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

ADDENDUM

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PART 5. APPEAL AND REVIEW

Article 54

Appeal against judgement or sentence

1. [The Prosecutor and] the convicted person may, in accordance with the Rules, appeal against a decision under Articles 50, 51 or 52 on any of the following grounds:

- (a) material error of law;
- (b) error of fact which may occasion a miscarriage of justice; or
- (c) manifest disproportion between the offence and the punishment.

2. Unless the Chamber otherwise orders, a convicted person shall remain in custody pending an appeal, and provisional measures may be taken to ensure that the judgement of the Chamber, if affirmed, can be promptly enforced.

Commentary

(1) The convicted person may appeal: (1) the judgement, on the grounds that it is based on a material error of law or an error of act which may occasion a miscarriage of justice; or (2) a sentence, on the grounds that the punishment is manifestly disproportionate to the offence. The Nuremberg Charter provided that the decisions of the Tribunal were final and not subject to review. However, more recent developments militate in favour of providing for the right of appeal. The United Nations Covenant on Civil and Political Rights in paragraph 5 of Article 14 states as follows: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Furthermore, this right is provided for in Article 25 of the Statute of the International Tribunal for the former Yugoslavia.

(2) Consideration was also given to allowing the Prosecutor appeal a decision on the same grounds. Some members, however, expressed concern about allowing the Prosecutor to appeal a decision of the Court, notably an acquittal, except in very limited circumstances and possibly at an earlier stage of the proceedings when the Court might decide to dismiss the case based on insufficient evidence before reaching a judgement on the merits. This is why the words ["The prosecutor and] appear between brackets in the text. One member believed that in such cases the Appeals Chamber should either deny the

appeal or remand the case to the Trial Chamber for further action, to the extent that such action would be consistent with the principle non bis in idem.

(3) A person who has been convicted of a crime must remain in custody while the appeal is pending, unless the Trial Chamber decides otherwise.

Provisional measures may be taken while the appeal is being considered to facilitate the prompt enforcement of the judgement and sentence of the Trial Chamber in the event that the decision of the Appeals Chamber is affirmative. The Working Group decided to return to the question of time limits for filing an appeal.

Article 55

Proceedings on appeal

1. As soon as notice of appeal has been lodged, the Bureau shall take steps in accordance with the Rules to constitute an Appeal Chamber consisting of seven judges who did not take part in the judgment contested.
2. The President or a Vice-President shall preside over an Appeal Chamber.
3. The Appeal Chamber has all the powers of the trial Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal.
4. The decision of the Appeal Chamber shall be by majority, and shall be given in public.
5. Subject to Article 56, the decision of an Appeal Chamber is final.

Commentary

- (1) The Bureau must establish an Appeals Chamber consisting of seven judges who did not participate in the consideration of the case by the Trial Chamber, in accordance with the rules of the Court, as soon as the notice of appeal has been lodged with the Registrar. One member was opposed to conferring the power of appointment on the members of the Bureau for the same reasons expressed with respect to Article 36.
- (2) The Appeals Chamber, as the higher chamber, would have all the powers of the Trial Chamber, as provided in this Statute, and would also have the power to affirm, reverse or revise the decision of the lower court.
- (3) The Appeals Chamber would decide the issues raised in the appeal based on the opinion of a majority of the judges. As in the case of a decision of a trial chamber, the Statute does not provide for dissenting or separate

opinions to the decisions of the Appeals Chamber. The decisions would be delivered at a public proceeding and would be final, subject to the possibility of revision under Article 56.

(4) Some members believed that there should be a separate and distinct Appeals Chamber, such as the one provided for in Article 11 of the Statute of the International Tribunal for the former Yugoslavia. This would be consistent with the principle of the double degree of jurisdiction under which judges of the same rank did not review each others decisions to avoid undermining the integrity of the appeal process as a result of the judges' hesitancy to reverse decisions to avoid the future reversal of their own decisions. However, the limited structure of the Tribunal was not conducive to reserving a number of judges to sit in an appeals chamber, which would severely limit the number of judges available for the trial chambers. Another alternative would be to have appeals heard by all of the judges of the Court meeting in plenary, except those who participated in the lower court decision. While some members felt that the appellate jurisdiction must as a matter of principle be exercised by a separate and distinct higher court, others felt that it would be sufficient to establish a higher chamber within the hierarchy of the Tribunal which would be the highest jurisdiction with competence in international criminal law comprised of the world's most eminent jurists.

The Working Group invited the Commission and the General Assembly to comment on this question.

Article 56

Revision

The convicted person [or the Prosecutor] may, in accordance with the rules of the Court, apply to the Court for revision of its judgement on the ground that a new fact, not known at the time of the trial or at the time of the appeal, which could have been a decisive factor in the judgement of the Court, has since then been discovered.

