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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
16 March-3 April 1998

DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5(20)

Crimes within the jurisdiction of Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) the crime of genocide;
- (b) the crime of aggression;
- (c) war crimes;
- (d) crimes against humanity;
- (e) ...

N.B. Once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly.

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Crime of genocide

For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent¹ to destroy, in whole or in part, a national, ethnical, racial or religious group,² as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm³ to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group;

[The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.]⁴

¹ The reference to "intent to destroy, in whole or in part ... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.

² The Preparatory Committee took note of the suggestion to examine the possibility of addressing "social and political" groups in the context of crimes against humanity.

N.B. The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.

³ The reference to "mental harm" is understood to mean more than the minor or temporary impairment of mental faculties.

⁴ The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on general principles of criminal law has considered this issue in the context of its work.

N.B. See also article 17[B a. to d.] (Individual criminal responsibility).

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[⁵ Crime of aggression⁶

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10[23].

Option 1

[For the purpose of the present Statute, the crime [of aggression] [against peace] means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

- (a) planning,
- (b) preparing,
- (c) ordering,
- (d) initiating, or
- (e) carrying out

[an armed attack] [the use of armed force] [a war of aggression,] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

⁵ This square bracket closes at the end of paragraph 2.

⁶ The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

The Preparatory Committee considered this crime without prejudice to a final decision on its inclusion in the Statute.

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[2. [Acts constituting [aggression] [armed attack] include the following:]⁷

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

[Crime of aggression

[1. For the purpose of the present Statute [and subject to a determination by the Security Council referred to in article 10[23], paragraph 2, regarding the act of a State], the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

⁷ Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

/...

- (b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]

2. Where an attack under paragraph 1 has been committed, the

- (a) planning,
- (b) preparing, or
- (c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.]

War crimes⁸

For the purpose of the present Statute, war crimes means:

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering, or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement;

⁸ Views were expressed that certain provisions should be placed within square brackets. The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.

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(h) taking of hostages.

E. Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(a bis)

Option 1

intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).

(b)

Option 1

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;⁹

⁹ It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

N.B. With respect to this footnote see, however, articles 23[H] (Mens rea (mental elements)) and 24[K] (Mistake of fact or of law) which deal with similar issues.

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Option 2

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;¹⁰

Option 3

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;¹¹

Option 4

No paragraph (b).

(b big)

Option 1

intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

Option 2

No paragraph (b big).

(c)

Option 1

attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option 2

making non-defended localities and demilitarized zones the objects of attack;

¹⁰ Ibid.

¹¹ Ibid.

/...

(d) killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(e) making improper use of flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(f)

Option 1

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option 2

the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 3

- (i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
- (ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4

No paragraph (f).

(g)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are

/...

collected, provided they are not being used at the time for military purposes;

(h) subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(i) killing or wounding treacherously individuals belonging to the hostile nation or army;

(j) declaring that no quarter will be given;

(k) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(l) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(m) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(n) pillaging a town or place, even when taken by assault;

(o)

Option 1

employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering:

- (i) poison or poisoned weapons,
- (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction;

/...

Option 2

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

- (i) poison or poisoned weapons,
- (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,
- (vi) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

Option 3

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate;

Option 4

employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

or

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

- (i) poison or poisoned weapons,
- (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,

/...

- (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction,
- (vi) nuclear weapons,
- (vii) anti-personnel mines,
- (viii) blinding laser weapons,
- (ix) such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p)

Option 1

committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Option 2

committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

/...

(t)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities."¹⁴

Option 3

- (i) recruiting children under the age of fifteen years into armed forces or groups; or
- (ii) allowing them to take part in hostilities;

Option 4

No paragraph (t).

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OPTION I

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

¹⁴ In drafting this option, we have sought to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility.

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

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C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) taking of hostages;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(a)

Option 1

intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(b) intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c)

Option 1

intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

/...

Option 2

intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(d) pillaging a town or place, even when taken by assault;

(e) committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f)

Option 1

forcing children under the age of fifteen years to take direct part in hostilities;

Option 2

recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

Option 3

(i) recruiting children under the age of fifteen years into armed forces or groups; or

(ii) allowing them to take part in hostilities;

Option 4

No paragraph (f).

(g) ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) killing or wounding treacherously a combatant adversary;

(i) declaring that no quarter will be given;

(j) subjecting persons who are in the power of another Party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of

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the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

(k) destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(1)

Option 1

No provision on prohibited weapons.

Option 2

A reference to arms, in the light of the discussions on paragraph B(o).

OPTION II

Insert the following provisions in section D:

- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;
- intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;
- slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

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* * *

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.¹²

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.²

Option 3

No provision on threshold.

