other hand, by leaving the door open for one or the other of these defences in an individual case by means of article 31 para. 3 (see *infra* B.III).

B. Analysis and interpretation of elements

I. Paragraph 1

1. Chapeau

a) "Grounds for excluding criminal responsibility"

- 15 When using this language, the Statute is basically, although only half-way, following continental-European rather than common law traditions. In avoiding the common law term of "defences", open for comprising substantive as well as procedural bars to punishability and prosecution, the Statute is merely addressing substantive grounds for excluding criminal responsibility²⁷. When speaking of "excluding criminal responsibility" without further differentiation, however, the Statute leaves open the question as to whether a given ground is justifying the wrongful act or solely excusing the perpetrator, or even merely negating punishability for some other substantive reason²⁸. In abstaining from such further differentiation, the Statute remains behind jurisprudential development as was achieved particularly in the Germanic and, to some degree, in the Romanic jurisdictions as well²⁹. This, however, is not too great a deficiency as long as "criminal responsibility" is understood in a broad sense, and, thus, its exclusion cannot solely be supported by exculpatory factors, as insanity, paragraph 1 (a) may infer, but also by genuine justifications as in the case of necessary and proportionate self-defence, paragraph 1 (c).

b) "In addition to ... other grounds ... provided for in this Statute"

- 16 By referring to "additional grounds" for the exclusion of criminal responsibility, this article reveals its supplementary, if not even fundamental function as central place for the possible exclusion of criminal responsibility. Taking this route, the article could serve as the main instance of reference in such cases where general issues of these or other grounds for excluding criminal responsibility are in question. This might become relevant, for example, with regard to the time at which a defense must be present: for instance, as neither article 32, concerned with mistake of fact or law, nor article 33, concerned with superior orders, makes any reference to the relevant time, reference to the "person's conduct" in this paragraph could serve as guideline (see *infra* c).
- 17 Although paragraph 1 only refers to additional exclusionary grounds "provided for in this Statute", this may not be interpreted as a "closed shop" against other grounds for excluding criminal responsibility, for, as can be derived from paragraph 3, the Statute

²⁷ Incidentally, this narrower understanding of defences seems to be gaining fellowship also among common law scholars; see, e.g., A. Ashworth, *PRINCIPLES OF CRIMINAL LAW* at 201 (2nd ed. 1995).

²⁸ So also the commentary by L. Sadat Wexler, *MODEL DRAFT STATUTE* at 56; E. Wise, *Principles* (at 52), even speaks of a "miscellaneous lot of exculpatory [?] grounds".

²⁹ Cf. the contributions to A. Eser/W. Perron (eds.), *RECHTFERTIGUNG UND ENTSCHULDIGUNG III* (1991) and J. Watzek, *RECHTFERTIGUNG UND ENTSCHULDIGUNG IM ENGLISCHEN STRAFRECHT* at 3 (1997).

does not bar the invocation of other exclusionary grounds found in applicable international and national law according to article 21 (see *infra* III).

However, although the case of concurrent exclusionary grounds is not expressly addressed, there is no reason why it should not be possible for a defendant to invoke multiple grounds for excluding criminal responsibility if they are given, as in the case in which he or she was misguided by a mistake of fact or law, according to article 32, and additionally acting under duress, according to paragraph 1 (c).

c) "at the time of that person's conduct"

In stating the "person's conduct" as the decisive time at which a ground for excluding criminal responsibility must be given, the Statute takes a rather narrow view as excluding the time at which the statutory result of the conduct appears irrelevant. Consequently, for instance, with regard to intoxication, paragraph 1 (b), a person taking part in genocide who, at the time of giving orders or providing support, had already consumed alcohol, his mind yet not affected, could not claim exculpation by proving that, at the time at which the genocidal act was committed by the principals, he had lost his capacity to appreciate the unlawfulness of his conduct. Nevertheless, this so-called "act theory" is – as opposed to the so-called "ubiquity principle", according to which the place of the statutory result is equally relevant as the place of the conduct³⁰ – feasible in the same way that prohibition, permission and excuses are determinant for the conduct, whereas the occurrence of the statutory result may be accidental or at least no longer influenced by the conduct the respective person as such is responsible for.

