

DRAFT REPORT OF THE AD HOC COMMITTEE

Rapporteur: Ms. Kuniko Saeki (Japan)

C. Other issues pertaining to Jurisdiction

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2. Exercise of jurisdiction

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(b)

exercise of jurisdiction

1. A number of delegations expressed the view that, for practical reasons, only the consent of the State in whose territory the crime was committed or of the custodial State as provided in article 21 was necessary. They were in favour of keeping to the minimum the number of States whose consent would be needed for the international criminal court to exercise jurisdiction. They pointed out that the international criminal court could not conduct an effective prosecution without the cooperation of the territorial State. Nor could a prosecution be conducted unless the alleged offender was surrendered to the court by the custodial State. The point was further made that, under general international law, the custodial State was in a key position to determine who should prosecute a crime. It would be necessary to determine how much of this power the custodial State should cede to the international criminal court.

2. Some delegations however felt that the consent of the State of nationality of the accused should also be required, considering that some States may be constitutionally barred from extraditing their own nationals. Other speakers felt that the requirement of consent of the State of nationality would complicate the exercise of jurisdiction by the international criminal court in cases of multiple offenders.

3. The comment was also made that the question of State consent should be examined from the perspective of a basic goal of the planned court: to allow and to encourage States to exercise jurisdiction over the perpetrators of a particular crime. Only when such States were unable to exercise jurisdiction should the international criminal court be called upon to intervene. This approach was found by some delegations to be consistent with the concept of complementarity.

4. It was pointed out that the draft statute provided for two forms of consent: (i) a State may consent to the jurisdiction of the international criminal court by a declaration of general consent as provided for in article 22, paragraph 1 or (ii) by an ad hoc declaration as stipulated in article 22, paragraph 2. It was noted that the draft statute did not treat a third form of consent: consent with respect to particular crimes. A related issue, not yet considered, it was observed, was whether State consent was a precondition to prosecution by the international criminal court of a particular crime, and whether such consent was among the factors and elements to be considered by the court in determining whether it should exercise jurisdiction or yield to national jurisdiction. In this context, the comment was made that the draft statute should distinguish between consent to prosecution and consent to jurisdiction, inasmuch as consent to jurisdiction might not always be consent to prosecution in a particular case.

5. It was further noted that, insofar as consent implied cooperation, various situations had to be envisaged. The consent of the territorial State might not be crucial in certain circumstances, e.g., peacekeeping operations or belligerent occupation. There were also situations, e.g., belligerency between two States where the same State was at once the custodial State, the territorial State and the State of nationality.

(c) Trigger mechanism

6. As regards the complaint envisaged as a trigger mechanism under articles 21 and 25, some delegations expressed the view that any State Party to the statute should be entitled to lodge a complaint with the prosecutor with respect to the serious crimes under general international law that were of concern to the international community as a whole referred to in article 20 (a) to (d). It was further suggested that complaints with respect to the crime of genocide as a crime under general international law should not be limited to States Parties to the relevant Convention. However, the view was also expressed that only the States concerned which had a direct interest in the case and were able to provide relevant documents or other evidence should be entitled to lodge complaints. It was further suggested that the complaint should not automatically trigger the jurisdiction of the court without notice being given to the States concerned and a determination having been made as to whether any State was willing and able to effectively investigate and prosecute the case.

7. Some delegations felt that the role of the prosecutor should be more fully elaborated and expanded to include the initiation of investigation or prosecution in the case of serious crimes under general international law that were of concern to the international community as a whole in the absence of a complaint. These delegations were of the view that this expanded role would enhance the independence and autonomy of the prosecutor, who would be in a position to work on behalf of the international community rather than a particular complainant State or the Security Council. In this regard, attention was drawn to the limited role played by State complaints in the context of certain human rights conventions. Reference was also made to the more prominent role assigned to the prosecutor of the ad hoc tribunals, who was authorized to initiate an investigation ex officio or on the basis of information obtained from any source, including States, international organizations, and nongovernmental organizations.

8. There were different views as to whether the proposed expanded role of the prosecutor would be consistent with the functions of the procuracy as envisaged in article 12 of the draft statute which was similar to the corresponding provisions of the statutes of the ad hoc tribunals. It was suggested that consideration should be given to the implications of such a role on other provisions of the draft statute, including those relating to the question of determining the admissibility of a case under article 35. Opinions also differed as to whether, in the absence of a State complaint, it would be appropriate for the prosecutor to initiate an investigation: according to one view, the absence of such a complaint was an indication that the crime was not of sufficient gravity or concern to the international community; according to another view, it might mean that the States concerned were unable or unwilling to pursue the matter.

9. With regard to article 26, the view was expressed that a higher threshold should be required for the initiation of an investigation following a complaint or, alternatively, that the Prosecutor should be given broader discretion to determine whether to initiate an investigation.

10. As regards article 27, the remark was made that the authority of the prosecutor to file indictments under the article required further consideration with respect to the principle of complementarity.

11. There was a further suggestion that the victims of crimes or their relatives should be authorized to trigger the jurisdiction of the court if three criteria were met, namely (1) the crimes were within the jurisdiction of the court; (2) the territorial State was a party to the statute and had accepted the jurisdiction of the court with respect to the crime; and (3) the court was entitled to initiate an investigation or prosecution in conformity with the principle of complementarity. In this regard, it was also suggested that a special commission should be established within

the court to review complaints filed by individuals and to determine before the initiation of any further action whether the necessary criteria were met so as to avoid overloading the court.

12. Several delegations emphasized the relationship between the question of the trigger mechanism for the exercise of jurisdiction and other issues such as the position of State consent requirements and that of the mechanism by which States would indicate their consent.