* * *

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

N.B.

- Article Y could constitute a separate article or could be placed in article 5[20] (Crimes within the jurisdiction of the Court).

- Article 15[A] (3) (Nullum crimen sine lege) and article 14[33] (Applicable law) deal with related issues.

Crimes against humanity

1. For the purpose of the present Statute, a crime against humanity means any of the following acts when committed

¹² The view was expressed that the substance and placement of this proposal should be considered.

/...

[as part of a widespread [and] [or] systematic commission of such acts against any population]:

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

N.B. In case the second alternative is retained, its relationship with subparagraph 1(h) should be considered.

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation or forcible transfer of population;
- (e) [detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];¹³
- (f) torture;
- (g) rape or other sexual abuse [of comparable gravity,] or enforced prostitution;
- (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds¹⁴ [and in connection with other crimes within the jurisdiction of the Court];
- (i) enforced disappearance of persons;¹⁵
- (j) other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.¹⁶

¹³ It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.

¹⁴ This also includes, for example, social, economic and mental or physical disability grounds.

¹⁵ It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.

¹⁶ It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.

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[2. For the purpose of paragraph 1:

(a) extermination includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

(b) "deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

(c) ["torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person [in the custody or physical control of the accused] [deprived of liberty]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions [in conformity with international law]]

["torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) persecution means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law]

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(Crimes of terrorism

For the purposes of the present Statute, crimes of terrorism means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political,

¹⁷ The Preparatory Committee considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the Statute. The Preparatory Committee also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.

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philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

- (a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
- (b) Convention for the Suppression of Unlawful Seizure of Aircraft;
- (c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
- (d) International Convention against the Taking of Hostages;
- (e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- (f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel]

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

(a) murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

/...

[Crimes involving the illicit traffic in narcotic
drugs and psychotropic substances]

For the purposes of the present Statute, crimes involving the illicit traffic in narcotic drugs and psychotropic substances means any of the following acts committed on a large scale and in a transboundary context:

- (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in subparagraph (i) above;
- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the annex to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- (v) The organization, management or financing of any of the offences enumerated in subparagraphs (i), (ii), (iii) or (iv) above;
- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his or her actions;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

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N.B. The Court's jurisdiction with regard to these crimes will only apply to States parties to the Statute which have accepted the jurisdiction of the Court with respect to those crimes. Refer to article 9[22], option 1, paragraph 2, or option 2, paragraph 1.

Article 6[21]

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5[20] [(a) to (e) or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10[23]] [acting under Chapter VII of the Charter];]

(b) a complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 45[25];

[(c) the matter is brought by the Prosecutor, in accordance with article 46[25 bis].]

[2. [In the case of subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9[22] and] [if national jurisdiction is either not available or ineffective] [in accordance with article 11[35]] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

[¹⁸Article 7[21 bis]

Preconditions to the exercise of jurisdiction

Opening clause of paragraph 1

Option 1¹⁹

[In the case of article 6[21], subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of

¹⁸ This square bracket ends at the end of article 7[21 bis].

¹⁹ Options are not put in square brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.

/...

the Court over the crimes referred to in [article 5[20] (a) to (e) or any combination thereof] in accordance with article 9[22]:

Option 2

[In the case of article 6[21], subparagraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

[(a) [the State that has custody of the suspect with respect to the crime ("custodial State")] [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;]

[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) the State of which the victim is a national;]

[(e) the State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].]²⁰

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.]²¹

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may, by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

²⁰ This paragraph is relevant only to option 2 of the opening clause to paragraph 1.

²¹ Ibid.

/...

[²²Article 8[21 ter]²³

Temporal jurisdiction

1. The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

N.B. There is an interrelationship between this article and article 16[A bis] (Non-retroactivity).

[²⁴Article 9[22]

Acceptance of the jurisdiction of the Court

Option 1²⁵

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5[20], paragraphs [(a) to (d) or any combination thereof].

2. With regard to the crimes referred to in article 5[20] other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute; or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

²² This square bracket ends at the end of article 8[21 ter].

²³ The issues raised in this article deserve further reflection as to its place in the Statute.

²⁴ The square bracket ends at the end of paragraph 5 of this article.

²⁵ Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.

/...

3. If under article 7[21 big] the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9[7] of the Statute.]

Option 2

1. A State Party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 5[20] (a) to (e) or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 5[20] (a) to (e)] committed during a particular period of time.²⁶

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.²⁷

4. If under article 7[21 big] the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9[7] of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]

Further option

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)].

²⁶ This paragraph may also apply to option 1.

²⁷ Ibid.

[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.]

