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Report of the Working Group on the Draft Statute
for an International Criminal Court

Addendum

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PART 3: INVESTIGATION AND COMMENCEMENT OF PROSECUTION

Article 28

Complaint

Any State Party to the Statute with jurisdiction over a particular offence under the terms of an international convention and which has accepted the jurisdiction of the Court pursuant to Article 23 of the Statute with respect to the offence or other State with such jurisdiction and which has accepted the jurisdiction of the Court pursuant to article 23 (4): or the Security Council pursuant to article 25; may by submission to the Registrar bring to the attention of the Court in the form of a complaint, with such supporting documentation as it deems necessary, that a crime, within the jurisdiction of the Court, appears to have been committed.

Commentary

(1) The International Criminal Tribunal is envisaged as a facility that would be available to States Parties to its Statute, other States and the Security Council. The complaint is the mechanism that would invoke this facility and initiate the preliminary phase of the criminal procedure. Such a complaint may be filed by any State which has jurisdiction over the crime and has accepted the jurisdiction of the Court with respect to that crime. To meet the first requirement, the State must have jurisdiction over the crime under a treaty listed in Article 22 to which it is a party, under customary law, or under its national law. To meet the second requirement, the State must also have accepted the jurisdiction of the Court with respect to the crime by a general or specific declaration as a State Party to the Statute under paragraphs 1, 2 or 3 of Article 23 or as a State not a party thereto under paragraph 4 of the same article.

(2) The Working Group considered limiting resort to the Tribunal to States Parties to the Statute to encourage States to accept the rights and obligations provided for therein and to share in the financial burden relating to the operating costs of the Tribunal, a matter which has yet to be worked out. In some respects, this approach seemed appropriate for a tribunal established by means of a treaty. However, the Working Group felt that the interests of the international community in providing a universal mechanism for prosecuting, punishing and deterring international crimes wherever they occur weighed in favour of making this particular treaty institution available to all States in accordance with the provisions of this article.

(3) In the light of the primary responsibility of the Security Council for the maintenance of international peace and security under the United Nations Charter, the Council would also be entitled to invoke the Tribunal and initiate criminal proceedings with respect to international crimes under conventional or customary law, in accordance with the functions and powers conferred on the Council by the Charter. While recognizing the circumstances which led the Security Council to establish an ad hoc tribunal to prosecute persons for crimes committed in the former Yugoslavia, the Working Group believed that it would be preferable for the Security Council to be able to refer such matters to an existing institution.

(4) One member suggested that the Prosecutor should be authorized to initiate an investigation in the absence of a complaint if it appears that a crime apparently within the jurisdiction of the Court may otherwise not be duly investigated. However, other members felt that the investigation and prosecution of the crimes covered by the Statute should not be undertaken in the absence of the backing of a State, at least not at the present stage of development of the international legal system.

(5) The complaint, which is to be submitted to the Registrar, is intended to bring to the attention of the Tribunal the apparent commission of a crime within its jurisdiction. The complaint must be accompanied by supporting documentation for the following reasons. First, the Tribunal is envisaged as a mechanism that should be available whenever necessary, but which should not be activated unless there is reason to do so. Given the personnel required and the costs involved in a criminal prosecution, the institution should not be invoked on the basis of frivolous, groundless or politically motivated complaints. Second, the Prosecutor must have the necessary information to begin an investigation. This is not to suggest that the complaint should establish a prima facie case, but rather that it should include sufficient information and supporting documentation to demonstrate that a crime has apparently been committed and to provide a starting point for the investigation.

(6) During the investigation and pretrial phase, the Bureau of the Court would perform various judicial functions, in addition to its administrative functions, that it might otherwise assign to a Chamber of the Court depending on the number of cases referred to the Tribunal. The Tribunal was envisaged as a permanent institution which would only function when called upon to do so in a particular case. Depending on the caseload, it may be necessary for the

Bureau to convene one or more Chambers to perform functions relating to investigations and pretrial proceedings, such as those relating to requests for arrest warrants or orders as well as reviewing indictments. This may be required to ensure timely consideration of requests by the Prosecutor for orders essential to conducting investigations and prosecutions as well as to ensure the right of the accused to be tried without undue delay once the indictment has been confirmed. One member also suggested the possibility of establishing an Indictment Chamber consisting of 3 judges, assuming that the number of complaints referred to the Tribunal justified the establishment of such a Chamber.

Article 29

Investigation and preparation of the indictment

1. The Prosecutor shall, upon receipt of a complaint in accordance with Article 28 and unless he determines that no possible basis exists for action by the Court, initiate investigations. The Prosecutor shall assess the information obtained and decide whether there is sufficient basis to proceed. The Prosecutor shall inform the Bureau of the Court of the nature and basis of the decision he has taken. In the case of a decision by the Prosecutor not to proceed, the Bureau, acting as a Review Chamber, and at the request of the complainant State, shall have the power to review the decision and if it finds that there is sufficient basis, direct the prosecutor to commence a prosecution.

