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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

Rapporteur: Mr. Jun YOSHIDA (Japan)

C. Complementarity

1.

1. It was observed that complementarity, as referred to in the third paragraph of the preamble of the draft statute, was to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of States. Different views were expressed on how, where, to what extent and with what emphasis complementarity should be reflected in the statute.

2. Some delegations felt that complementarity should more explicitly reflect the intention of the Commission, in respect of the role of an international criminal court, in order to provide clear guidance for interpretation. That intention was for such a court to operate in cases where there was no prospect of persons, who had been accused of the crimes listed in the statute, being duly tried in national courts; but such a court was not intended to exclude the existing jurisdiction of national courts or to affect the right of States to seek extradition and other forms of international judicial assistance under existing arrangements. The Commission's intention, it was further noted, applied not only to national decisions as to whether or not to prosecute, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such other State to cooperate accordingly, particularly where that State was under an international obligation

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to do so. In this regard, therefore, complementarity becomes a constant in the arrangements for the court and needs to be taken into account at each point at which the respective roles of the court and national authorities can or do coincide. From this perspective, it is not a question of the court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the court could obtain jurisdiction quickly over a case because no good faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the court's jurisdiction should not come into operation.

3. It was also observed that the limited resources of the court should not be exhausted by taking up prosecution of cases which could easily and effectively be dealt with by national courts. In addition, taking into account that under international law, exercise of police power and penal law is a prerogative of States, the jurisdiction of the court should be viewed only as an exception to such State prerogative.

4. Many delegations expressed the view that the establishment of the court did not, by any means, diminish the responsibility of States to vigorously investigate and prosecute criminal cases. Therefore, they wanted the preamble of the statute to reiterate the obligation of States in this respect. Caution, however, was voiced against placing such a paragraph in the preamble because, it was felt, it might tilt the bias in favour of national jurisdiction in interpreting complementarity. According to this view, the establishment of such a court was itself a manifestation of States exercising their obligations to prosecute vigorously perpetrators of serious crimes.

5. Some other delegations expressed concern that without specifying clear exceptions to the concept, complementarity would render the court meaningless by undermining its authority. In their view, a suggestion that in each and every case the prosecutor had to prove that circumstances required the court's intervention would reduce it to a mere residual institution, short of necessary status and independence. In this context it was noted that while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the crimes listed in the statute, the court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law. While attempts should be made to minimize the risk of the court dealing with a matter that could eventually be dealt with adequately on the national level, it was, according to this view, still preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities. In addition, a concern was raised that complementarity should not be used to uphold the sanctity of national courts. Such an approach would shift the emphasis from what the court can do to what the court should not do. For that reason, some delegations opposed a suggestion to devote article 1 of the statute to the definition of complementarity. Some other delegations supported the suggestion.

6. The remark was also made that complementarity was closer to the concept of concurrent jurisdiction. The jurisdiction of the court, it was stated, should

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be looked at in different contexts. While, for certain crimes, the court would have inherent jurisdiction, the primary jurisdiction of national courts would be more appropriate for other crimes. The remark was further made that in respect of core crimes, there would always be a "perception" problem: it would be difficult to believe that national courts could be fair and impartial. For other types of crimes, such as terrorism, drug trafficking, etc., this would not be a problem. In addition, it was noted that, in cases of inherent jurisdiction, complementarity should not be construed so as to make the court's jurisdiction dependent on factors beyond the court's control. However, it was noted, even in respect of core crimes, the important role of national courts should not be undermined. Reference was made to the recent practice with respect to the establishment of ad hoc tribunals whereby the tribunals exercise inherent and primary jurisdiction over certain individual cases, with some deference to national justice systems as they currently exist.

2. Third preambular paragraph

7. Many delegations agreed that while the preambular reference to complementarity should remain, a more explicit definition of the concept, enumerating its constituent elements, should also be embodied in an article of the statute. In this context it was noted that the words "unavailable" or "ineffective" should be further defined. Suggestions were also made to replace the words "trial procedures" with "systems" for further clarity. It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. Such a determination would place the court in the position of passing judgement on the penal system of a State. That might be embarrassing to that State to the extent that it might impede its eventual cooperation with the court.