[²Article 10[23]

[[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6[21], [7[21 bis]] [and [9[22]]], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5[20] [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

1 bis. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

1 ter. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5[20] appear to have been committed.]

2.

Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5[20]] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

² This square bracket ends at the end of option 2 of paragraph 3.

/...

2 big. [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 2 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

2 ter. [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

[²⁹3. Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2

1. [Subject to paragraph 2 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and]; acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.
2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]
3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]]

²⁹ This square bracket ends at the end of paragraph 3 of option 2.

Article 10 bis [45[25]]³⁰

Complaint by State

1.

Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article 9[22] with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5[20], subparagraphs [(a) to (d) or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9[22] with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5[20] [(a) to (d) or any combination thereof]] appears to have been committed:

- (a) a State on the territory of which the act [or omission] in question occurred;
- (b) a State of the custody;
- (c) a State of the nationality of a suspect;
- (d) a State of the nationality of victims.]

[2. A State Party, which, for a crime under article 5[20] (e), has accepted the jurisdiction of the Court pursuant to article 9[22] and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.]³¹

³⁰ This article was moved here from part 5.

³¹ This provision is without any prejudice to the position of delegations with regard to "treaty crimes".

/...

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.]³²

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 45[25].]

[Article 10 ter [46[25 bis]]]³³

Prosecutor

The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5[20] (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]]³⁴

N.B. The terms "sufficient basis" used in this article (if retained) and "reasonable basis" in article 47[26] (1) should be harmonized.

[Article 10 quater

Information submitted to the Prosecutor

1. Upon receipt of information relating to the commission of a crime under article 5, submitted by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, non-governmental organizations, victims or their representatives or other sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules.

³² Further discussion on the content of a complaint may be necessary in the context of matters dealing with procedures.

³³ This article was moved here from part 5.

³⁴ The procedure to be followed by the Prosecutor in relation to this article may be discussed further.

/...

2. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 11, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction and admissibility of the case pursuant to article 12.

The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

3. If, after the preliminary examination referred to in paragraph 1, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.]

Further option for articles 6[21], 7[22], 10[23] and
10 bis [45[25]]³⁵

Article 6[21]

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 45[25];

[(b) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 46[25 bis]]; or

(b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council [acting under Chapter VII of the Charter of the United Nations].

³⁵ It was mentioned that although the approach merited consideration, strong reservations were expressed with regard to the references to the Security Council; the view was also expressed that the Court should not exercise jurisdiction unless States Parties gave their express consent.

/...

Article 7(22)

Acceptance of jurisdiction

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.
2. Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation], the Court may exercise its jurisdiction with respect to a crime referred to in article 5 provided that [one of] the following States [are Parties] [is Party] to the Statute or [has] [have] accepted the jurisdiction of the Court with respect to the crime in question in accordance with paragraph 3 below:
 - [(a) the State that has custody of the suspect with respect to the crime ("custodial State")] [the State of the nationality of the suspect];
 - (b) the State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
3. If the acceptance of a State that is not a Party to this Statute is required under paragraph 2 above, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

Article 10(23)

Role of the Security Council

- [1. The Court may not exercise its jurisdiction with respect to a crime of aggression unless the Security Council has first determined under Chapter VII of the Charter of the United Nations that the State concerned has committed an act of aggression. A determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of any person concerned.]
2. No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council[, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 10 bis [45(25)]

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed,

/...

requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

3. The Prosecutor shall notify the Security Council of all situations referred under this article.

Article 0 [24]

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

N.B. This article seems to be unnecessary in view of a similar text in paragraph 1 of article 12[36] (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted.

Article 11[35]

Issues of admissibility³⁶

The following draft text represents the results of informal consultations on article 11[35] and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

1[2]. Having regard to paragraph 3 of the preamble,³⁷ the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

³⁶ The present text of article 11[35] is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.

³⁷ Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.

/...

*³⁸

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint,³⁹ and a trial by the Court is not permitted under paragraph 2 of article 13[42];⁴⁰

**⁴¹

(d) the case is not of sufficient gravity to justify further action by the Court.⁴²

2[3]. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

³⁸ The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

N.B. In the context of this footnote, see also article 12[36] (2) (Challenges to the jurisdiction of the Court or the admissibility of a case).

³⁹ If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.

⁴⁰ It was noted that article 11[35] should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 13[42], as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 13[42] to determine whether the reference to article 13[42] was sufficient or whether additional language was needed in article 11[35] to address these situations.

⁴¹ Some delegations preferred the inclusion of the following subparagraph: "the accused is not liable under article 84[57] (Rule of speciality) to be prosecuted before or punished by the Court".

N.B. In the light of the text of article 84[57] (Rule of speciality), consideration should be given as to whether this footnote is still necessary.

