

8 August 1996

United Nations
Press Release
L/2792

PREPARATORY COMMITTEE ON ESTABLISHMENT OF INTERNATIONAL
CRIMINAL COURT TO MEET AT HEADQUARTERS, 12-30 AUGUST

Background Release

Discussions on crimes against humanity, the definition of aggression, and the role of the Security Council in relation to the proposed international criminal court will continue as the Preparatory Committee on the establishment of the court begins its second session at Headquarters on Monday, 12 August.

The Preparatory Committee was set up by General Assembly resolution 50/46 of 11 December 1995 and is charged with preparing a widely acceptable consolidated text of a convention for such a court as a step towards consideration by a conference of plenipotentiaries.

At its first session, held at Headquarters from 25 March to 12 April, the Preparatory Committee undertook a comprehensive analysis of the draft statute of the proposed court, which was elaborated in the International Law Commission prior to being discussed in the Ad Hoc Committee on the establishment of the court and in the Sixth Committee (Legal) of the General Assembly.

The upcoming session is scheduled to conduct a second reading of the issues raised at the first session. Following its conclusion, the second session will report on the proposed international criminal court to the next session of the Assembly, which begins next month.

Among the issues discussed during the first session were which crimes should be included in the draft statute. For example, the question of whether aggression was to be included was raised. Delegates also discussed whether or not crimes committed in internal armed conflicts, crimes of international terrorism, or crimes of international drug trafficking should be included. They discussed what acts constitute the "crimes against humanity" which will be prosecuted by the proposed court, and whether or not corporations should be criminally liable under the proposed court's jurisdiction. The

relationship between the proposed court and national courts was also the subject of deliberations. Attention was focused on what would initiate, or "trigger", action by the court, including whether that responsibility should fall under the competence of the Security Council or the Prosecutor.

- 2 - Press Release L/2792 8 August 1996

Draft Statute

In its original format, the 60-article draft statute prepared by the Commission, which was contained in the Commission's report on its forty-sixth session (document A/49/10), details the establishment of the court; its relationship to the United Nations; composition and administration; jurisdiction and applicable law; investigation and commencement of prosecution; trial; appeal and review; international cooperation and judicial assistance; and enforcement.

It provides that the court may enter into a relationship with the United Nations, either by becoming a part of the organic structure of the Organization or could be set up by a treaty. According to the draft statute, the court can only operate effectively if brought into close relationship with the United Nations, both for administrative purposes and because part of its jurisdiction would be consequential upon decisions by the Security Council.

The draft contemplates two categories of crime -- those under general international law such as genocide, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity; and those crimes covered by treaty provisions.

According to the draft statute, the court's jurisdiction will apply when a State has custody of an accused person (either because such a State had jurisdiction over the crime or because it had received an extradition request relating to it), or when the crime was committed on its territory. A State could accept the jurisdiction of the court either by a declaration of general application or it could be party to the Statute by a declaration lodged with the depository or, at a later time, with the registrar. A declaration might be made for a specific or unspecified period.

It also provides that the court should have jurisdiction over crimes referred to it by the Security Council, acting under Chapter VII of the United Nations Charter. A complaint related to an act of aggression cannot be brought unless the Council determines that a State has committed such an act. The Council would decide if a prosecution, arising from a situation

which it was dealing with under Chapter VII of the Charter, could begin.

Under the terms of the draft statute, the Council would not normally refer a "case" against individuals to the court, but would refer a "matter" or situation to which Chapter VII of the Charter applied. It would be the prosecutor's responsibility to determine which individuals would be charged.

- 3 - Press Release L/2792 8 August 1996

Issues Raised During Preparatory Committee's First Reading

During the Preparatory Committee's first session, discussions focused, among others, on whether or not the proposed court would deal with the crime of aggression. (The Committee's proceedings are summarized in document A/AC.249/1.) Some delegations were of the view that aggression should be included to avoid a significant gap in the court's jurisdiction, as aggression was one of the most serious crimes of international concern. Others supported the inclusion of that crime if agreement were reached on its definition, and if an appropriate balance could be struck between the respective roles and functions of the court and the Security Council.

Among the arguments of those opposing the inclusion of aggression were that there was no precedent for individual responsibility for acts of aggression in contrast to wars of aggression; its inclusion could subject the court to the struggle for political influence among States; and it would be difficult to achieve an appropriate relationship between the judicial functions of the court and the political functions entrusted to the Security Council under the Charter. Some delegations expressed support for providing a review mechanism under which aggression might be added at a later stage to avoid delaying the court's establishment, but that view drew opposition.

Concerning the need for a definition of the crime of genocide, several delegations expressed the view that the Convention on the Prevention and Punishment of the Crime of Genocide provided an adequate basis for the definition of that crime. Others suggested that further clarification was required to provide guidance to the court in its interpretation and application.

Discussion was also held on provisions relating to serious violations of the laws and customs applicable in armed conflict. There were different views as to whether that category of crimes should include violations committed in international or non-international armed conflicts. Some expressed the view that it was important to include violations committed in internal armed conflicts given their increasing frequency in recent years, noting that

individuals could be held criminally responsible for such violations as a matter of international law.

With respect to crimes against humanity, there was discussion on whether to include a nexus to armed conflict. Some delegations expressed the view that crimes against humanity were invariably committed in situations involving some type of armed conflict, but others said that such crimes could also occur in times of peace.