Commentary

A person convicted of a crime or the Prosecutor may, in accordance with the rules to be adopted by the Court, apply for revision of a judgement on the ground that a new fact, which was not known at the time of the trial or appeal and which could have been a decisive factor in the judgement, has since been

discovered. The Working Group considered that while appeals should be heard by a different chamber, revisions should be heard by the same chamber that issued the earlier decision.

PART 6. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 57

International cooperation and judicial assistance

1. States parties shall cooperate with the International Criminal Tribunal in connection with criminal investigations relating to, and proceedings brought in respect of, crimes within the Court's jurisdiction.

2. States parties which have accepted the jurisdiction of the Court with respect to a particular crime shall respond without due delay to any request for international judicial assistance or an order issued by the Court, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Criminal Tribunal, in accordance with article 62.

(f) any other request that may facilitate the administration of justice, including provisions or interim measures as required.

Commentary

(1) The effective functioning of the International Tribunal would be dependent upon the international cooperation and judicial assistance of States. States Parties to the Statute would have an obligation to cooperate with criminal investigations conducted by the Prosecutor and to respond without undue delay to any request or order of the Court regarding, for example, the location of persons, the taking of testimony, the production of evidence, the service of documents, the arrest or detention of persons, or the surrender or transfer of the accused.

(2) This article is similar to article 29 of the Statute of the International Tribunal for the former Yugoslavia. Whereas all States would have an obligation to cooperate with the International Tribunal established by the Security Council under Chapter VII of the Charter, paragraph 1 of the present

article recognizes the general obligation of all States parties to the Statute to cooperate with and provide judicial assistance to the Tribunal. States parties which have also accepted the jurisdiction of the Court with respect to the particular crime would be required to respond without undue delay to a request or order issued by the Court with respect to measures such as those listed in paragraph 2. In connection with this article, the Working Group also took account of the Model Treaty on Mutual Assistance in Criminal Matters adopted by the General Assembly in resolution 45/117.

Article 58

Cooperation with States non-Parties to the Statute

States non-Parties to the present Statute may provide the International Criminal Tribunal with the judicial assistance and cooperation under articles 57 (2) or 61 on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Commentary

This article recognizes that all States as members of the international community have an interest in the prosecution, punishment and deterrence of the crimes referred to in the Statute. Thus, even those States which are not parties to the Statute are encouraged to cooperate with and to provide assistance to the Tribunal on the basis of comity, a unilateral declaration which may be general or specific in character, an ad hoc arrangement for a particular case or any other type of agreement between the State and the Tribunal.

Article 59

Consultation

The States parties shall consult promptly, at the request of any one of them, concerning the application or the carrying out of the provisions on international cooperation and judicial assistance, either generally or in relation to a particular case.

Commentary

States parties are required to consult promptly at the request of any one of them concerning the application or implementation of the provisions on international cooperation and judicial assistance, either with respect to a particular case or a general matter concerning the Tribunal. This is intended to avoid undue delays in the functioning of the Tribunal which may require the

cooperation of a number of States to effectively perform its functions either in a particular case or in general.

Article 60

Communications and contents of documentation

1. Communications in relation to this Statute shall normally be in writing and shall be between the competent national authority and the Register of the Court.
2. Whenever appropriate, communications may also be made through the International Criminal Police Organization (ICPO/INTERPOL), in conformity with arrangements which the Tribunal may make with this organization.
3. Documentation pertaining to international cooperation and judicial assistance shall include the following:
 - (a) the purpose of the request and a brief description of the assistance sought, including the basis and legal reasons for the request;
 - (b) information concerning the individual who is the subject of the request;
 - (c) information concerning the evidence sought to be seized, describing it with sufficient detail to identify it, and describing the reasons for the request and the justification relied upon;
 - (d) description of the basic facts underlying the request; and
 - (e) information concerning the charges, accusations or conviction of the person who is the subject of the request.
4. All communications and requests shall be made in any of the working languages determined by the present Statute.
5. If the requested State considers that the information contained in the request is not sufficient to enable the request to be dealt with, it may request additional information.

Commentary

- (1) This article establishes the general rule that communications should normally be between the Registrar and the competent national authorities of the State concerned and should be in writing in one of the working languages of the Tribunal.
- (2) It also recognizes the possibility of communications between the Tribunal and the International Criminal Police Organization, which may be particularly appropriate in connection with criminal investigations.

(3) Any request or order must be accompanied by a sufficient explanation of its purpose and legal basis as well as appropriate documentation, in accordance with paragraph 3 of this article. Upon receipt of such a communication, the State may ask the Tribunal to provide additional information required to respond to the request or comply with the order.

(4) This article is based on a similar provision contained in article 5 of the Model Treaty on Mutual Assistance in Criminal Matters.

