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PREPARATORY COMMITTEE ON
THE ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
25 March-12 April 1996

PROCEEDINGS OF THE PREPARATORY COMMITTEE DURING
THE PERIOD 25 MARCH-12 APRIL 1996

Draft summary

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D. Trigger mechanism

1. The trigger mechanism touches upon two main clusters of issues: acceptance of the court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction (arts. 21 and 22); and who can trigger the system and the role of the prosecutor (arts. 23 and 25).

1. Acceptance of the court's jurisdiction, State consent requirements and the conditions for the exercise of jurisdiction: articles 21 and 22

2. Some delegations felt that the treatment of jurisdiction in articles 21 and 22 of the statute was insufficient. In their view, the inherent jurisdiction of the court should not be limited to genocide, but should extend to all the core crimes. Acceptance of inherent jurisdiction for the core crimes would require significant revision of articles 21 and 22. From this perspective, the court would not need specific State consent to establish its jurisdiction. States, by virtue of becoming party to the statute, would be consenting to its jurisdiction. This meaning of inherent jurisdiction, some delegations felt, was fully compatible with respect for State sovereignty, since States would have expressed their consent at the time of ratification of the statute as opposed to having to express it in respect of every single crime listed in the statute at different stages. Hence, there would be no need for a selective "opt in" or "opt out" approach. In accord with this view, the opening clause of article 21 should be changed to state that the court should have jurisdiction over the

crimes listed in article 20. Article 22 would become superfluous and should be deleted. It was, however, noted that if the statute were to include crimes other than core crimes, the "opt in" regime could be maintained for them. In this regard, a remark was made that a distinction should be made between the jurisdiction of the court per se and the exercise of that jurisdiction or the terms and conditions for the exercise of jurisdiction; these issues all linked to the question of admissibility under article 35. In this context, a comment was made that article 21 dealt with the conditions of the exercise of jurisdiction by the court, by establishing the court's jurisdiction ratione personae.

3. Some delegations found inherent jurisdiction to be a contradiction in terms, for the jurisdiction of the court would arise exclusively out of the contractual stipulations in the instrument by which the court would be created. They also found inherent jurisdiction incompatible with complementarity. Other delegations saw it differently. For them, the concept of inherent jurisdiction meant that the court was invested with jurisdiction by virtue of its constituent instrument, with no need for additional consent to exercise its jurisdiction. Inherent jurisdiction also did not, in their view, imply that the court, in all circumstances, had a better claim than national courts to exercise jurisdiction. It was therefore possible that a case could arise in relation to a crime which was within the court's inherent jurisdiction but which would none the less be tried by a national jurisdiction, because it was determined that the exercise of national jurisdiction would be more appropriate in that particular case.

4. Some other delegations expressed reservations about the inherent jurisdiction of the court over any crime, including the core crimes. They believed that the regime of "opt in" provided for in article 22 was more likely to maximize universal participation. In their view, this approach was also consistent with the principle of sovereignty and the regimes set out by the treaties on the core crimes themselves. A comment was made that the "opt in" approach was compatible with the practice of adherence to the jurisdiction of the International Court of Justice. Similarly, in the current context, by becoming party to the statute of the court, States did not automatically accept the jurisdiction of the court in a particular case. This would be done by means of a declaration, in accordance with article 22 of the statute.

5. Some delegations saw merit in having genocide come under the inherent jurisdiction of the court. Reference was made to article VI of the Genocide Convention, which provides that persons accused of genocide should be tried by a competent tribunal or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

6. It was noted that the question of acceptance of the court's jurisdiction was inextricably linked to the question of pre-conditions for the exercise of that jurisdiction, or consent, as well as to the question of who might bring complaints. In this connection, a comment was made that the jurisdiction of the court, even under the core crimes approach, embraced different categories of crimes with different degrees of probable cause required for bringing charges. For example, the threshold for establishing genocide was rather high, compared to many war crimes which were not as high. However, not every single war crime

was of sufficient serious international concern to warrant its submission to the court.

7. Some delegations supported the requirement, set out in article 21 (1) (b), calling for the consent of the custodial State and the State where the crime was committed. In their view, such a consent requirement was essential, since the court could not function without the cooperation of these States. A comment was made that custody over a suspect, however, should be in accordance with international law; the maxim male captus, bene detentus should have no application to the jurisdiction of the court. It was further stated that, as a general rule, the number of States whose consent was required should be kept to the minimum. Otherwise, the likelihood of one of these States not being party to the statute would increase, precluding the court from initiating proceedings.

