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

ADDENDUM

	<u>Page</u>
B. DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL AND COMMENTARIES THERETO (<u>continued</u>)	

PART 4: THE TRIAL

Article 35

Place of Trial

1. The place of the trial will, in principle, be the seat of the Tribunal.

2. By arrangement between the Court and the State concerned, the Court may exercise its jurisdiction in the territory of any State Party, or in the territory of any other State.

3. Where practicable and consistent with the interest of justice a trial should be conducted in or near the State where the alleged offence was committed.

Commentary

(1) The trials will generally take place at the seat of the Tribunal and make use of the available personnel and facilities.

(2) There may be circumstances in which it is more practical to conduct the trial at a location which is situated closer to the scene of the alleged crime to facilitate the transportation of witnesses and evidence in a shorter period of time and at a lower cost.

(3) However, the proximity of the trial to the place where the type of crimes referred to in the Statute were allegedly committed may cast a political shadow over the judicial proceedings, thus raising questions concerning respect for the defendant's right to a fair and impartial trial, or may create unacceptable security risks for the defendant, the witnesses, the judges and the other staff of the Tribunal. Thus, trials may take place in a State other than the host country only when it is both practicable and consistent with the interest of justice to do so.

(4) The Chamber must take into account these two considerations in determining the place of the trial in accordance with paragraph 1 (a) of Article 38. The Chamber may request the views of the Prosecutor or the defence on this question without unnecessarily delaying the commencement of the trial.

(5) Trials taking place in States other than the host country would be conducted pursuant to an arrangement between the Tribunal and the State concerned, which may or may not be a State Party to the Statute. This arrangement would need to address matters similar to those to be provided for

in the agreement with the host country and possibly other matters if the trial is to be held in a State which is not a party to the Statute. It was suggested that the standard conditions for such an arrangement could be set forth in an annex to the Statute, with the possibility of adding any additional provisions that may be required in a particular case. The Working Group recognized that it may be more appropriate to move this provision to the article of the Statute that will provide for the headquarters agreement, an article to be added at a later stage.

Article 36

Establishment of Chambers

1. Cases shall be tried by Chambers of the Court.
2. A Chamber of the Court shall be established in accordance with the rules of the Court. Each Chamber shall consist of five judges.
3. Several Chambers may be established and sit concurrently.
4. No judge from a complainant State or from a State of which an accused is a national shall be a member of the Chamber dealing with that particular case.

Commentary

- (1) Persons charged with crimes under the Statute would be tried by a Chamber of the Court consisting of five judges to be established in accordance with the rules to be adopted by the Court.
- (2) Depending on the number of cases referred to the Court, it may be necessary, to ensure respect for the right of the accused to be tried without undue delay, to convene more than one Chamber and conduct several trials concurrently.
- (3) In the light of the nature of the crimes covered by the Statute, no judge may serve in a Chamber convened to hear a case on the basis of a complaint brought by the State of which the judge is a national or against an accused who is of the same nationality as the judge. This is to avoid any questions concerning the independence or impartiality of the Court and to ensure that the accused receives a fair trial.
- (4) The Chamber is to be convened by the Bureau to hear a particular case upon the affirmation of an indictment in accordance with Article 30. Some members believed that it would be appropriate for the Bureau, as the standing

body of the judicial organ consisting of the officers of the Court, to appoint the judges who would serve in a Chamber. However, other members believed that the membership of the Chambers should be predetermined on an annual basis and should follow the principle of rotation to ensure that all judges would have the opportunity to participate equally in the work of the Court. It was also suggested that the selection should be based on an objective criteria set forth in the rules to be adopted by the Court, rather than the subjective decision of the three members of the Bureau. The Working Group invited the Commission and the General Assembly to comment on this issue which would be considered at a later stage.