Article 61

Provisional measures

In cases of urgency, the Court may request of the State concerned any or all of the following:

(a) to provisionally arrest the person sought for surrender;

(b) to seize evidence needed in connection with any proceedings which shall be the object of a formal request under the provisions of this Statute;

or

(c) to take as a matter of urgency all necessary measures to prevent the escape of a suspect, injury to or the intimidation of a witness, or the destruction of evidence.

Commentary

When circumstances so require, the Court may also request the State concerned to take provisional measures, including measures to prevent the accused from leaving its territory or the destruction of evidence located in its territory. In connection with this article, the Working Group considered article 9 of the Model Treaty on Extradition adopted by the General Assembly in resolution 45/116 as well as article 55 of the Proposal for an International War Crimes Tribunal for the Former Yugoslavia prepared under the auspices of the Conference on Security and Cooperation in Europe.

Article 62

Transfer of an accused person to the Tribunal

1. As soon as practicable after the admission of the indictment under article 31, the Prosecutor shall seek from the Bureau or, if a Chamber has been constituted, from the Chamber, an order for the arrest and surrender of the accused.

2. The Registrar shall transmit the order to any State on whose territory the accused person may be found, and shall request the cooperation of that State in the surrender of the accused.

3. On receipt of a notice under paragraph (2):

(a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question shall take immediate steps to arrest and surrender the accused person to the Court;

(b) a State party which is also a party to the treaty establishing the crime in question but which has not accepted the Court's jurisdiction over that crime shall, if it decides not to surrender the accused to the Tribunal, forthwith refer the matter to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its constitutional processes, take steps to arrest and surrender the accused person to the Tribunal.

4. The surrender of an accused person to the Tribunal constitutes, as between the States parties to this Statute, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case submitted to its competent authorities for the purpose of prosecution.

5. A State party should, as far as possible, give priority to a request under paragraph (2) over requests for extradition from other States.

6. A State party may delay complying with paragraph (3) if the accused is in its custody and is being prosecuted for a serious offence or is serving a sentence imposed by a court for an offence.

7. A State party may, within 45 days of receiving an order under paragraph (2), file a written application with the Registrar requesting the setting aside of the order or the quashing of the indictment on specified grounds. Pending a decision of the Chamber on the application, the State concerned shall take all necessary provisional measures under article 61.

Commentary

(1) The Bureau or a Chamber, acting on behalf of the Court, would issue an order at the request of the Prosecutor for the arrest or transfer of the accused once the indictment has been affirmed. The order would be transmitted by the Registrar to any State on whose territory the accused may be found.

(2) Whereas the term "surrender" is used to refer to situations in which the accused is to be arrested and delivered to the Tribunal for trial, the term "transfer" is used to refer to situations in which the person is already in

custody and is to be transferred to the Tribunal for trial. With respect to the latter situation, the person may have already been arrested and be awaiting trial for criminal charges under national law or may have already been convicted for such a crime and be serving a term of imprisonment. With respect to the latter situation, the trial of such a person would be subject to the principle non bis in idem, in accordance with article 44.

(3) Paragraph 3 of this article provides for the surrender or transfer of an accused person by a State in three different situations, as follows: (a) a State party which has accepted the jurisdiction of the Court with respect to the crime in question must take immediate steps to arrest and transfer the accused person to the Court; (b) a State party which is also a party to the relevant treaty defining the crime in question but has not accepted the Court's jurisdiction must transfer or prosecute the accused; and (c) a State party which is not a party to the relevant treaty must consider whether its internal law permits the arrest and surrender of the accused.

(4) A State party should, to the extent possible, give priority to requests from the Tribunal for the surrender of an accused over extradition requests from other States, according to paragraph 5 of this article. However, only a State party which has accepted the jurisdiction of the Court with respect to the particular crime would be obliged to do so under paragraph 3 (a). Other States parties would be required to prosecute the accused if they decided not to surrender the person for trial by the Tribunal. The Working Group decided to return to the question of whether such a State should also be allowed to extradite the accused to another State for prosecution rather than surrendering the person to the Tribunal. The surrender of a person to the Tribunal would constitute sufficient compliance with any treaty obligation to prosecute or extradite a person suspected of committing a crime referred to in the treaty, as between the States parties to the Statute.

(5) This article, as presently drafted, did not envisage the suspension of criminal proceedings in a national court to allow a person to be transferred to the Tribunal for trial or the transfer of any such proceedings to the Tribunal, although the proceedings may relate to acts constituting crimes referred to in this statute. A State party may delay, rather than ignore, complying with a request for a person who is being prosecuted for a serious crime or is serving a sentence imposed by a court for an offence, in contrast with a person who is arbitrarily detained or whose presence is not required in

connection with the administration of criminal justice in that State. As regards the former situation, the present statute differed from the Statute of the International Tribunal for the former Yugoslavia which established the primacy of the International Tribunal over the national courts and provided that a State may be requested to defer to the competence of the International Tribunal with respect to a particular individual.

