



The European Law Students' Association

REPORT

# THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT



10<sup>TH</sup> SESSION  
1-12 JULY 2002

UNITED NATIONS HEADQUARTERS  
NEW YORK CITY

# TABLE OF CONTENTS

## **Introduction**<sup>1</sup>

Key Information	4
Items of the agenda, session 1 - 10	6
Documents, session 10	7
Background - The International Criminal Court	13
Background - The ICC PrepCom at a glance	17

## **Working Group Reports, 10<sup>th</sup> session**

Financial issues - Remuneration of Judges	18
Financial issues - Victims Trust Fund	20
First Year Budget <sup>2</sup>	27
Assembly of States Parties, Preparatory Documents <sup>3</sup>	35
The Crime of Aggression <sup>4</sup>	45

## **Annex I**<sup>5</sup>

The International Criminal Court - an introductory report	55
Guide to the Rome Statute (the ICC treaty)	61
History of the ICC	63

## **Annex II**

Further Reading	65
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<sup>1</sup> Introductory chapters; by Espen Rostrup Nakstad (Head of Delegation)

<sup>2</sup> First Year Budget & Financial issues; report by Connie Schneider, Johanna Hautakorpi, Roberta Ferrario

<sup>3</sup> Assembly of States Parties - Preparatory Documents; report by Matthias Goldmann, Andreas Stomps

<sup>4</sup> The Crime of Aggression; report by Ann Swampillai, Heidi Bentzen, Myriam Bouazdi

<sup>5</sup> Annex I – an introductory report to the ICC Preparatory Commission; by Espen Rostrup Nakstad

## FINAL PREPARATORY COMMISSION IN NEW YORK

12 July 2002

*Dear friends,*

On 1 July 2002 the Rome Statute entered into force, establishing the world's first permanent international criminal court in The Hague. Its creation is one of the best examples of what can be achieved through strong cooperation among governments, international organizations and civil society groups. The European Law Students' Association is proud to have been part of the process from the early meetings of the Preparatory Committee in 1995, through the 1998 treaty conference, to the final session of the Preparatory Commission for the International Criminal Court in New York in July 2002. It is time to look back - but also to look ahead - as the centre of events moves to the European continent and The Netherlands.

It is truly remarkable that only four years have passed since the international community first met at the Rome Diplomatic Conference of Plenipotentiaries in an effort to strengthen international justice mechanisms and bring an end to impunity. At the time, the fifty students representing ELSA International thought it impossible that five weeks of negotiations would result in the adoption of a treaty. Yet, on 17 July 1998 the Rome Statute was adopted by an overwhelming majority of states, making July 17<sup>th</sup> a new "international day of justice". There have been many obstacles to the ICC process, however, and predictions were made that it would be decades before enough governments would make the political commitment to bring the treaty into force. Still, a new epoch in international justice arrived on 11 April 2002, less than four years after the creation of the treaty, with 66 instruments of ratification deposited and enter into force of the treaty on 1 July 2002.

The Preparatory Commission (PrepCom) has drafted annexes to the ICC treaty that will enhance a swift and fast change into action as the Court is being established in The Hague. At the first meeting of the Assembly of States Parties (ASP) in September 2002, the commission's recommendations will be adopted and provide management oversight to the Presidency, Prosecutor and Registrar regarding the administration of the Court. Much work remains, however, to ensure that the Court will be as fair, effective and independent as possible. The annual meetings of the ASP will therefore continue to discuss "PrepCom issues" such as the Court's rules of procedure and budgets, the ASP Preparatory Documents and the Courts' cooperation with the United Nations. It has also been decided that the Crime of Aggression will continue to be discussed in the future and the September meeting agenda is already packed.

This report from the European Law Students' Association has been compiled in order to give both background knowledge of the International Criminal Court and a more detailed presentation of the proceedings of the Commission at its 10<sup>th</sup> and final session. It is our hope that lawyers and students with a general interest in international law and international criminal law will take interest in it. All contributions have been prepared by members of ELSA's PrepCom delegation and are based on their individual experiences as members of NGO legal expert teams. A special introductory report to the ICC and a guide to the Rome statute are included (Annex I). We encourage new readers to study these documents carefully before getting to grips with the reports itself.

