

23 March 1998

Original: English

Preparatory Committee on the Establishment of an International Criminal Court

16 March-3 April 1998

The jurisdiction of the International Criminal Court

An informal discussion paper submitted by Germany

Germany would like to share with other delegations this informal discussion paper which outlines in somewhat more detail the German position on the conditions under which the International Criminal Court should be able to exercise its jurisdiction.

Germany would be grateful if delegations could reflect upon the ideas and arguments contained in this informal paper and take them into consideration when we come back to a further discussion on the subject of the jurisdiction of the Court.

1. Content of the German proposal

Germany continues to favour the following approach for article 9 [22]:

“Acceptance of the jurisdiction of the Court

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 [20 (a) to (d)].
2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.”¹

In accordance with this approach, article 7 [21 *bis*: “Preconditions to the exercise of jurisdiction”] of the Zutphen draft, which provides that certain States must have accepted

¹ See footnote 273 on page 142 of the Zutphen draft (A/AC.249/1998/L.13), which reads as follows: “It was suggested that the issue of non-States Parties should be addressed in a separate article 77 [51] *bis*.” This could be done either by substituting a new paragraph 2 for paragraphs 2 and 3 of Option 1 of Article 9, as suggested above, or by adding a paragraph 2 to Article 77 in Part 9 “International Cooperation and Judicial Assistance”.



the jurisdiction of the International Criminal Court before the Court can exercise its jurisdiction, should be deleted.

2. **What is the reasoning underlying the proposal?**

(a) Under current international law, **all States may exercise universal criminal jurisdiction** concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed.² This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice.

With regard to the crime of genocide, States have frequently exercised universal jurisdiction e.g. by enacting statutes in that regard. Furthermore, both prosecutions and extraditions have taken place solely based on the principle of universal jurisdiction. This result is not contradicted by article VI of the Genocide Convention, which not only provides that the territorial State is under an obligation to prosecute acts of genocide, but also does not preclude the exercise of criminal jurisdiction by other States. Besides, article VI also foresees the creation of an International Criminal Court for the prosecution of acts of genocide.

As far as **crimes against humanity** are concerned, the Nuremberg Tribunal already based its jurisdiction, *inter alia*, on the fact that each of the Allied Powers could have exercised jurisdiction for those crimes even without an existing territorial or personal link. Besides, a large number of States have since enacted statutes that provide for universal jurisdiction for those crimes.

Furthermore, all those basic human rights which are violated in the context of crimes against humanity possess a character *erga omnes*. That means that even third-party States not directly concerned with such crimes have a legal interest in bringing the offenders to justice.

Finally, certain Conventions have confirmed the exercise of universal jurisdiction for specific sub-categories of crimes against humanity, such as, e.g. article 4 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

As to **war crimes**, the four Geneva Conventions of 1949 provide that all Contracting Parties are under the obligation to prosecute persons who have committed grave breaches, regardless of their nationality. The same is true for those States which are Parties to Additional Protocol I as to those other grave breaches contained in the Protocol. Furthermore, States have exercised jurisdiction for other serious violations of the laws and customs of war even if they did not fall within the scope of application of the provisions on grave breaches of the four Geneva Conventions of 1949. This includes violations of the rules of warfare which are applicable in armed conflicts that are not of an international character.

(b) Given this background, there is no reason why the ICC – established on the basis of a Treaty concluded by the largest possible number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and

² As to the crime of aggression, any consideration would depend on the final drafting of article 10 [23] relating to the role of the Security Council. Therefore, this issue is not addressed in this paper.

war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes. This means that, like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted the jurisdiction of the Court.

(c) On the other hand, third States not Parties to the Statute are not obliged to cooperate with the ICC. Therefore, Germany proposes that non-State Parties may accept the obligation to cooperate with the ICC on an ad hoc basis. The relevant rule concerning such acceptance could be placed either in Part 2, "Jurisdiction, Admissibility and Applicable Law", or in Part 9, "International Cooperation and Judicial Assistance", of the draft Statute.