8. The remark was made that the word "custody" in article 21 (1) (b) (i) was misleading, for it appeared to include mere presence, even a transitory presence. This was inconsistent with current State practice, according to which an accused must be located in or extradited to the State in which he or she committed the crime. Furthermore, in current State practice, the potential for political abuse was controlled in a number of ways, including comity and diplomatic immunity. In contrast, the current draft, according to this view, left open significant possibilities for efforts by States to embroil the court in legal controversies and political disputes, which could undermine its effectiveness.

9. In addition, it was noted that the actual location of the accused was not important at the initial stage of the proceedings, but only at the stage of arrest. Hence, the role of the custodial State should be addressed in connection with the obligation to cooperate with the court, and not in connection with jurisdiction. Even in that context, it sufficed, according to this view, for the custodial State to be party to the statute; it was not necessary for it to have accepted a particular type of jurisdiction.

10. As regards the requirement of consent of the State where the crime was committed, a comment was made suggesting modifying the language of article 21 (1) (b) (ii) by means of the addition of the words "if applicable" in order to cover situations where the crime might have been committed outside the territory of any State, such as on the high seas.

11. It was also stated that in certain types of conflict, in order to determine the States whose consent were necessary for the proceedings of the court, one should look at the whole situation and not just the State where the crime was committed. The example given was war crimes, where at least two States would have interests in the case and the State where the war crime was committed could be the one that started the war in violation of international law. Going beyond the core crimes, to terrorism, for example, it was noted that there would be other States, such as the one which was the target of the crime, with a real interest in the proceedings, yet whose interests were not taken into account by the current draft. It was further stated that a large number of States were precluded by their domestic law from extraditing their nationals for criminal prosecution abroad. The State of nationality of the suspect would have to extradite only if it refused to commence prosecution, in good faith, within a

reasonable period of time. This approach, according to this view, was compatible with the principle of universal jurisdiction and should be taken into account in the statute.

12. It was also noted that the court could not exercise jurisdiction in relation to States not party to the statute. This, it was agreed, could become a particularly difficult issue, when the State not party, was the custodial State or its cooperation was indispensable to the prosecution. For this reason, some delegations were of the view that it would be proper for the Security Council to have a role respectful of the independence of the court in humanitarian situations.

2. Who can trigger the system and the role of the prosecutor: articles 23 and 25

(a) The Security Council: article 23

13. Delegates in their comments appeared to agree that the statute would not affect the role of the Security Council as prescribed in the Charter of the United Nations. The Council would, therefore, continue to exercise primary authority to determine and respond to threats to and breaches of the peace and to acts of aggression; the obligation of Member States to accept and carry out the decisions of the Council under Article 25 of the Charter would remain unchanged. In the light of the above, three general concerns were voiced: first, that it was important, in the design of the statute, to ensure that the international system of dispute resolution - and in particular the role of the Security Council- would not be undermined; secondly, that the statute should not confer any more authority on the Security Council than that already assigned to it by the Charter; and thirdly, that the relationship between the court and Council should not undermine the judicial independence and integrity of the court or the sovereign equality of States.

14. In the light of the above concerns, some delegations found article 23 either completely unacceptable or in need of substantial revision precisely because it conferred more authority on the Security Council than did the Charter or than was necessary in contemporary international relations; it also diminished the requisite judicial independence of the court. In their view, the Security Council was a political organ whose primary concern was the maintenance of peace and security, resolving disputes between States and having sufficient effective power to implement its decisions. The Council made its decisions, according to these delegations, taking into account political considerations. The court, in contrast, was a judicial body, concerned only with the criminal responsibility of individuals who committed serious crimes deeply offensive to any moral sense.

15. Some other delegations, however, favoured the proposed article 23 of the statute. In their view, the article was compatible with the role for the Security Council carved out in the Charter and properly took account of the current situation of international relations. They did not agree with the view that decisions of the Security Council were exclusively political in nature. They were convinced that, while it was a political organ, the Security Council

made decisions in accordance with the Charter of the United Nations and international law.

(i) Article 23 (1)

16. Some delegations asked for the deletion of article 23 (1), empowering the Security Council to refer a "matter" to the court. Others favoured its retention. For the former delegations, a referral by the Security Council would affect the independence of the court in the administration of justice. Delegations holding this view believed that a political body should not determine whether a judicial body should act. In addition, referral by the Security Council would dispense with the requirements of article 21 as well as complementarity and the sovereign equality of States. It was further noted that article 23 (1) assigned the right of referral of a matter to the court only to the Security Council. Taking into account current efforts to define the new world order, in which the relationship between the Security Council and the General Assembly had come under scrutiny, these delegations wondered if such right should also be conferred upon the General Assembly.