Special thanks are due to the CICC staff in New York, its convenor Bill Pace, program manager Jayne Stoyles and legal advisor Jennifer Schence; to Kate Aleksidze, Vice President S&C of ELSA International, for supporting the work of the team and for helping to make ELSA's contribution to the ICC project continue; to ELSA's international legal research groups; to the PrepCom's Bureau and chairman Philip Kirsch; to Professor Benjamin Ferencz for his long-time support; and to all members of previous ELSA delegations who have done outstanding work at the first nine sessions.

On behalf of the ELSA delegation to the 10<sup>th</sup> session of the ICC Preparatory Commission,

**Espen Rostrup Nakstad**

Head of Delegation

### ELSA Member and Observer Groups

Albania  
Austria  
Belgium  
Bosnia and  
Herzegovina  
Bulgaria  
Croatia  
Czech Republic  
Denmark  
Estonia  
Finland  
France  
Georgia  
Germany  
Greece  
Hungary  
Iceland  
Ireland  
Italy  
Kazakhstan  
Latvia  
Lithuania  
Republic of  
Macedonia  
Malta  
The Netherlands  
Norway  
Poland  
Portugal  
Romania  
Russian Federation  
Slovak Republic  
Slovenia  
Spain  
Sweden  
Switzerland  
Turkey  
Ukraine  
United Kingdom  
Yugoslavia

## KEY INFORMATION

### FIRST – NINTH SESSION ITEMS

RPE	Rules of Procedure and Evidence <sup>6</sup>	finalised	June 2000
EoC	Elements of Crimes	finalised	June 2000
ICC-UN	A Relationship Agreement between the Court and the UN	finalised	Oct 2001
APIC	An Agreement on Privileges and Immunities of the Court	finalised	Oct 2001
RP/ASP	The Rules of Procedure of the Assembly of States Parties	finalised	Oct 2001
FR	Financial Regulations	finalised	Oct 2001
FR	Financial Rules	finalised	Apr 2002
HQA	Basic principles governing a Headquarters Agreement	finalised	Apr 2002

### TENTH SESSION ITEMS

CA	Proposals for a provision on the Crime of Aggression	10 <sup>th</sup> session	July 2002
ASP-PD	Assembly of States Parties - Preparatory Documents	10 <sup>th</sup> session	July 2002
FYB	Budget for the Court's first operational year	Finalised	July 2002
FI-VTF	Financial issues - Victims Trust Fund	Finalised	July 2002
FI-RJ	Financial issues - Remuneration of judges, the Prosecutor and Registrar	Finalised	July 2002

### AVAILABLE DOCUMENTS

UN	Proceedings of the PrepCom at its 10 <sup>th</sup> session 1-12 July 2002	<a href="http://www.un.org">www.un.org</a>
CICC	Report from the 10 <sup>th</sup> session of the ICC PrepCom, July 2002	<a href="http://www.iccnw.org">www.iccnw.org</a>
ELSA	Report, ninth and tenth session of the ICC PrepCom 2002 <sup>7</sup>	<a href="http://www.elsa.org">www.elsa.org</a>

### ELSA DELEGATION – TENTH SESSION

Johanna Hautakorpi	(Finland)	<a href="mailto:hautakor@mappi.helsinki.fi">hautakor@mappi.helsinki.fi</a>
Myriam Bouazdi	(France)	<a href="mailto:myrounette@aol.com">myrounette@aol.com</a>
Andreas Stomps	(Germany)	<a href="mailto:stomps@web.de">stomps@web.de</a>
Matthias Goldmann	(Germany)	<a href="mailto:matthiasgoldmann@gmx.de">matthiasgoldmann@gmx.de</a>
Connie Schneider	(Germany)	<a href="mailto:connieschneider@gmx.net">connieschneider@gmx.net</a>
Roberta Ferrario	(Italy)	<a href="mailto:ferrario@tiscali.it">ferrario@tiscali.it</a>
Heidi Bentzen	(Norway)	<a href="mailto:bentzen@jusstud.uio.no">bentzen@jusstud.uio.no</a>
Silvia Martis	(Romania)	<a href="mailto:silviamartis@yahoo.com">silviamartis@yahoo.com</a>
Ann Swampillai	(United Kingdom)	<a href="mailto:aswampillai@hotmail.com">aswampillai@hotmail.com</a>
Espen Rostrup Nakstad	(Norway) - Head of Delegation	<a href="mailto:espenn@gmx.net">espenn@gmx.net</a>

**The International Criminal Court (ICC)** is the world's first permanent institution capable of investigating and trying individuals accused of war crimes, crimes against humanity and genocide. The ICC is complementary to national courts and its jurisdiction is not retroactive.