(6) A State party which receives an order pursuant to this article may request that it be set aside and challenge the indictment on specified grounds, possibly relating to the jurisdiction of the Court or the factual basis for the indictment. As discussed in connection with Article 37, the Working Group will consider at a later stage the appropriate judicial organ for deciding such matters.

Article 63

Rule of speciality

1. A person delivered to the Tribunal shall not be subject to prosecution or punishment for any crime other than that for which he has been surrendered.
2. Evidence tendered shall not be used for any other purpose than for the purpose for which it was tendered.
3. The Registrar may request the State concerned to waive the requirements of paragraphs (1) or (2), for the reasons and purposes specified in the request.

Commentary

- (1) This provision sets forth the rule of speciality under which a person delivered to another jurisdiction can only be prosecuted or punished for the crime indicated in the initial request, according to paragraph 1.
- (2) Similarly, evidence tendered to another jurisdiction can only be used for the purpose stated in the original request, according to paragraph 2.
- (3) However, the Registrar, acting on behalf of the Court, may request the State concerned to waive such limitations with respect to either persons or evidence, as provided in paragraph 3.
- (4) The Working Group considered article 14 of the Model Treaty on Extradition concerning the rule of speciality in connection with paragraph 1 and it took into account article 8 of the Model Treaty on Mutual Assistance in Criminal Matters concerning limitations on the use of evidence.

PART 7. ENFORCEMENT OF PENALTIES

Article 64

Recognition of judgements

A State party to the Statute undertakes to recognize and give effect to the judgement of the Court. Where necessary or appropriate, States Parties shall enact specific legislative and administrative measures necessary to comply with the obligation to recognize the judgement of the Court.

Commentary

States parties to the Statute must recognize and give effect to judgements of the Court and, where necessary, enact the national legislative and administrative measures required to do so, in accordance with article 64. This article recognizes that, as a general rule, States will not enforce the criminal or penal judgements of other States in the absence of a treaty. In this regard, attention may be drawn to paragraph 3 (b) of article 1 of the Model Treaty on Mutual Assistance in Criminal Matters and the Optional Protocol thereto concerning the proceeds of crime, as well as the European Convention on the International Validity of Criminal Judgements (1970 Eur.T.S. No. 70).

Article 65

Enforcement of sentences

1. States parties to the Statute are requested to offer facilities for imprisonment in accordance with this Statute.
2. Imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Tribunal their willingness to accept convicted persons. Such imprisonment shall be subject to the supervision of the Court.

Commentary

The prison sentences imposed by the Court are to be served in the prison facilities of a State designated by the Court, and subject to its supervision. Since the limited institutional structure of the Tribunal, as presently envisaged, would not include a prison facility, States would be requested to offer the use of such facilities to the Tribunal. While the prison facilities would continue to be administered by the national authorities, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of Prisoners

adopted under the auspices of the United Nations. The imprisonment of the convicted person would be subject to the supervision of the Court, the details of which may be elaborated in the rules to be adopted by the Court. For example, the rules could establish the procedures under which a convicted person could seek redress for mistreatment or provide for periodic reports by the national authorities, taking into consideration the limited institutional structure of the Tribunal.

Article 66

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Registrar.
2. If a notification has been given under paragraph (1), the prisoner may, subject to and in accordance with the Rules, apply to the Registrar seeking an order for pardon, parole or commutation of the sentence.
3. If the Bureau decides that an application under paragraph (2) is apparently well-founded, it shall convene a Chamber to consider and decide whether in the interests of justice the person convicted should be released and on what basis.
4. When imposing sentence, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of the State which, under article 65 (2), is responsible for implementing the sentence. In such a case the consent of the Court is not required to subsequent action of that State in conformity with those laws, but the Registrar shall be given at least 45 days notice of any decision which might materially affect the terms or extent of the imprisonment.
5. Except as provided in paragraphs (3) and (4), a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Commentary

The Working Group felt that the Statute should provide for the possibility of pardon, parole and commutation of sentence. Some members felt that such questions should be decided on the basis of a uniform standard, while other members felt that consideration must be given to the efficient administration of justice by the national authorities.

This article provides that the State where the person is imprisoned must notify the Court if the person would be eligible for pardon, parole or

commutation of sentence under the law of that State, in accordance with paragraph 1. Following a notification received under paragraph 1, the prisoner would apply to the Registrar for an order of the Court granting pardon, parole or commutation of the sentence. The Bureau would convene a Chamber to consider the matter if the application was apparently well-founded.

In imposing a sentence, the Court may also provide that the sentence is to be governed by specified laws as to these matters. In such cases, the Registrar must be notified prior to any decision that would materially affect the terms or extent of imprisonment, but the consent of the Court would not be required.

Except as provided in this article, a person should not be released before the sentence imposed by the Court has been served.