2. The different subparagraphs

(a) Incapacity

Different from all other exclusionary grounds of article 31 which underwent various modifications in the course of the promulgation of the Statute, the wording of paragraph 1 (a) has remained unchanged since its elaboration by the Working Group on General Principles of Criminal Law and its adoption by the Preparatory Committee at its December 1997 session³¹. As to its contents, this ground for excluding criminal responsibility has two basic requirements: a defective mental state (α) in which the capacity to either appreciate the unlawfulness or to control the conduct is destroyed (β).

α) "mental disease or defect"

In comparison to corresponding regulations in various recent national penal codes³² this requirement is narrow in one respect and rather broad in the other. It is narrow insofar as it solely recognizes "mental" deficiencies, thus excluding psychic disturbances as long as they do not effect the cognitive or intellectual capacity of the person concerned; in this respect, the Statute certainly trails national laws which would also take psychic affections or deep emotional disturbances into consideration. Therefore, if defects of the

³⁰ Cf. A. Eser, in: A. Schönke/H. Schröder, *supra* note 20, § 8 margin No. 2 and § 9 margin No. 3.

³¹ Cf. article L, *supra* note 8, at p. 18.

³² Cf. in particular § 20 German Penal Code of 1975, article 35 Polish Penal Code of 1998, article 20 Spanish Penal Code of 1995.

latter sort are present in a given case, the defendant may have to resort to paragraph 3 of this article (*infra* III). On the other hand, the wording is rather open by not being limited to a specific mental "disease", but rather recognizing any "defect" that destroys the person's relevant capacity. As this entails the danger of opening this ground for excluding liability to almost any mentally affective influence, the requirement that the person "suffers" should be observed, thus implying that more than only a momentary mental disturbance is required.

β) "Destruction" of the person's "capacity to appreciate" or "to control"

Even in as far as the before mentioned defective state of mind would be interpreted in a broad way, it could find a corrective by means of the requirement that the mental defect must "destroy" and not only diminish the person's capacity. As again different from various national penal codes, the Statute itself does not contain a special rule for "diminished responsibility"³³, in a given case the Court would have to resort to paragraph 3 (*infra* III).

With regard to the defected "capacity", it suffices that either the (cognitive) "appreciation" of the unlawfulness or nature of the conduct or the (volitional) "control" of the conduct to conform to the requirements of the law is destroyed³⁴. If the mental deficiency goes so far as to completely exclude the person's ability or awareness of acting as such, criminal responsibility is not only excluded by lack of culpability according to paragraph 1 (a), but eventually even by lack of human conduct or lack of intent, article 32 para. 1.

(b) Intoxication

As to this world-wide highly controversial ground for excluding criminal responsibility³⁵, whose regulation differs greatly from nation to nation, the Statute follows a centerline by neither completely disregarding nor unconditionally recognizing lack of capacity by reason of intoxication as a defence. Although the main approach of the present provision can be found as early as in the Report of the Working Group as accepted by the Preparatory Committee in its December 1997 session³⁶, the Draft Statute of April 1998 still contained quite a few alternatives³⁷. Thus, it was not prior to the session of the

³³ As proposed by the Preparatory Committee in its compilation of 1996 in article L Proposal I para. 2, *supra* note 6, at p. 97, with possible reduction of the sentence.

³⁴ For more details of these two different sides of culpability *cf.*, with regard to the almost equivalent version of the German § 20 Penal Code, Th. Lenckner, in: A. Schönke/H. Schröder, *supra* note 20, § 20 margin Nos. 25 et seq. (at 318 et seq.).

³⁵ Beside this lack of a common approach to dealing with intoxication, as already addressed in the Preparatory Committee's first report of 1996 (see note to article M, *supra* note 6, at p. 98), and still in the Draft Statute of April 1998, *supra* note 10, at p. 69, note 24, it was even questioned in principle whether voluntary intoxication was at all a defence worth to be discussed in the context of crimes at stake here: see Report of the Working Group on General Principles of Criminal Law, Committee of the Whole, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 (1998), at p. 4, note 8; *cf.* also K. Ambos, *Principles* at III.B.

³⁶ See article L para. 1 (b) Decisions Taken by the Preparatory Committee, *supra* note 8, at p. 19.