Article 37

Disputes as to Jurisdiction

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.
2. Challenges to its jurisdiction may be made, in accordance with procedures laid down by the Rules:
 - (a) at the commencement stage of the trial, by an accused or any State party;
 - (b) at any stage of the trial, by the accused.
3. If a State challenges the jurisdiction under paragraph 2 (a), the accused has a full right to be heard in relation to the challenge. A decision that there is jurisdiction shall not be reopened at the trial.

Commentary

- (1) The competence of the Court is limited to those cases which are within its jurisdiction as defined by the Statute. The Court must satisfy itself that it has jurisdiction to hear a particular case before proceeding to do so.
- (2) Any State Party may challenge the jurisdiction of the Court with respect to a particular case in preliminary proceedings at the commencement of the trial. States Parties which may be called upon to assist in the prosecution of the case, from serving documents to providing evidence and surrendering the accused, should have the right to challenge the jurisdiction of the Court, not at any stage in the proceeding, but at least at the commencement of the trial. It would be unreasonable to allow a State Party duly notified of the

indictment to wait until the proceedings were almost completed to raise such an objection, particularly since the proceedings may be both lengthy and costly. The accused has the right to participate in the proceedings concerning the jurisdictional challenge raised by a State Party. Once the Court has decided that it has jurisdiction, that decision cannot be reopened at the trial.

(3) Some members felt that only States which have a direct interest in the case should be allowed to challenge the jurisdiction of the Court. However, other members felt that since the criminal jurisdiction was conferred on the Court by all of the States Parties, any one of them should have the right to question whether the Court was acting in accordance with this conferral of jurisdiction.

(4) The accused has the right to challenge the jurisdiction of the Court at any stage of the trial. In addition, it was suggested that, given the very serious consequences of being charged with one of the crimes covered by the Statute, it would be imperative for the accused to be allowed to challenge the jurisdiction of the Court, and possibly the sufficiency of the indictment, at an earlier stage than the trial since a person's reputation would suffer greatly by merely being charged with one of the crimes referred to in the Statute. However, other members noted that the limited institutional structure of the Court did not provide for an existing judicial body to hear such challenges before the commencement of the trial. The Statute does allow a State Party ordered to arrest and surrender the accused to challenge the indictment on jurisdictional or other grounds in paragraph 7 of Article 62. In the absence of a Chamber, such a challenge could be decided by the Bureau, although this may be the same body that initially issued the indictment.

(5) The Working Group decided to return to this matter at a later stage and invited comments on the following questions:

(a) Should all States Parties or only those with a direct interest in the case have the right to challenge the Court's jurisdiction?

(b) Should the Statute provide for the possibility of pre-trial challenges by the accused as to jurisdiction and/or the sufficiency of the indictment? If so, should such challenges be decided by the Bureau or should a Chamber be established at the pretrial stage to decide such matters?

Article 37

Duty of the chamber

1. If the Bureau has not already done so under Article 31, the Chamber shall decide, as early as possible in each case:

(a) the place at which the trial is to be held, having regard to Article 35;

(b) the language or languages to be used during the trial, having regard to articles 18 and 43 1 (f) and 2.

2. The Chamber may order:

(a) the disclosure to the defence of any documentary or other evidence available to the Prosecutor;

(b) the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial.

3. At the commencement of the trial, the Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, and allow the accused to enter a plea of guilty or not guilty.

Commentary

(1) Once the Chamber has been established it must decide certain preliminary matters and may issue various pre-trial orders at the request of either the prosecution or the defence. The Chamber determines the place of the trial in accordance with the provisions of Article 35, unless the Bureau has already done so when it convened the Chamber in accordance with Article 31.

(2) The Chamber must also decide on the languages to be used during the trial, bearing in mind the right of the accused to a simultaneous translation of the proceedings, if necessary, according to Article 18, and the two working languages of the Tribunal, English and French, as provided in Article 43.

(3) The Chamber may issue pretrial orders to ensure the right of the accused to have adequate time and facilities for the preparation of the defence. Prior to the commencement of the trial, the accused has the right to receive all incriminating evidence and all exculpatory evidence available to the prosecution, according to paragraph 3 of Article 43. The present article authorizes the Chamber to order the Prosecutor to provide such information.