2. The Prosecutor shall have the power to request the presence of and to question suspects, victims and witnesses, to collect evidence, including the disclosure and production of any documentation or exhibits relevant to the complaint, and to conduct on-site investigations.

3. In carrying out these tasks, the Prosecutor may, as appropriate, seek the cooperation of any State in a position to provide assistance and shall have the authority to request the Court to issue such subpoenas and warrants as may be required, including for the arrest and detention of a suspect.

4. A person suspected of an offence shall:

(a) Prior to his being questioned in an investigation under the Statute, be informed of his right to remain silent without such silence being a consideration in the determination of his guilt or innocence, and of his right to have the assistance of counsel of his own choice or, should he not have the means to retain counsel, to have counsel and legal assistance assigned to him;

(b) Not be compelled to testify against himself or to confess his guilt;

(c) If he is to be questioned in a language other than a language he understands and speaks, be provided with competent interpretation services, and translations of documents on which he is to be questioned.

Commentary

(1) The Prosecutor, upon notification by the Registrar of the receipt of a complaint, is responsible for the investigation and the prosecution of the alleged crime, as provided in Article 13. The Prosecutor must, in consultation with the Bureau, appoint the qualified staff required to conduct the investigation of the alleged crime pursuant to Article 13 and initiate the investigation, unless the Prosecutor reviews the complaint and supporting documentation and concludes that there is no possible basis for such an investigation. While most members felt that the Prosecutor should be required to conduct at least a preliminary investigation of a complaint filed by a State or the Security Council, one member questioned setting the Tribunal machinery in motion if the complaint was completely groundless.

(2) In conducting the investigation, the Prosecutor would have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. The Prosecutor may seek the cooperation of any State and request the Court to issue orders to facilitate the investigation. During the investigation, the Prosecutor may request the Bureau to issue such orders on behalf of the Court since a Chamber may not be convened until a later stage when the investigation has produced sufficient information for an indictment and confirmed the probability of a trial, assuming that the presence of the alleged perpetrator is secured or not required according to paragraph 1 (h) of Article 43.

(3) At the investigation phase of a criminal proceeding, a person who is suspected of having committed a crime may be questioned concerning the allegations. Prior to questioning, the suspect must be informed of the following rights: the right not to be compelled to testify or to confess guilt; the right to remain silent without reflecting guilt or innocence; the right to have the assistance of counsel, freely chosen or provided if necessary, during questioning; and the right to translation during questioning, if necessary.

(4) There is some overlap between the provisions concerning the rights of the suspect, a person believed to have committed a crime but not yet charged, and the rights of the accused, a person formally charged with the crime in the form of an indictment, under this Statute. However, the rights of the accused

during the trial would have little meaning in the absence of respect for the rights of the suspect during the investigation, for example the right not to be compelled to confess to a crime. Thus, the Working Group felt that it was important to include a separate provision to guarantee the rights of a person during the investigation phase before the person has actually been charged with a crime. It is also necessary to distinguish between the rights of the suspect and the rights of the accused since the former are not as extensive as the latter. For example, the suspect does not have the right to examine witnesses or to be provided with all incriminating evidence, rights which are guaranteed to the accused under paragraph 1 (d) and paragraph 3 of Article 43.

(5) Following the investigation, the Prosecutor must assess the information obtained and decide whether or not there is a sufficient basis to proceed with the preparation of an indictment for which the Prosecutor must establish a prima facie case. The Prosecutor must inform the Bureau of the nature and basis of the decision taken. The Bureau may, at the request of the complainant State, review a decision of the Prosecutor not to prepare an indictment and proceed with the prosecution and may also direct the Prosecutor to do so if the Court finds that there is a sufficient basis for such action. Some members felt that there should be a judicial review of the Prosecutor's decision not to proceed with a case, assuming that the complainant State was sufficiently convinced of the matter to request such a review. However, other members believed that such a review was inconsistent with the independence and the discretion of the Prosecutor in deciding, based on his or her experience and expertise, whether the results of the investigation warranted further action. They also raised practical questions concerning the effectiveness of requiring the Prosecutor to proceed with a case under such circumstances.

Article 30

Commencement of prosecution

1. Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute.
2. Prior to an indictment against him by the Court, a person may be arrested or detained under the Statute, for such period as may be determined by the Court in each case, only pursuant to:

(a) A determination by the Court, that such arrest or detention is necessary because there is sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested or detained his presence at his trial cannot be assured; and

(b) The issuance of warrant or other order of arrest or detention by the Court.