³⁷ See article 31 para. 1 (b) Draft Statute of April 1998, *supra* note 10, at pp. 67 et seq.

Working Group of 29 June 1998³⁸ that the final version was accepted. The rather lengthy provision can be broken down into two positive elements by requiring a certain state of intoxication (α) by which the person's capacity of appreciation and control is destroyed (β), and a negative element by excluding exculpation if the person was mentally intoxicated (γ).

a) "State of intoxication"

Whereas the first drafts had required intoxication to be caused by alcohol or drug consumption³⁹, although then opening it to "other means"⁴⁰, the Statute finally rescinded the presupposition of a specific substance or cause by which the intoxication must have been produced. As, however, intoxication by its very meaning implies a sort of toxic impact, it would not suffice that the person acted in a state of excitement or acceleration, as may follow from endogenic causes or external circumstances, though in its effect comparable to drunkenness or drug consumption, rather the intoxication must at least be caused by consumption of an exogenic substance with the effect of an intoxication. 25

β) "Destruction" of the person's "capacity to appreciate" or "to control"

As in the case of incapacity by mental defect, it would not be sufficient that the intoxication merely diminishes the person's capacity of appreciation and control, but rather it must "destroy" the personal ability to realize and estimate that he is acting unlawfully or, if the person is still aware of the unlawfulness of the conduct, lacks the ability to control it according to the requirements of the law⁴¹. 26

γ) Unless "voluntarily intoxicated"

By excluding exculpation if the person concerned became voluntarily intoxicated, the Statute attempts to prevent a *mala fide* procured state of incapacity, as would be the case if penal law were to tolerate that a person puts himself into a state of non-responsibility by means of intoxication with the objective of committing a crime and later to invoke his lack of capacity as a ground for excluding responsibility. Instead of denying any voluntary intoxication an exculpation, however, the Statute follows the principle of *actio libera in causa* by presupposing that the person was aware of the risk and likelihood of getting involved in criminal conduct at the point of becoming intoxicated. Consequently, intoxication is only then excluded as a defence if (a) the person intentionally became drunk or otherwise intoxicated and (b) knowingly or recklessly took the risk that, due to the intoxication, he would commit or otherwise get involved in a crime. Thus, intoxication can be invoked as a defence if and as long as the person was involuntarily intoxicated or, although having voluntarily become drunk or stupefied by drugs, was not aware of the risk that he could engage in criminal conduct as a ramification of the intoxication. Yet, even if the person is aware of such likelihood, he is only barred 27

³⁸ Article 31 para. 1 (b) Report of the Working Group on General Principles of Criminal Law, Committee of the Whole, U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1 (1998).

³⁹ See article M in the Preparatory Committee's Compilation of 1996, *supra* note 6, at p. 98.

⁴⁰ Cf. article 25 (L) para. 1 (b) Zutphen Report, *supra* note 9, at p. 61.

⁴¹ For further details see margin Nos. 21 et seq.

from exculpation if the crime he is likely to become involved in would be "within the jurisdiction of the court". This means that even in a case in which a soldier is aware that, due to his drunkenness, he might commit a murder, he could hardly be barred from invoking intoxication as a defence as long as he was not aware of the genocidal or anti-humanitarian character of the murder in terms of article 6 or 7 of this Statute⁴².

(c) Self-defence, defence of another person and defence of property in war crimes

28 Although legitimate defence as a "classical" ground of justification had already been contained in the Preparatory Committee's compilation of 1996⁴³, its concept and phrasing remained highly controversial until the very last framing of this provision⁴⁴. Whereas the Draft Statute of April 1998 was sent to the delegates of the Rome Conference with quite a few undecided alternatives and a lengthy wording⁴⁵, the first sentence of the present provision seems to go back to a proposal by the USA of June 1998⁴⁶, not yet, however, including the defence of property in case of war crimes which in terms of "military necessity" was originally conceived as a separate ground for excluding criminal responsibility⁴⁷, but was finally integrated into the first sentence of this provision on proposal of the Working Group⁴⁸. The last sentence of the provision, dealing with defensive operations, was finally added in the very last minute by the Drafting Committee⁴⁹. Basically two requirements are essential for the exclusion of criminal responsibility according to this provision: a certain danger to a person or property by unlawful force (α) and an appropriate defence against it (β), whereby the latter requires more than mere involvement in a defensive operation (γ).