(4) The Chamber may also issue orders requiring the defence and the prosecution to exchange information so that both parties are aware of the

issues to be decided at the trial and adequately prepared to present their arguments on those issues at the commencement of the proceedings. This will ensure that the trial is conducted efficiently and without unnecessary delays.

(5) At the commencement of the trial, the presiding judge of the Chamber must read the indictment to make sure that the accused understands the charges. Before allowing the accused to enter a plea, the Court must also satisfy itself that the person has been informed of and understands the rights of the accused and that those rights have been fully respected.

Article 39

Fair trial

1. The Court shall ensure that a trial is fair and expeditious, conducted in accordance with the present Statute and the rules of procedure and evidence of the Court, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A trial shall be public, unless the Court in accordance with article 45 of the Statute determines that certain proceedings be in closed session.

Commentary

This article establishes the responsibility of the Trial Chamber, acting on behalf of the Court, to ensure any person charged with crimes under this Statute receives a fair and expeditious trial which fully respects the rights of the accused set forth in Articles 39 to 44. The Chamber must also conduct the proceedings in accordance with the uniform procedures and standards established in the rules of procedure and evidence to be adopted by the Court. The trial is to be conducted in public, unless the Chamber determines that it is necessary to close the proceedings to protect the accused, victims or witnesses in accordance with Article 45. For example, this may be necessary to protect the privacy of the victims or to avoid public disclosure of the identity of the witnesses whose safety may be threatened. While the Court is required to have due regard for the protection of victims and witnesses, this must not interfere with full respect for the rights of the accused to a fair trial. Thus, while the Court may order the non-disclosure to the media or the general public of the identity of a victim or witness, the right of the accused to question the prosecution witnesses must be fully respected under paragraph 1 (d) of Article 43.

Article 40

Principle of Legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution under Article 22, unless the Treaty concerned was in force [and its provisions had been made applicable in respect of the accused;]

(b) in the case of a prosecution under Article 25 or Article 26 (2) (a), unless the act or omission in question constituted a crime under international law; or

(c) in the case of a prosecution under Article 26 (2) (b), unless the act or omission constituted a crime under the relevant national law, in conformity with the Treaty,

at the time the act or omission occurred.

Commentary

(1) The principle of nullum crimen sine lege is a fundamental principle of criminal law which is recognized in Article 15 of the United Nations Covenant on Civil and Political Rights which states as follows: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed." It recognizes that such act or omission may be "criminal according to the general principles of law recognized by the community of nations."

(2) In accordance with the proposed article, a person may be prosecuted for an act or omission which was defined as a crime at the time it occurred by any one of the following sources of law: (1) a treaty which was in force and applicable with respect to the accused; (2) customary international law; or (3) national law enacted in conformity with the relevant treaty, according to Article 40 of this Statute.

(3) With regard to crimes defined in a treaty, there were different views as to whether the State Party must have fulfilled any obligation provided for in the treaty or required as a matter of internal law to either adopt implementing legislation or to define the crime as a matter of national law, respectively. Some members felt that the treaty did not directly create any obligations for the individual, while others believed that in the case of crimes under international law the prohibition and the criminal responsibility flowed directly from international law, emphasizing the source of the

prohibition of the conduct or the criminalization of the offence. With respect to the latter point, it was suggested that there may be circumstances in which it would be possible to prosecute an individual for a crime under international law in an international tribunal even though the same person could not be tried in a national court due to the absence of the necessary provision in the national criminal code. One member felt that the rules of international criminal law should be applied uniformly rather than creating inequalities as to the criminal responsibility of different individuals based on requirements of internal law or the failure of a State Party to comply with its treaty obligations.

Article 41

Equality before the Tribunal

All persons shall enjoy equality before the Tribunal.