Several delegations were of the view that the definition of crimes against humanity should include a list of exceptionally serious, grave or inhumane acts which shocked the conscience of humanity. Among the acts

- 4 - Press Release L/2792 8 August 1996

proposed for inclusion were murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecution on political, racial or religious grounds. Some delegations also favoured the inclusion of the category "other inhumane acts" to cover similar acts which were not envisaged and might not be foreseeable.

The Preparatory Committee also discussed treaty-based crimes, with various perspectives being offered on whether or not to include them. Among the crimes falling under that category is the crime of international terrorism. A number of delegations felt that crimes of international terrorism qualified for inclusion given their serious nature and the magnitude of the consequences they wrought. The view was expressed that including crimes of international terrorism would strengthen the ability of the international community to combat them. It was also felt that the court might consider cases of international terrorism in exceptionally serious situations when the question was referred to the court for consideration by the Security Council. Some delegations emphasized the importance of distinguishing between international terrorism and the right to self-determination.

On the other hand, a number of delegations were of the view that international terrorism should not be included because there was no general definition of that crime and elaborating such a definition would substantially delay the court's establishment. It was also stated that the inclusion of those crimes would impose too great a burden on the court and significantly increase its costs while detracting from the other core crimes.

Divergent views were also expressed concerning the question of including illicit drug trafficking in the draft statute. Some were of the view that

particularly serious drug trafficking offences which had an international dimension should be included, since those offences had serious consequences and there was no unified system for addressing those crimes because of divergences in national laws. Others stated that drug trafficking should not be included because, among other reasons, the court would not have the necessary resources to conduct the lengthy and complex investigations required to prosecute the crimes; the investigation of the crimes often involved highly sensitive information and confidential strategies; and the crimes could be more effectively prosecuted by national authorities.

A number of delegations said that particular attention should be paid to attacks against United Nations and associated personnel. The view was also expressed that the inclusion of serious threats to the environment must be considered.

Among the issues raised during the discussions of general principles of criminal law was the irrelevance of official position. There was support for the statute to disallow any plea of official position as head of State or government or other official position; such official position should not

- 5 - Press Release L/2792 8 August 1996

relieve an accused of criminal responsibility. With respect to the criminal liability of corporations, some were of the view that it would be more useful to focus attention on individual responsibility. The point was made, however, that the liability of a corporation could be important in the context of restitution.

The issue of complementarity, which involves the relationship between the international criminal court and national courts, was widely discussed. It was generally agreed that a proper balance between the two was crucial to 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.

Also widely discussed was the trigger mechanism, including the question of who can trigger the system and the role of the prosecutor. Delegates appeared to agree that the statute would not affect the role of the Security Council, which would continue to exercise primary authority to determine and respond to threats to and breaches of the peace and to acts of aggression. Concern was expressed that the statute should not confer any more authority on the Security Council than that already assigned to it by the Charter; that the role of the Security Council should not be undermined; and that the relationship between the court and the Council should not undermine the

judicial independence and integrity of the court or the sovereign equality of States.

Concerning the role of the prosecutor, some were of the view that it was too restricted, and that States or the Security Council, for a variety of political reasons, would be unlikely to lodge a complaint. They said the prosecutor should be empowered to initiate investigations, as was the case with the prosecutors of the two existing ad hoc tribunals. Support was also expressed for allowing for individuals to lodge complaints.

Some others could not agree with the notion of an independent power for the prosecutor to institute proceedings before the court. They were of the view that such power would lead to the politicization of the court, and to allegations that the prosecutor had acted for political motives, thus undermining the court's credibility.

Discussions were also held on cooperation between States and the proposed court, including on the issue of apprehension and surrender. Delegates also discussed international cooperation and judicial assistance, covering such topics as public or national security interests; political or military offences; non-compliance; the enforcement of sentences; and pardon, parole and commutation of sentences. Concerning the latter, some were of the view that since the court was a judicial body and should not be put in the position of dealing with extra-legal matters associated with pardon and parole, perhaps a separate entity should be created to deal with those issues.

- 6 - Press Release L/2792 8 August 1996

Background

The process leading to the establishment of the Preparatory Committee dates back to 25 November 1992, when the General Assembly adopted resolution 47/33 under which it requested the Commission to undertake the elaboration of the draft statute.

On 9 December 1994, by its resolution 49/53, the Assembly decided to establish the Ad Hoc Committee, open to all Member States or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.

After meeting for four weeks in two sessions in 1995 (from 3 to 13 April and

from 14 to 25 August), the Ad Hoc Committee reported that the participating States still had different views on the major substantive and administrative issues. It, therefore, decided that those issues could be addressed most effectively by combining further discussions with the drafting of a consolidated text of a convention for the court as a next step towards consideration by the conference of plenipotentiaries.

In its report to the fiftieth session of the General Assembly (document A/50/22), the Ad Hoc Committee recommended that the Assembly organize future work towards an early completion of such a draft convention. The Assembly established the Preparatory Committee by its resolution 50/46, which stated that its work would be based on the draft statute prepared by the Commission but should take into account the report of the Ad Hoc Committee on the establishment of the court. It should also take into account the written comments submitted by States to the Secretary-General on the draft statute as well as contributions of relevant organizations.

Officers; Membership

The Chairman of the Preparatory Committee is Adriaan Bos (Netherlands). Its Vice-Chairmen are Cherif Bassiouni (Egypt), Silvia A. Fernandez de Gurmendi (Argentina), and Marek Madej (Poland). Jun Yoshida (Japan) is the Rapporteur.

The Preparatory Committee is open to all Member States of the United Nations, members of specialized agencies and members of the International Atomic Energy Agency.

* * * * *