α "imminent and unlawful use of force" against (specific) legally protected interests

29 First of all, the exclusion of criminal responsibility in any of the various instances of this provision requires the imminent and unlawful use of force. As "force" can be ex-

⁴² As this reference and limitation to the "jurisdiction of the court" was added to the last sentence of article 31 para. 1 (b) rather late, namely (according to the available papers) by the Chairman's (of the Working Group on General Principles of Criminal Law) proposal for article 31 para. 1 (b) Option 3 (U.N. Doc. A/CONF.183/C.1/WGPP/L.8/Rev.1 (25 June 1998)), it is not quite clear whether this restriction of the responsibility by *actio libera in causa* was made on purpose or whether an interpretation different from that assumed here was intended.

⁴³ See article N in the Preparatory Committee's Compilation of 1996, *supra* note 6, at p. 99 with Annex, at pp. 15 et seq.

⁴⁴ Cf. Report of the Working Group of 29 June 1998 (U.N. Doc. A/CONF.183/C.1/WGPP/L.4/Add.1, at p. 5, note 13).

⁴⁵ See article 31 para. 1 (d) Draft Statute of April 1998, *supra* note 10, at p. 68, based on article L para. 1 (d) Zutphen Report, *supra* note 9, at p. 62.

⁴⁶ Article 31 para. 1 (b) Proposal by the United States of America for single provision covering issues currently governed by articles 31, 32, 33 and 34 (U.N. Doc. A/CONF.183/C.1/WGPP/L.2 (1998)); a similar proposal, although not yet containing defence of property, had been made by Japan (cf. Annex of the Preparatory Committee Report of 1996, *supra* note 6, at p. 16).

⁴⁷ See article R in the Preparatory Committee's Compilation of 1996, *supra* note 6, at p. 103, article 33 Draft Statute of April 1998, *supra* note 10, at p. 17.

⁴⁸ See article 31 para. 1 (c) Report of the Working Group, *supra* note 38, at pp. 4 et seq.

⁴⁹ In this sense, as already favoured by some delegations (see Report of the Working Group, *supra* note 38, at p. 5, note 12), article 30 para. 1 (c), sentence 2 Draft Report of the Drafting Committee to the Committee of the Whole (U.N. Doc. A/CONF.183/C.1/L.65/Rev.1 (1998), at p. 7). – To the genesis of this article of the Statute cf. also K. Ambos, *Principles* at III.C.

erted in various ways and to a varying degree and no further qualification is required by this provision, force can be understood in a broad way, not necessarily requiring a physical attack, however also including psychic threats, provided that their effects are not only announced for the future but exerting coercion presently⁵⁰. Thus, a limitation of this defence can be reached only in view of the necessary danger to a "person": Whereas this requirement certainly precludes mere danger to any "property"⁵¹, a person can be endangered with regard to life, physical integrity and liberty. The force must be "imminent" in terms of immediately antecedent, presently exercised or still enduring. The force is "unlawful" if not justified for its part by law or any other legally valid permission or order.

With regard to the special "case of war crimes", the opening of the clause to the protection of "property" goes back to defences by reason of "military necessity" under public international law⁵². Even in times of war, however, defence of property is not justified as such, but only in as far as it is essential for the "survival of the person concerned or another person" or for accomplishing "a military mission". As this phrase might be open, however, for broad interpretation, the limitation by sentence 2 of this provision must be taken into account all the more⁵³. 30

In any case, the use of force as well as the danger to person or property must be objectively given and may not only exist in the subjective belief of the defender. Although various proposals were prepared to admit self-defence even in the case that the person merely "reasonably believes" that there is a threat to the person concerned⁵⁴, this expansion of self-defence, as known particularly in common law countries, was not adopted in the end. Therefore, a person who is not actually attacked or endangered but merely believes this to be the case, may resort to mistake of fact according to article 32 for excluding criminal responsibility⁵⁵. 31

β) Reasonably reactions to defend "in a manner proportionate to the degree of danger"