8. As regards who is to decide on whether the court should exercise jurisdiction, three views emerged. According to one view, taking into account that the exercise of penal jurisdiction was the prerogative of States, the court's jurisdiction was an exception to be exercised only by State consent. An optional clause regime, according to this view, was consistent with this approach. According to another view, the court itself should make the final determination of jurisdiction, but in accordance with precise criteria set out in the statute. According to yet a third view, while agreeing that the court should decide on its own jurisdiction in accordance with the statute, the statute should leave some discretion to the court.

9. It was recommended that the consequences of a State's refusal to consent to the court's jurisdiction, if required by the statute, should also be examined. The question would be whether, in such cases, the State would entail such responsibility as existed in the classical international law of State responsibility, or whether different consequences would ensue which should be specified in the statute itself.

3. Article 35

10. It was noted that the principle of complementarity involved besides the third preambular paragraph, a number of articles of the statute, central among

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which was article 35 on admissibility. Several delegations felt that the three grounds indicated in that article, on the basis of which the court may decide that a case before it is inadmissible seemed too narrow. Paragraph (a) refers, for example, only to decisions of a State not to proceed to a prosecution, ignoring other national decisions to discontinue the proceedings, acquit, convict of a lesser offence, sentence or pardon or even requests for mutual assistance or extradition. Moreover, it was observed that other grounds of inadmissibility contained in other articles of the statute (for example articles 42 and 55) could be included in article 35 which would then constitute the main article on complementarity in the operative part of the statute. The view was expressed that the article should be expanded to include cases which are being or have been prosecuted before national jurisdictions, subject to qualifications in respect of impartiality, diligent prosecution etc. It was further noted that the court should abstain from exercising jurisdiction unless no domestic court was properly fulfilling this responsibility.

11. It was observed that paragraph (b) of article 35 indicated a crime under investigation as a ground for inadmissibility without taking into account the circumstances under which a crime was investigated and the possibilities of ineffective or unavailable procedures or even sham trials. A view was expressed to allow for parallel investigations to be conducted by national authorities and the court, under certain circumstances, as for example, when an interested State did not object for the court to investigate other aspects of the same conflict. It was generally agreed that "parallel" procedures between national courts and the court should be avoided to the extent possible. The necessity of additional procedural checks and review was also stressed particularly in cases where the procedure of article 36 was applicable.

12. Other delegations recalled again the difficulties in assessing when procedures were ineffective and pointed out the essentially subjective character of the proposed criteria. It was felt that more stringent and objective criteria, possibly included in the text of the statute itself, would be needed for the purposes of greater clarity and security. Efficiency of national proceedings (as juxtaposed to the intention to "shield" the accused) was one such criterion: several delegations noted that notions such as "absence of good faith" and "unconscionable delay" in the conduct of the proceeding on the part of national authorities would be useful tools on the clarification of this issue. However, other delegations felt that these terms were also vague and might be confusing.

13. On the subject of who may raise the issue of inadmissibility, the question was raised as to whether the accused should be permitted to file an application or this right should rest only with "interested States". It was, however, noted that the notion "interested States" should be further defined. In this context several suggestions were made, notably mentioning the State of which the accused is a national, the State(s) of which the victim or victims are nationals, the State which has custody of the accused, the State on the territory of which the alleged crime was committed (State of locus delicti) or any other State which could exercise jurisdiction in respect of the crime. It was also pointed out that in such a case, article 36 would have to be modified to include any "interested State" in this sense. Other delegations noted that any State could have the right to file such a request. A view was also expressed that the

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accused could bring a challenge only after indictment and only on specific grounds, such as a decision not to prosecute, discontinuation of prosecution, acquittal, pardon, conviction.

14. As for the time of raising the issue of admissibility, it was generally agreed that it should be prior to, or at the beginning of the trial and not later. It was also generally agreed that the court should be able to declare, at any time and of its own motion, a case inadmissible. In this respect, it was also noted that the court should retain the right to recommence proceedings after a fundamental change of circumstances, or to review its own decision on the admissibility of a case.