⁴² Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.

/...

(a) the proceedings⁴ were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in article 5[20];

(b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3[4]. In order to determine inability in a particular case, the Court shall consider whether, due to a total or partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

Article 11 bis

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by public announcement and by notification to all States Parties.

2. Within [] days of the public announcement of such referral, a State may inform the Court that it is investigating its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the

⁴ The term "proceedings" covers both investigations and prosecutions.

/...

Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination. The Prosecutor's deferral to the State's investigation shall be open for review by the Prosecutor [six months] [one year] after the date of deferral.

3. A preliminary ruling of the Pre-Trial Chamber confirming the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned. If the preliminary ruling is appealed by the State, [two thirds] [all] of the judges of the Appeals Chamber must confirm that ruling before the Prosecutor may commence the investigation and seek indictments.

4. When the Prosecutor has deferred an investigation pursuant to section 2, the Prosecutor may request that the State concerned report periodically on the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

5. That a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge admissibility of a case under article 12⁴⁴ [or to withhold its consent to the exercise of jurisdiction under article 7].

Article 12[36]

Challenges to the jurisdiction of the Court or the admissibility of a case

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case and (b) may, on its own motion, determine the admissibility of the case pursuant to article 11[35].⁴⁵

2. Challenges to the admissibility of the case, pursuant to article 11[35], or challenges to the jurisdiction of the Court may be made by:

(a) an accused [or a suspect];⁴⁶

⁴⁴ Article 12 (4) should be revised to require a vote by two thirds of the judges of the Appeals Chamber to decide that a case is admissible.

⁴⁵ In the light of the wording to be adopted for article 12[36], several draft provisions of the Statute may have to be re-examined including article 47[26], paragraph 4, and article 51[27], paragraph 2 (b).

⁴⁶ The term "suspect" includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.

/...

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted⁴⁷

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.

In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 6[21],⁴⁸ [those non-State parties which have jurisdiction over the crimes]⁴⁹ as well as victims, may also submit observations to the Court.

3.⁵⁰ The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 11[35], paragraph 1[2] (c).⁵¹

⁴⁷ The final wording of this subparagraph will depend on the content of article 11[35].

⁴⁸ The final wording will depend on the content of article 6[21] (States, Security Council, Prosecutor).

⁴⁹ This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.

⁵⁰ It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

⁵¹ The final wording of this subparagraph will depend on the content of article 11[35].

/...

3 big. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity.⁵²

4. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.⁵³

[5. If the Court has decided that a case is inadmissible pursuant to article 11[35], the Prosecutor, may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 11[35] to render the case inadmissible no longer exist or that new facts arose.]

Article 13

Ne bis in idem

1. Except as provided in this Statute,⁵⁴ no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried before another court for a crime⁵⁵ referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3.⁵⁶ No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:

⁵² The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.

⁵³ The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure and Evidence.

⁵⁴ The phrase "Except as provided in this Statute" should be reviewed in light of the final text of article 75.

⁵⁵ It was noted that further consideration might be necessary on whether this paragraph should apply to conduct constituting a crime or a similar notion.

⁵⁶ Further consideration might be necessary in light of the final text of article 11.

/...

...⁵⁷

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

...⁵⁸

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

"The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it."

[Article 13 bis⁵⁹

Without prejudice to article 13, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty.]

⁵⁷ It was noted that further consideration might be necessary on whether there should be additional exceptions to the principle of ne bis in idem, such as failure to take account of the grave nature of the crime, at either the trial or the sentencing stage.

⁵⁸ The principle in article 70 that the Court may deduct time previously served in connection with conduct underlying the crime should be reviewed, as it was pointed out that the Court should, in principle, be obliged to deduct any such time.

⁵⁹ It was noted that further consideration of this article, in particular its content and placement, is needed.

/...

Article 14

Applicable law

1. The Court shall apply:

(a) in the first place, this Statute and its Rules of Procedure and Evidence;

(b) if necessary, applicable treaties and the principles and rules of general international law [, including the established principles of the law of armed conflict];

(c)⁶⁰

Option 1

failing that, general principles of law derived by the Court from national laws of legal systems of the world [, where those national laws are not inconsistent with this Statute and with international law and internationally recognized norms and standards].

Option 2

failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

(i) the national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(ii) if the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or

(iii) if the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the

⁶⁰ There was broad support for option 1. Some delegations, however, favoured the approach taken in option 2.

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prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.⁶¹

⁶¹ It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of nullum crimen sine lege. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 15. For example, article 15 (2) could be reformulated as follows:

"The provisions of article 5 shall be strictly construed and shall not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under it."