17. Those delegations favouring the retention of article 23 (1) based their views on the following: the Security Council had already demonstrated a capacity to address the core humanitarian law crimes through the creation of two ad hoc tribunals for the former Yugoslavia and for Rwanda and had created the International Commission of Inquiry for Burundi to report on violations of international humanitarian law; one of the purposes of the court was to obviate the creation of ad hoc tribunals. In this context, the Council's referral should activate a mandatory jurisdiction, similar to the powers of the ad hoc tribunals. The Council's referral would not, according to these delegations, impair the independence of the court, because the Prosecutor would be free to decide whether there was sufficient evidence to indict a particular individual for a crime.

18. It was also noted that article 23 (1) limited the Security Council's referral authority to Chapter VII situations. Some delegations proposed that the Council's referral authority should be extended to matters under Chapter VI as well. They mentioned Articles 33 and 36 of the Charter, which encourage Council action of a peaceful character with respect to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security. One of the "appropriate procedures" described, it was noted, was "judicial settlement". Those pressing this point suggested deleting "Chapter VII of" from article 23 (1) so that Chapter VI actions would also be covered. Some other delegations did not favour the extension of the Council's right of referral to Chapter VI, while some other delegations reserved their position on this issue.

19. As regards the use of the word "matter" in article 23 (1), a suggestion was made to replace it with "case" and to provide that any referral should be accompanied by such supporting documentation as was available to the Security Council. This modification of article 23, according to this suggestion, would impose on the Council the same burdens and responsibilities imposed on a complainant State. Many delegations, while not disagreeing with the latter, did

not agree with the proposal to change the word "matter" to "case". The word "situation" was also considered too broad by some delegations.

(ii) Article 23 (2)

20. With respect to the requirement of article 23 (2) that the Security Council should have determined that an act of aggression had already been committed before the court could process complaints on individual responsibility for an act of aggression, two different views were expressed. According to one view, the paragraph should be retained if aggression was going to be included in the list of crimes in the statute. According to another view, paragraph 2 should be deleted even if aggression was included in the list of crimes in the statute. Some delegations reserved their position pending a final decision on the inclusion of aggression in the list of crimes.

21. A number of delegations recalled their opposition to the inclusion of the crime of aggression in the list of crimes in the statute (for their views, see paras ... above) and observed that if aggression were excluded from the list of crimes, there would be no need to maintain article 23 (2). But article 23 (2) would be indispensable if aggression were included in the list. They referred to Article 39 of the Charter, according to which the Security Council has the exclusive power to determine whether an act of aggression has been committed. In their view, it was difficult to see how an individual could be charged with an act of aggression - assuming a definition for individual culpability were agreed upon - without the threshold requirement of an act of aggression first being determined by the Security Council.

22. Delegations that favoured the deletion of article 23 (2), while supporting the retention of aggression as a crime under the statute, based their view on the following grounds. First, in practice, the Security Council often responded to situations under Chapter VII of the Charter without explicitly determining the existence of an act of aggression; requiring such a determination for the exercise of jurisdiction by the court could impede the effective functioning of the court. Secondly, because of the veto power, the Council might be unable to characterize an act as aggression. Thirdly, the Council's determination of an act of aggression was based on political considerations, while the court would have to establish criminal culpability on legal grounds. In this connection and to protect the prerogatives of the Council, it was suggested that a provision should be included to the effect that the statute was without prejudice to the functions of the Security Council under Chapter VII.

(iii) Article 23 (3)

23. As regards article 23 (3), providing that no prosecution may be commenced arising from a situation being dealt with by the Security Council in accordance with Chapter VII unless the Council otherwise decides, a number of different views were expressed.

24. According to one view, the necessity for the retention of the paragraph arose from the fact that the Security Council had the primary responsibility for the maintenance of international peace and security. Delegations expressing this view thought it would be incongruous if the court were empowered to act in

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defiance of the Charter of the United Nations and to interfere in delicate matters under consideration by the Security Council. According to this view, paragraph 3 should be revised to include, not only Chapter VII situations, but all situations which were being dealt with by the Council.

25. According to another view, because paragraph 3 was designed to function as the political equivalent of the sub judice rule, its ambit was so wide as to infringe on the judicial independence of the court. Reference was made to the large number of situations currently under consideration by the Security Council. The court would be precluded from examining any complaint in respect of them. It was further noted that the Statute of the International Court of Justice did not prevent the Court from hearing cases relating to international peace and security which were being dealt with concurrently by the Security Council. According to this view, paragraph 3 should therefore be deleted.