15. Concerning the non-gravity of the crime as a ground for inadmissibility, it was pointed out that, the inclusion of more detailed definition of crimes in article 20, would suffice to indicate that the crime did not pertain to the jurisdiction of the court as defined in the same article 20.

4. Article 42

16. As regards article 42, the remark was made that, the principle of non bis in idem was closely linked with the issue of complementarity. This paragraph it was noted should apply only to res judicata and not to proceedings discontinued for technical reasons. In addition, non bis in idem should not be construed in such a way as to permit criminals to escape any procedure.

17. Some delegations felt that the term "ordinary crime" in paragraph 2 (a) of article 42 of the draft needed further clarification. Some others thought that the term was sufficiently clear and should be retained. Yet some other delegations considered that it could be left out altogether since it might create a certain confusion. In this connection, it was mentioned that the principle non bis in idem could apply when a person has already been tried for only a part of a crime. The view was also expressed that it was the nature of the crimes that was significant and this should be taken into consideration for the distinction between "ordinary crimes" and "other crimes" falling under the jurisdiction of the court. It was suggested that a formulation to the effect that the national proceedings did not take account of the international character and the grave nature of the act might be useful.

18. Concerning the other pre-condition for the court to try a person already tried in another court, indicated in paragraph 2 (b) of article 42, many delegations voiced their concern on the vagueness and the subjectivity of the criteria. It was pointed out that several core crimes could not effectively be tried in national courts because of their very nature and the circumstances of their commission. Several delegations felt that this wording would grant the court an excessive right of control over national jurisdictions and would even undermine the principle of complementarity. According to this view, the court should not be considered as an appellate court. However, several other delegations considered the article as drafted by the Commission sufficiently clear and comprehensive.

19. A view was also expressed that article 42 should include cases where the sentence imposed by the national jurisdiction was manifestly inadequate for the

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offence as an exception to non bis in idem. It was, however, noted that a possible solution would be to provide for the court to try a person already tried in another court, only if the proceedings in the other court manifestly intended to shield the accused from his/her international criminal responsibility.

20. The view was also expressed that the "exception" to the principle non bis in idem as set out in article 42 (b) should extend beyond the trial proceedings, to embrace parole, pardon, amnesty, etc. Others pointed out that the conditions and modalities laid down in article 35 should also apply to article 42. It was further noted that both articles 35 and 42 could be consolidated in order to constitute a unique central article on complementarity in the operative part of the statute. The view was also expressed on the possibility of a preliminary hearing on the question of admissibility between any interested State and the court.

5. Article 27

21. It was noted that the decision of the prosecutor not to prosecute should be subject to subsequent revision if, for example, new evidence appeared or a new complaint lodged by a State. The view was also expressed that the prosecutor should examine ex officio, on receiving a complaint, the question of inadmissibility of the case.

22. Moreover, in a case where the prosecutor defers investigation since a State is proceeding with a national investigation, a mechanism of mutual information between the prosecutor, the investigating and the complainant States should be established. This mechanism would allow for the complainant State to lodge further complaints with the court, should the third State's investigation be inadequate. In the same context, other delegations expressed their concern on the powers of the prosecutor to conduct investigations under article 26 and the possibility that they be in conflict with domestic judicial procedures. 1/ According to a number of delegations, however, the provisions of articles 26 and 27 reflected adequately the issue of complementarity and avoided the risk of "double jeopardy".

6. Article 51

23. As concerns article 51 which imposes an obligation on States to cooperate with the court in connection with its investigations and proceedings, it was observed that this obligation should be confined to cases which are not inadmissible. Other delegations felt that the obligation should not be limited but embrace all aspects of cooperation even for the determination of grounds of inadmissibility.

7. Article 53

24. A view was expressed that paragraph 4 of article 53 of the statute which gives priority to court requests among possibly completing extradition obligations, should be deleted in the context of a strict application of the complementarity. Another view pointed out however, that the provision was

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satisfactory and did not really affect complementarity in so far as the case had not been declared inadmissible.

25. A number of proposals were made in respect of articles dealing with complementarity. Those proposals are to be found in annex ...

Notes

1/ For more discussion on the role of the prosecutor, see paragraphs ... (on the trigger mechanism).

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