As probably recognized world-wide, the concept of legitimate defence is not limited to self-defence but also comprises defence "of another person" who has been endangered by an unlawful attack. The defence must be "reasonable" in terms of being necessary as well as able to prevent the danger. This means that the defence might neither be excessive by causing more harm to the aggressor than is needed for diverting the attack or a danger nor inapt by implying inefficient or otherwise futile means. 32

Furthermore, even as far as the defence is reasonable in terms of necessary and suitable to divert the force and danger, it still must be performed in "proportionate" manner. 33

⁵⁰ This broad notion of "force" is also supported by the fact that stronger alternatives which, for instance, required threat of death or serious bodily harm (see article 31 para. 1 (d) Draft Statute of April 1998, *supra* note 10, at p. 68, were finally not accepted, nor was ever required force in form of "violence" which more easily would have been open for implying some physical impact.

⁵¹ As proposed by the US without any further qualification: see article 31 para 1 (b), *supra* note 46.

⁵² Cf. Preparatory Committee Report of 1996 to article R, *supra* note 6, at p. 103.

⁵³ See margin No. 33.

⁵⁴ After this concept had already been expressed in article 33-12 of the Updated Siracusa Draft, *supra* note 4, at p. 75, it was contained as an alternative in Proposal 1 of article N in the Preparatory Committee's Report of 1996, *supra* note 6, at p. 99, and still proposed as an alternative in article 31 para. 1 (d) Draft Statute of April 1998, *supra* note 10, at p. 68.

⁵⁵ To same end cf. the commentary by L. Sadat Wexler, MODEL DRAFT STATUTE at 57.

This means that even self-defence is not an unlimited right⁵⁶, but restricted by the principle of proportionality. As solely the "degree of danger" to the person or property protected is named as criterion for the proportionality of the defence, the estimation offers a wide range: Neither does a waging of different sorts of defended and thereby violated personal or property interests seem to be precluded, nor is deadly defence, as objected to by some proposals⁵⁷, categorically excluded. Nevertheless, defence by killing an assailant should be restricted to cases where either death or serious bodily harm is to be prevented.

γ) *Involvement in a "defensive operation conducted by forces"*

- 34 After the inclusion of the war crimes clause in the first sentence of this provision had opened a wide field for legitimate defence of property in connection with defensive operations⁵⁸, it became necessary to prevent this clause from being used as a readily available "panacea" in any sort of military confrontation. For this reason, as clarified by sentence 2 of subparagraph 1 (c), the justifying "individual self-defence" in question here cannot be simply be invoked by reference to a "defensive operation" the person concerned is involved in. As this reservation with regard to some sort of "collective defence", however, only concerns this subparagraph, criminal responsibility in connection with defensive operations may still be excluded by other provisions, such as under public international law⁵⁹.

(d) Duress

- 35 Among the many compromises which had to be made in order to get this Statute accepted, paragraph 1 (d) of this article is one of the least convincing provisions, as in an ill-guided and lastly failed attempt, it tried to combine two different concepts: (justifying) necessity and (merely excusing) duress⁶⁰. Whereas all Pre-Rome conference proposals and drafts had, more or less, clearly distinguished between necessity and duress⁶¹, it was only in the final stage of the conference that, for whatever unclear reasons,

⁵⁶ As it may appear in clauses, such as in the German Penal Code (§ 32), which do not expressly require proportionality of the defence.

⁵⁷ Cf. article 31 para. 1 (d) Draft Statute of April 1998, *supra* note 10, at p. 68 with note 95.

⁵⁸ See margin No. 29.

⁵⁹ Cf. in particular article 51 of the UN-Charter; cf. also U.N. Doc. A/CONF.183/C.1/WGPP/L.4/Add.3 (1998), at p. 2 (note 1) to "accomplishing a military mission" which declares that "the use of force by States is governed by the applicable international law".

⁶⁰ Cf. also K. Ambos, *Principles* at III.C.