Commentary

While the complaint is the mechanism that initiates the investigation of the alleged crime, the indictment is the mechanism that initiates the prosecution of the criminal case. Following a determination that the information obtained during the investigation confirms that the crime alleged in the complaint has apparently been committed by the suspect, the Prosecutor shall proceed with the preparation of an indictment stating the relevant facts and the crime or crimes that the person to be charged is alleged to have committed under the Statute. Prior to the affirmation of the indictment, the Court, namely the Bureau or possibly a Chamber acting on behalf of the Court, may order the arrest or detention of the suspect on the basis of a preliminary determination that there are sufficient grounds for the charges and a risk that the person's presence at trial cannot otherwise be assured. The person shall be detained for a period to be determined by the Court in each case.

Article 31

The indictment

1. The indictment together with the necessary supporting documentation shall be submitted by the Prosecutor to the Bureau of the Court.
2. The Bureau acting as an Indictment chamber shall examine the indictment and determine whether or not a prima facie case exists.
3. If the Bureau concludes that a prima facie case exists it shall affirm the indictment and convene a chamber in accordance with article 36.
4. On admission of the indictment, the Bureau may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Commentary

- (1) The Prosecutor submits the indictment and necessary supporting documentation to the Court. The Bureau of the Court, acting as an Indictment

Chamber, reviews the indictment and decides whether it provides prima facie evidence of the crime alleged to have been committed by the person named in the indictment. If the Bureau concludes that the Prosecutor has established a prima facie case, then the Bureau affirms the charges or allegations contained in the indictment and convenes a Chamber, in accordance with Article 36, to conduct the trial. It is at this point in time, when the indictment is affirmed by the Court, that the person is formally charged with the crime and the former "suspect" becomes the "accused". Once the indictment has been confirmed, the Bureau may issue an arrest warrant or other orders requested by the Prosecutor which may be required for the prosecution and conduct of the trial. However, the Chamber would assume responsibility for pretrial orders and other matters relating to the trial once it is convened.

(2) Some members although accepting the principle that the indictment prepared by the Prosecutor should be subject to review and affirmation by the judicial organ of the Tribunal, also felt that this affirmation of a prima facie case should in no way be perceived as a pre-judgement by the Court as a whole on the final determination of the guilt or innocence of the accused. For this reason, they believed that careful consideration should be given to the appropriate organ of the Court to be charged with reviewing and determining the sufficiency of the indictment.

Article 32

Notification of the indictment

States parties to the Statute

1. The Court, with a view to ensuring prompt notification of an indictment to the accused, shall immediately following the issuance of an indictment:

(a) notify all States parties to the Statute of the indictment and of any order relating to the accused that may have been issued by the Court; and

(b) transmit to the State Party, or States parties, to the Statute within whose jurisdiction the accused is then believed to be:

(i) the indictment and any order relating to the accused that may have been issued by the Court;

(ii) a copy of the Statute of the Court;

(iii) a copy of the rules of evidence and procedure of the Court;

- (iv) a statement of the accused's right to obtain legal assistance as set out in article 43 paragraph 1(b) of the Statute; and
- (v) if any one of the official languages of the Tribunal is not the principal language understood and spoken by the accused, a translation under the auspices of the Tribunal of the indictment and other documents referred to in the preceding subparagraphs.

2. Where the State party or States parties, within whose jurisdiction the accused is believed to be, have accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall order such State Party, or States parties:

(a) to ensure that the indictment, together with the other documents referred to in paragraph 1 of this article, are personally notified to the accused: and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to ensure that the accused is arrested or detained immediately following such notification.

3. Where the State Party or States parties, within whose jurisdiction the accused is believed to be, have not accepted the jurisdiction of the Court with respect to such crimes as are the subject of the indictment, the Court shall request such State or States:

(a) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and

(b) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

States not Parties to the Statute

4. Where the State or States, within whose jurisdiction an accused is believed to be, are not Parties to the Statute, the Court shall with a view to prompt notification of an indictment on the accused, and where necessary the arrest or detention of the accused, immediately following the issuance of an indictment:

(a) notify such State or States of the indictment and of any order of the Court relating to the accused;

(b) transmit to such State or States copies of the indictment and other documents referred to in subparagraph 1(b) of the present article and

(c) invite such State or States: (i) to cooperate with the Tribunal in having the indictment and other documents personally notified to the accused; and (ii) if an order for the arrest or detention of the accused has been issued by the Court, to cooperate in obtaining the arrest or detention of the accused.

Cases where personal notification of indictment may not be feasible

5. If personal notification of the indictment together with the other documents is not made on the accused within a period of (sixty) days after the indictment, the Court shall prescribe such other manner of bringing the indictment to the attention of the accused.