**The Preparatory Commission (PrepCom)** has convened at UN headquarters to finalise the work of the ICC treaty conference, draft annexes to the ICC statute and develop documents that will enhance a swift and fast change into action once the Court is established in The Hague.

<sup>6</sup> Rules of Procedure and Evidence; PCNICC/2000/1/add.1 - Elements of Crimes; PCNICC/2000/1/add.2

<sup>7</sup> This report is available at the following web sites; [www.elsa.org](http://www.elsa.org) - [www.iccnw.org](http://www.iccnw.org) - and via [elsa@brutele.be](mailto:elsa@brutele.be)

## NGO LEGAL EXPERT TEAMS <sup>8</sup>

Legal Expert Teams	Team leaders	Deputies	Members*
Crime of Aggression	Jutta Bertram-Nothnagel Daniel Nsereko	Ann Swampillai	Heidi Bentzen Myriam Bouazdi
Preparatory Documents/ Assembly of States Parties	Thordis Ingadottir	Matthias Goldmann	Andreas Stomps Silvia Martis
First Year Budget/ Remaining Financial Issues	Carla Ferstman John Washburn Jonathan O'Donohue	Connie Schneider	Johanna Hautakorpi Roberta Ferrario

\* all members not listed

## OFFICERS AND COORDINATORS OF THE PREP COM

### The Bureau

Chairman	Philippe Kirsch (Canada)
Vice-Chairmen	Enver Daniels (South Africa) George Winston McKenzie (Trinidad&Tobago)
Rapporteur	Mirza Kusljagic (Bosnia & Herzegovina) Salah Suheimat (Jordan)

### PrepCom Working Groups

Assembly of States Parties Prep. Documents	Saeid Mirzaiee-Yengejeh (Iran)
First-Year Budget	Valentin Zellweger (Switzerland)
Victims and witnesses Trust Fund	Gaile Ramoutar (Trinidad and Tobago)
Remuneration of judges, Prosecutor & Registrar	John Holmes (Canada)
The Crime of Aggression	Silvia Fernandez de Gurmendi (Argentina)

### Coordinators

## TIME-LINE 2002-2003

The first annual meeting of the ASP	3-10 Sept. 2002 (UN headquarters)
Elections of prosecutor and judges	Jan - Feb 2003
Swearing in ceremony & election of President	Feb - Mar 2003
Appointment of the Registrar of the Court	Mar - Apr 2003
The ICC in operation	Mid-2003

**The European Law Students' Association (ELSA)** is the world's largest independent law students' association. It comprises a membership in excess of 25 000 students and recent graduates who are interested in law and have demonstrated commitment to international issues. ELSA operates primarily through its local groups, which are located at more than 200 universities throughout 39 countries in Europe.

ELSA is a member of the **steering committee** of the NGO Coalition for the International Criminal Court.

<sup>8</sup> The teams provide daily oral reports on developments of the PrepCom working groups, help guide the Coalition's strategy in responding to these developments, produce reports on the document progress achieved and goals yet to be addressed by WGs.