Commentary

This provision is consistent with Article 14 of the United Nations Covenant on Civil and Political Rights which states that "All persons shall be equal before the courts and tribunals." The term "persons", as it is used in this Statute, is intended to cover not only the defendants, but also victims and witnesses who may come before the Court to testify in a proceeding and should be treated equally.

Article 42

Presumption of Innocence

A person shall be presumed innocent until proved guilty.

Commentary

This provision recognizes that in a criminal proceeding the accused is entitled to a presumption of innocence and the burden of proof rests with the Prosecution. The presumption of innocence is recognized in Article 14 of the United Nations Covenant on Civil and Political Rights which states that "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The Prosecutor has the burden to prove every element of the crime beyond a reasonable doubt or in accordance

with the standard for determining the guilt or innocence of the accused. If the Prosecutor fails to prove that the accused committed the alleged crime, then the person must be found not guilty of the charges.

Article 43

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and, subject to Article 39(2) public hearing, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to be informed of the right of the accused to conduct the defence or to have the assistance of counsel of the accused's choice or, in the absence of means to retain counsel, to have counsel and legal assistance assigned to the accused by the court;

(c) to have adequate time and facilities for the preparation of the defence, and communicate with counsel;

(d) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(e) to be tried without undue delay;

(f) if any of the proceedings of, or documents presented to, the court, are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt;

(h) to be present at the trial, unless the court, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2. At the commencement of a trial, the court shall ensure that the indictment and other documents referred to in article 32, paragraph 1 (h) and 4 (b) of the Statute, and copies thereof in a language understood and spoken by the accused, have been provided to the accused sufficiently in advance of the trial to enable adequate preparation of his defence.

3. All incriminating evidence and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence.

Commentary

(1) This article sets forth in paragraph 1 the minimum guarantees to which the accused is entitled in the determination of the criminal charges. It reflects the fundamental rights of the accused set forth in Article 14 of the United Nations Covenant on Civil and Political Rights.

(2) In connection with paragraph 2 (7), the question of the possibility of holding trials in absentia gave rise to conflicting views in the Working Group. According to some members, this possibility was completely unacceptable from the perspective of a fair trial which respects the fundamental rights of the accused. Attention was drawn to Article 14 of the United Nations Covenant on Civil and Political Rights which characterizes the right of the accused to be present at the trial as a minimum guarantee to which everyone shall be entitled, in full equality, in the determination of any criminal charge. Furthermore, they felt that judgements by the court without the actual possibility of implementing them might lead to a progressive loss of its authority and effectiveness in the eyes of public opinion.

(3) Other members were strongly in favour of drawing some distinctions, as regards, in particular, three possible situations: (a) the accused has been indicted but is totally unaware of the fact that proceedings are being instituted against him; (b) the accused has been duly notified but chooses not to appear before the court; and (c) the accused has already been arrested but escapes before the trial is completed. Most of those members thought that while in hypothesis (a), an accused person should not be judged in absentia, in cases (b) and (c) a trial in absentia is perfectly in order, otherwise, the court's jurisdiction would, in fact, be subject to the "veto" of the accused. Furthermore, they felt that in such cases a judgement in absentia would in itself constitute a kind of moral sanction which could contribute to the isolation of the accused wherever he might be and, possibly, to his capture in the end. It was also argued in favour of trials in absentia that in criminal cases evidence should be effectively preserved by means of an expeditious trial. Such evidence might be lost if proceedings were delayed until such time as the accused could be brought before the court. One member felt that trials in absentia could be appropriate under (c) above but not under (a)

or (b) Another member also mentioned disruption of the trial by the accused, security reasons, or ill health of the accused, as valid grounds for pursuing the trial without the presence of the accused.

(4) Members in favour of trials in absentia would also generally feel that such a judgement should be provisional and, should the accused appear before the court at a later stage, a new trial should be conducted in his presence.

(5) The Working Group invited the Commission and the General Assembly to comment on the question of trials of in absentia.