⁶¹ Starting with these distinction in the Siracusa/Freiburg Draft of AIDP/ISISC/MPI, DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT – ALTERNATIVE TO ILC DRAFT, prepared by a Committee of Experts, Siracusa/Freiburg July 1995 (at IV.A.1/2 and 9 to article 34, at 39) and the Ad Hoc Committee Report, *supra* note 5, Annex II sub. 5 (b), at p. 59, and the various proposals in the Updated Siracusa Draft, *supra* note 4, article 33-13.1 and 2, in the Preparatory Committee's Compilation of 1996, *supra* note 6, articles O and P, at pp. 100 et seq.; cf. also the compilation of various proposals in the Annex of the Preparatory Committee of Mar./Apr. 1996, *supra* note 6, at pp. 16-18, resulting in the more or less equivalent proposals of the Decisions Taken by the Preparatory Committee of December 1997 (articles L.1 (d) and (e), *supra* note 8, at p. 19), the Zutphen Report (articles L.1 (d) and (e), *supra* note 9, at pp. 62 et seq.) and the Draft Statute of April 1998 (article 31 para. 1 (d) and (e), *supra* note 10, at p. 68).

they were mixed up in one provision⁶². In order to make this rather complex provision more transparent, at least four items must be distinguished: the type of conduct to be excluded from criminal responsibility (α), the elements of duress on the person concerned (β), the requirements for the (re)action to avoid the threat (γ), and the subjective intent (δ).

α) Conduct "alleged to constitute a crime within the jurisdiction of the Court"

Obviously – but perhaps also superfluously, as a matter of course – this clause aims at restricting the exclusion of criminal responsibility to criminal charges which are "within the jurisdiction of this Court"; this means that this defence is only available for crimes according to articles 5-8 of this Statute. 36

Why this clause speaks of "conduct alleged to constitute a crime", is difficult to understand. If it is to express no more than the fact that, by the exclusion of criminal responsibility, a crime has not been constituted but remains merely alleged, then the same consequence would be true with all other grounds by which criminal responsibility is excluded. Therefore, this phrase, if to be meaningful, would have to express more than that general matter of course; what this might be, however, cannot be clarified without access to the respective deliberations of the Working Group. 37

β) Duress resulting from a "threat of imminent death" or of "continuing or imminent serious bodily harm"

Firstly, the person concerned must see himself or another person exposed to a "threat" which can either be "made by other persons", as is the case if the person concerned is the victim of coercion⁶³, or "constituted by other circumstances beyond that person's control", as is the case of danger which does not result from another person's action, but from other sorts of endangerment by natural forces or technical menaces. 38

Secondly, it may be a threat of "imminent death" in terms of appearing to occur closely and seriously, or "continuing or imminent serious bodily harm" requiring more than easily healed superficial wounds.

Thirdly, the threat must result in "duress"; this means that the person concerned feels unable to withstand the threat and, thus, is driven to the relevant criminal conduct.

γ) Acts necessary and reasonable to avoid threat

Different from self-defence where reasonableness and proportionality are required (*supra* (c) γ), a "necessary" and "reasonable" act is asked for here. In the final end, however, it comes out to more or less the same: the act directed at avoiding the threat must be necessary in terms that no other means are available, reasonable in terms of being 39

⁶² Eventually starting with Working Paper of 22 June 1998 (U.N. Doc. A/CONF.183/C.1/WGGP/L.6), with some modifications in the Report of the Working Group of 29 June 1998 (U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1) and finalized by the Draft Report of the Drafting Committee to the Committee of the Whole, 14 July 1998 (U.N. Doc./A/CONF.183/C.1/L.65/Rev.1, article 30 para. 1 (d), at p. 7).

⁶³ As opposed to self-defence (paragraph 1 (c)), however, in this instance, the threat is not required to be unlawful; were this the case, then the person defending himself against an unlawful threat of death or bodily harm could even be justified according to paragraph 1 (c); see margin No. 28. With regard to the relationship and difference between duress and Superior Order cf. Ch.L. Blakesley, *Comparing* at 182 et seq., and A. Eser, *"Defences"* at 254 et seq.

able to reach the desired effect, as well as adequate in terms of not being unreasonably disproportionate.

d) *No intention "to cause a greater harm than the one sought to be avoided"*

-) This subjective conception of the "lesser evil"-principle is the crucial point of this defence: different from classical "necessity" on the one hand, which would require a balancing of conflicting interests and offer justification if the person objectively rescued the greater good at the cost of the minor, and different from classical "duress" on the other hand, providing an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat⁶⁴, this provision attempts to find a line in-between: in objective terms, it is not required that the person concerned in fact avoids the greater harm by his criminal conduct, but in subjective terms he must intend to do so. Thus, this defence requires less than justifying "necessity" would afford, and on the other side requires more than excusing "duress" would be satisfied with. Therefore, it is up to the Court to find an adequate solution for the individual case according to paragraph 2⁶⁵.