Commentary

(1) To ensure that the accused is promptly notified of the indictment, the Court shall immediately notify all States Parties to the Statute of the indictment and any related orders and transmit the indictment and other relevant documents to the State Party in whose territory the accused is believed to be located, according to Article 32. In the latter case, the documents are provided to the State Party with a view to their transmission to the accused at such time as the person is located and taken into custody. Thus, the accused is not only to be served with the indictment but also provided with documents necessary for the preparation of the defence, including a statement explaining the right to counsel, the Statute setting forth the rights of the accused and the trial procedures, and the Rules of Evidence and Procedure. If necessary, the accused must be provided with a translation of these documents.

(2) This article provides for the notification of the indictment to the accused in three different situations depending on whether the person is believed to be located in: (1) a State which is a party to the Statute and which has accepted the jurisdiction of the Court with respect to the alleged crime, (2) a State which is a party to the Statute but has not accepted the jurisdiction of the Court with respect to the alleged crime, or (3) a State which is not a party to the Statute.

(3) In the first instance, the Court shall order the State to personally notify the accused of the indictment, transmit the accompanying documents and comply with any arrest or detention order. Such a State has recognized the existence of the crime as a matter of law and has accepted these obligations as a party to the Statute.

(4) In the second instance, the Court shall request the State to cooperate in notifying, arresting or detaining the accused. As a State Party, the State has a general obligation to cooperate with the Tribunal. However, it does not have specific obligations regarding persons charged with crimes with respect to which it has not accepted the jurisdiction of the Court. Furthermore, it may not be a party to the treaty defining the crime.

(5) In the third instance, the Court shall transmit the indictment and other relevant documents and invite the State to cooperate in notifying, arresting or detaining the accused. Although such a State has not accepted any obligations with respect to the Tribunal, it should be given an opportunity and encouraged to cooperate in the prosecution of persons alleged to have committed serious crimes affecting the international community as a whole. If the State is a party to the treaty defining the crime, it may be prepared to do so. In the event that personal notification is not achieved within six months of the indictment, the Court may prescribe an alternative method of informing the accused of the charges, a matter which may be dealt with in greater detail in the rules to be adopted by the Court.

Article 33

Designation of persons to assist in a prosecution

1. A State party may, with the consent of the Prosecutor, designate persons to assist in a prosecution.
2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to the exercise of their functions under this article.
3. The Registrar of the Court shall maintain a roster of persons whose names have been submitted pursuant to paragraph 1 of this article. The Prosecutor in exercising his authority under article 13 (5) to appoint staff is not restricted to choosing staff from the said roster.

Commentary

(1) This article is intended to facilitate the initiation of an investigation and prosecution without delay upon receipt of a complaint by making qualified and experienced personnel available to the Prosecutor who will not have a permanent staff to call upon when the need arises, at least during the initial phase of the Tribunal as envisaged in this Statute. States Parties may designate persons to assist in the prosecution of a particular case under paragraph 1 of this article. They are also invited to designate persons which they are prepared to make available to serve as investigators or prosecutors, when circumstances so require, and to so inform the Registrar for the purpose of maintaining a roster.

(2) To avoid the disruption of an investigation or prosecution which is in progress, States should be prepared to make persons available for the duration of the prosecution. Any such persons would serve under the direction of the

Prosecutor and would be prohibited from seeking or receiving instructions from their Government or any other source. A similar provision concerning the staff of the United Nations is found in Article 100 of the United Nations Charter.

(3) The provision is intended to assist the Prosecutor in appointing qualified staff pursuant to paragraph 5 of Article 13. However, the Prosecutor is not limited to the persons designated by States Parties in making these appointments. The Prosecutor is given the authority to select the persons who possess the necessary qualifications and experience to carry out the tasks assigned to the Procuracy with a view to ensure the competence and independence of the Procuracy.

Article 34

Pre-trial detention or release on bail

1. The Court shall decide whether an accused person who is brought before it shall continue to be held in detention or be released on bail.

2. If the court decides to hold the accused in detention, the State on whose territory the seat of the Court is established shall make available to the Court an appropriate place of detention and, where necessary, the requisite guards.

Commentary

(1) Once the accused has been arrested and transferred to the Tribunal, the Court shall decide whether the accused should be detained or released on bail while awaiting trial.

(2) Given the serious nature of the crimes under this Statute, there is every reason to believe that it will be necessary to detain the accused. Thus, paragraph 2 of this article requires the State on whose territory the Tribunal is located to provide the necessary detention facilities and the requisite guards. There may be a need for stricter security arrangements for persons charged with crimes under this Statute than for persons charged with ordinary crimes under national law. The Working Group believed that the details concerning such matters should be addressed in the agreement to be concluded by the Tribunal and the State selected for the seat of the Tribunal.