(6) As in other provisions of this Statute, paragraph 2 of this article recognizes the responsibility of the court to ensure respect for the rights of the accused, including the right to have adequate time and facilities for the preparation of the defence in accordance with paragraph 1 (c). At the commencement of the trial, the court must ensure that the indictment and the other documents referred to in Article 32 have been provided to the accused sufficiently in advance of the trial.

(7) The accused is also entitled to receive all incriminating evidence and all exculpatory evidence available to the prosecution in reasonable time to prepare for the defence, according to paragraph 3 of this article.

Article 44

Non bis in idem

1. No person shall be tried before any other court for acts constituting crimes referred to in Articles 22 or 26, for which that person has already been tried under this Statute.

2. A person who has been tried by another court for acts constituting crimes referred to in Articles 22 or 26 may be subsequently tried under this Statute only if:

(a) the act in question was characterized as an ordinary crime; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the court shall take into account the extent to which any sentence imposed by another court on the same person for the same act has been served.

Commentary

(1) The principle of non bis in idem, sometimes referred to as the prohibition against double jeopardy, is a fundamental principle of criminal law. This principle is recognized in Article 14 (7) of the United Nations Covenant on Civil and Political Rights which states that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

(2) The present provision recognizes this principle with respect to the international court. It is inspired by Article 10 of the Statute of the International Tribunal created by the Security Council for crimes committed in the former Yugoslavia, with minor modifications to take account of the possibility of a previous trial in another international court or tribunal.

(3) The prohibition on subsequent trials under paragraph 1 applies only where the court has actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime. Since the jurisdiction of national courts would not be affected unless the court had actually exercised jurisdiction with respect to the merits, it was not considered necessary to include a provision equivalent to Article 9 of the Security Council's Statute concerning concurrent jurisdiction.

(4) The phrase "characterized as an ordinary crime" in paragraph 2 (a) refers to the situation where the act has been treated as a common crime as distinct from an international crime having the special characteristics of the crimes referred to in Article 22 or 26 of this Statute. For example, the same act may qualify as the crime of aggravated assault under national law and torture or inhuman treatment under Article 147 of the Fourth Geneva Convention of 1949.

(5) There were different views concerning paragraph 2 (b) of this article. Some members believed that the Tribunal should be able to prosecute a person for acts constituting crimes referred to in this Statute if the previous criminal proceeding against the same person for the same acts was really a "sham" proceeding, possibly even designed to shield the person from being tried by the court. One member suggested that the need for this provision was demonstrated by some of the war crimes trials in national courts after the First and Second World Wars. However, other members expressed strong

reservations about allowing the court to review the trial proceedings of national courts as an unacceptable encroachment on State sovereignty.

(6) In the event that the court convicts a person under either of the situations contemplated in paragraph 2, it must take into consideration in the determination of the appropriate penalty under Articles 51 to 53 the extent to which the person has actually served a sentence imposed by another court for the same acts. While a person may be convicted of more than one crime based on the same acts, for example murder and war crimes, the person should not be subject to multiple sentences for the same acts without any regard for the extent to which a previous sentence has already been served.

Article 45

Protection of the accused, victims and witnesses

The Chamber shall take all steps available to it, to protect the accused, victims and witnesses, and may to that end conduct proceedings in camera or allow the presentation of evidence by electronic or other special means.

Commentary

(1) The court has the responsibility and the authority to take the necessary steps to protect the accused, as well as victims and witnesses participating in the proceedings. The non-exhaustive list of such measures provided in this article include ordering that the trial shall be conducted in closed proceedings or allowing the presentation of evidence by electronic means such as video cameras.

(2) In conducting the proceedings, the court must have due regard for the need to protect both victims and witnesses but only to the extent that this is consistent with full respect for the rights of the accused, in accordance with Article 39. For example, allowing a key prosecution witness to testify by video camera may raise questions concerning the right of the defendant to examine prosecution witnesses and the ability of the judges to assess the credibility of witnesses, which is often critical in criminal proceedings, if they are not present in the courtroom. At the same time, such procedures may be the only way to obtain the testimony of a particularly vulnerable victim or witness.