II. Paragraph 2: The implementation by the Court

- 1 In face of the fact that the proposals of the ILC did not yet propose grounds for excluding criminal responsibility at all and that also later on remained uncertain as to which and in which way grounds for excluding criminal responsibility should be regulated by this Statute⁶⁶, it is not surprising that a provision which would give the Court power to determine the admissibility of reasons excluding punishment in view of the individual character of a crime was, in principle, proposed as early as in the Updated Siracusa Draft of 1996⁶⁷. The first decision to this end was then taken by the Preparatory Committee in its session of December 1997 and drafted in a version which basically remained unchanged up to the present provision⁶⁸. As to the contents of this provision, the following points are worth remarking:

1. Determination of applicability to the case before the Court

- 12 In principle, the power given to the Court to "determine the applicability" of exclusionary grounds must mean more than simply to apply the law, as this function would

⁶⁴ Cf. A. Eser, *Justification* at 54 et seq., *id.*, "Defences" at 261 et seq.

⁶⁵ Cf. also the criticism by K. Ambos, *Principles* at III.C, with particular reference to the jurisdiction of the ICTY in the case *Prosecutor v. Erdemovic* (Case No. IT-96-22-A); less critical the commentary by L. Sadat Wexler, MODEL DRAFT STATUTE at 57.

⁶⁶ Cf. margin No. 3.

⁶⁷ Cf. article 33-11 para. 1 Updated Siracusa Draft, *supra* note 4, at p. 74, which was literally adopted both by the ILC (article 14, Report of the International Law Commission on the Work of its Forty-Eighth Session, U.N. Doc. A/51/10 (May/July 1996), at p. 73) and the Preparatory Committee's Report of 1996 in its article S Proposal 2, *supra* note 6, at p. 104.

⁶⁸ Cf. article L para. 2 Decisions Taken by the Preparatory Committee, *supra* note 8, at p. 22. Even the final wording ("provided for in the Statute"), as phrased at the end by the Drafting Committee (article 30 para. 2, U.N. Doc. A/CONF.183/C.1/L.65/Rev.1 (14 July 1998), at p. 8) – instead of grounds "listed in paragraph 1", respectively "permitted by this Statute" – was one of various alternatives suggested in the original Draft of the Preparatory Committee.

not need to be proclaimed expressly. Therefore, the Court appears to be empowered to adjust available grounds in such a way that they are applicable to the individual case. This power, however, is not unlimited, but determined by the "case before the court". This means that according to this provision the Court may not pronounce new general definitions, but has to restrict itself to a just solution of the case before it. If it sees need and reason to modify existing exclusionary grounds or to create new ones in a general way, it would have to proceed according to paragraph 3 (*infra* III). However, even in as far as the Court merely adapts an existing ground to the case before it, it is not completely free, as already taken into account by the drafters of this provision⁶⁹, but bound by the rules of article 21 regarding applicable law⁷⁰.

2. Grounds "provided for in this Statute"

Due to the referral to grounds "provided for in this Statute", the determining power of the Court is not limited to exclusionary grounds of paragraph 1, as it had been a proposed alternative to the present version⁷¹, but relevant for grounds for excluding criminal responsibility outside of article 31 (*supra* A.2) as well. Thus, the determining power of the Court goes far beyond the reach of this article. 43

III. Paragraph 3: Other sources for exclusionary grounds

For reasons similar to those in the end causal for paragraph 2⁷², it was quite clear from the start that the Statute could and should not provide an exhaustive list of defences; therefore a clause was needed according to which the Court should be empowered to avail itself of defences which might be derived from other recognized legal sources⁷³. After the Preparatory Committee had proposed a rule to this end in its session of December 1997⁷⁴ which was still upheld as a separate provision by the Draft Statute of April 1998⁷⁵, it was then, on proposal of the USA, integrated into article 31 as paragraph 3 and phrased as it stands now⁷⁶. The provision contains three rules: 44

1. Grounds for excluding criminal responsibility "other than those referred to in paragraph 1"

This power given to the Court at trial reaches further than that according to paragraph 2 (*supra* II) in that the Court shall not only adjust an existing exclusionary clause to the case before it, but may even employ grounds for excluding criminal responsibility 45

⁶⁹ See note 11 to article L para. 2 in the Decisions Taken by the Preparatory Committee, *supra* note 8, at p. 22.