26. Yet another view, while concerned about the implication of paragraph 3 for the judicial independence of the court, found some ground for a safeguard clause, but not as currently formulated. According to this view, the words "being dealt with" should be narrowly defined to limit their scope. A narrow interpretation of these words was found compatible with the intention of the Commission as explained in its commentary to the paragraph which interpreted it to mean "a situation in respect of which Chapter VII action is actually being taken" by the Security Council. Even this interpretation, according to this view, left many questions unresolved; for example, the words "threat to or breach of the peace" were open to broad interpretation and could conceivably cover all cases likely to fall within the court's jurisdiction. Considering that national courts could prosecute a case relating to a situation under consideration by the Security Council, the reasonableness of denying the court the same power as national courts was questioned. It was proposed to include a provision stating that "should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation". The purpose of this proposal was to allow the court to take action in situations where the Security Council, though seized of a matter, would not or could not act upon it. A suggestion was also made to change the emphasis in the paragraph, by allowing the court to proceed with a complaint unless the Security Council asked the court not to proceed.

27. Concern was voiced about the possibility of conflict between decisions by the court and the Security Council on the same issue. There was a feeling that those concerns were not adequately dealt with in the current wording of article 23.

(b) States: Article 25

28. It was observed that the complaint mechanism set out in article 25 was premised on the right of any State party, under certain conditions, to lodge a complaint with the Prosecutor alleging that a crime "appears to have been committed". Some delegations found this arrangement satisfactory. Others, for different reasons, felt it needed substantial modification.

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29. Some delegations were uneasy with a regime that allowed any State party to select individual suspects and lodge complaints with the Prosecutor with respect to them, for, this could encourage politicization of the complaint procedure. Instead, according to these delegations, States parties should be empowered to refer "situations" to the Prosecutor in a manner similar to the way provided for the Security Council in article 23 (1). Once a situation was referred to the Prosecutor, it was noted, he or she could initiate a case against an individual. It was suggested, however, that in certain circumstances a referral of a situation to the Prosecutor might point to particular individuals as likely targets for investigation.

30. Some delegations felt that only those States parties to the statute with an interest in the case should be able to lodge a complaint. Interested States were identified as the custodial State, the State where the crime was committed, the State of nationality of the suspect, the State whose nationals were victims and the State which was the target of the crime. Some other delegations opined that the crimes under the statute were, by their nature, of concern to the international community as a whole. They also noted that the jurisdiction of the court would only be engaged if some Government failed to fulfil its obligations to prosecute an international crime; then, in their view, all States parties would become interested parties. Some delegations felt that articles 34, 35 and 36 of the statute provided adequate safeguards against abuse. In addition to preventing political abuse of the process, they suggested that the Prosecutor notify all other States parties to the statute, allowing them the opportunity to express their views on whether to proceed with the case before the court decided.

31. Some other delegations were of the view that the States which could lodge a complaint not only should be party to the statute, but should also have accepted the court's jurisdiction in respect of the specific crime for which the State had made a complaint. In this respect, it was noted that for the crime of genocide a complaint could be made to the court by a State party to the Genocide Convention but not party to the statute. In other words, the acceptance requirements of articles 21 (1) and 25 (2) would be circumvented.

(c) Prosecutor

32. Some delegations found the role of the Prosecutor, under article 25, too restricted. In their view, States or the Security Council, for a variety of political reasons, would be unlikely to lodge a complaint. The Prosecutor should therefore be empowered to initiate investigations ex officio or on the basis of information obtained from any source. It was noted that the Prosecutors of the two existing ad hoc tribunals were granted such rights; there was no reason to deny the same power to the Prosecutor of this court. Hence the suggestion to add a new paragraph to article 25 along the line of article 18 (1) of the Statute of the Tribunal for the former Yugoslavia and article 17 (1) of the Statute of the Tribunal for Rwanda. Under this system, therefore, individuals would also be able to lodge complaints.

33. In order to prevent any abuse of the process by any of the triggering parties, a procedure was proposed requiring that in case a complaint was lodged by a State or an individual or initiated by the Prosecutor, the Prosecutor would

first have to satisfy himself or herself that a prima facia case against an individual obtained and the requirements of admissibility had been satisfied. The Prosecutor would then have to present the matter to a chamber of the court (which would not ultimately try the case) and inform all interested States so that they would have the opportunity to participate in the proceedings. The chamber, upon a hearing, would decide whether the matter should be pursued by the Prosecutor or the case should be dropped. Up to this point, the procedure would be in and confidential, thus preventing any publicity about the case and protecting the interest of the States.

34. Some other delegations could not agree with the notion of an independent power for the Prosecutor to institute a proceedings before the court. In their view, such an independent power would lead to politicization of the court and allegations that the Prosecutor had acted for political motives. This would undermine the credibility of the court. This power could also lead to overwhelming the limited resources of the Prosecutor with frivolous complaints.

(d) Other comments

35. Two other comments were made in respect of article 25. First, preconditions to the exercise of jurisdiction should be looked at and satisfied at the very beginning and before the stage of investigation, lest the court invest substantial resources only to discover that it could not exercise jurisdiction. Secondly, some delegations felt that article 25 on complaint was too complicated and would make the exercise of the jurisdiction of the court unpredictable.