⁷⁰ For more details see M. McAuliffe de Guzman, article 21.

⁷¹ Cf. *supra* note 68.

⁷² See margin No. 40.

⁷³ Here again, the Updated Siracusa Draft (article 33-11 para. 2, *supra* note 4, at p. 74) as well as the Preparatory Committee's Report of 1996 (article S Proposal 1, *supra* note 6, at pp. 104 et seq.) have made first suggestions on this respect. Cf. also H.-H. Jescheck, *Stand* at 447 et seq.

⁷⁴ Article O in the Decisions Taken by the Preparatory Committee, *supra* note 8, at p. 23.

⁷⁵ See article 34 Draft Statute of April 1998, *supra* note 10, at p. 71.

⁷⁶ See *supra* note 46. Later changes did not do more than introduce "consideration" instead of "assertion and application" in paragraph 3 sentence 2; cf. article 31 para. 3 in the Report of the Working Group of 29 June 1998 (U.N. Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, at p. 5).

"other than those referred to in paragraph 1" and, as must be added, other than those provided for in the Statute as well; for as paragraph 1 also covers the "additional" grounds (*supra* A.2) by its chapeau, the power of the Court to look for other grounds for excluding criminal responsibility is not limited to the subparagraphs (a) to (d) of paragraph 1, but even goes beyond this Statute.

2. Derivation "from applicable law as set forth in article 21"

- 6 This clause is both a guideline and a limitation for the Court. For this purpose, it was extensively elaborated in earlier drafts⁷⁷, but even in its new trimmed version does it reach the same end by simply referring to article 21. This is due to the fact that the rules for the application of law in and outside of this Statute, as prescribed by article 21, concern grounds for excluding criminal responsibility in the same way as any other law within the jurisdiction of this Court. Thus, even defences which have not been expressly regulated by this Statute (such as those listed *supra* at A.3), can be invoked by the person concerned and considered by the Court, in as far as they are reconcilable with the application rules of article 21.

3. "The procedures relating to the considerations ... shall be provided for in the Rules of Procedure and Evidence"

- 17 In addition to the substantive limitation of sentence 1 binding the Court to certain legal sources, sentence 2 of paragraph 3 provides a certain procedure by which a ground for excluding criminal responsibility not provided for in this Statute may be taken into consideration⁷⁸.

C. Outlook

- 18 After the ILC's Draft Statute for an Permanent International Criminal Court had not yet contained any grounds for excluding criminal responsibility⁷⁹, it was certainly fundamental progress that the Statute was prepared to expressly recognize certain grounds for excluding criminal responsibility and, in addition, left the door open for further grounds. This is not to say that defences to such abhorrent crimes as those dealt with by the Statute should be easily open for defences; as was already necessary to be said, however, even war criminals cannot be denied the right to be tried according to the rule of law⁸⁰. On the other hand, it is not to be ignored that this part of the Statute is not yet in the very best of shape, both from substance and format. This holds particularly true with regard to the lack of differentiation between various – justificatory, exculpatory or other extenuating – reasons for which criminal responsibility may be excluded. This is a field which needs more refinement, at least in order to make certain exclusionary grounds better understandable and more adequately applicable⁸¹.

⁷⁷ Such as in article 34 Draft Statute of April 1998, *supra* note 10, at p. 73.

⁷⁸ For details on how to proceed *cf.* the Rules of Procedure and Evidence.

⁷⁹ *Cf.* margin No. 3 at fn. 3.

⁸⁰ *Cf.* margin No. 10.

⁸¹ *Cf.* – with varyingly far-reaching goals and hopes – A. Eser, "Defences" at 263 et seq., 271 et seq., Ch. Nill-Theobald, "DEFENCES" at 387 et seq. and H.-H. Jescheck, *Stand* at 448 et seq., 451.