# ITEMS OF THE AGENDA, 1ST – 10TH SESSION OF THE PREPARATORY COMMISSION<sup>9</sup>

<i>Item</i>	<i>Comments</i>
RPE - The Rules of Procedure and Evidence	The rules cover such issues as the composition and administration of the Court; penalties for crimes; obligations of international cooperation and assistance; enforcement of sentences.
EoC - The Elements of Crimes	The elements shall assist the Court in the interpretation and application of articles 6, 7 and 8; genocide, crimes against humanity, war crimes (not binding guidelines). By June 2000 the Commission identified the elements that constitute these crimes.
ICC-UN - A Relationship Agreement between the Court and the United Nations	The Rome Statute Art.2 states that the Court shall be brought into relationship with the United Nations through an agreement. The agreement covers such issues as; the independence of the Court, the integrity of the Statute; and institutional cooperation between the Court and UN.
APIC - An Agreement on Privileges and Immunities of the Court	Privileges and immunities safeguard the integrity and autonomy of any court. The scope of exploitation is huge (reprisals, prosecution) as the ICC will exercise jurisdiction across borders, within areas of conflict and against high level government officials. Therefore, different levels of privileges and immunities are provided depending on the risk of undue influence and the individual importance in the attainment of a just result.
RP/ASP - The Rules of Procedure of the Assembly of States Parties	The rules are applicable to the work of any Review Conference in accordance with article 121, paragraph 2, and article 123 of the Statute. Main issues; the observers at the Assembly, UN participation in the meetings of the Assembly Secretariat.
HQA - Basic principles governing a headquarters agreement	These are a set of principles and not the headquarters agreement itself. Therefore, they do not require the same degree of precision or detail that the agreement itself will require.
FRR - Financial Regulations and Rules	ICC is an independent organization established by a treaty, and does not enjoy institutional support. It will therefore need to establish and operate its own financial system. Most financial matters related to the Court and the meetings of the Assembly of State Parties, including its Bureau and subsidiary bodies, are governed by the Statute and the Financial Rules and Regulations adopted by the Assembly of State Parties. (Article 113 of Statute.) Main issues; Funding of the Court and the ASP, Committee on Budget and Finance, Draft Financial Regulations, Trust fund for Victims.
FYB – A Budget for the Court's First Operational Year	The budget is critically important for any institution and for an operational Court in particular. <i>See Working Group report from the 10<sup>th</sup> session.</i>
CA - The Crime of Aggression	The PrepCom is responsible for; drafting a definition of the crime, the elements of the crime and the conditions under which the ICC shall exercise jurisdiction with respect to the crime. <i>See WG report 10<sup>th</sup> session.</i>
FI - Remaining Financial Issues	These issues cover the remuneration of judges, Prosecutor, Registrar, and the victims' trust fund. <i>See Working Group report from the 10<sup>th</sup> session.</i>

<sup>9</sup> By Espen Rostrup Nakstad, The European Law Students' Association - espenn@gmx.net

# DOCUMENTS - 10<sup>TH</sup> SESSION

## GENERAL DOCUMENTS

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/L.3	Statement by the Preparatory Commission dated 3 July 2002, transmitted by the Chairmen of the Preparatory Commission to the President of the Security Council with copies to the members of the Security Council and to the Secretary-General
PCNICC/2002/L.4	Proceedings of the Preparatory Commission at its tenth session (1-12 July 2002)
PCNICC/2002/L.5	Draft Report of the Preparatory Commission for the International Criminal Court.
PCNICC/2002/DP.1	Note of the selection of the staff of the International Criminal Court – Proposal submitted by Spain
PCNICC/2002/DP.1/Rev.1	Note of the selection of the staff of the International Criminal Court – Proposal submitted by Spain and Chile
PCNICC/2002/INF/6/Corr.1	List of delegations Corrigendum (ninth session)
PCNICC/2002/INF/7	Statement of the European Union on the position of the United States of America towards the International Criminal Court – Information document submitted by Spain
PCNICC/2002/INF/8	List of delegations

## WORKING GROUP ON A DRAFT BUDGET FOR THE FIRST FINANCIAL YEAR OF THE COURT

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGFYB/L.3	Revised draft budget for the first financial period of the Court – Text of Part Two: prepared by the Secretariat
PCNICC/2002/WGFYB/L.4	Proposed text of provisions on external audit, on a Working Capital Fund and on outsourcing of procurement for inclusion in a draft budget for the first financial period of the Court, as well as an annex on non-recurrent requirements for furniture and equipment – prepared by the Secretariat

PCNICC/2002/WGFYB/L.5	Revised draft budget for the first financial period of the Court – Proposed changes to the text of Part One of the revised draft budget (PCNICC/2002/L.1/Rev.1/Add.1, section A)
PCNICC/2002/WGFYB/L.6	Revised draft budget for the first financial period of the Court – Proposed changes to the text of Part Two of the revised draft budget (PCNICC/2002/WGFYB/L.3)
PCNICC/2002/WGFYB/L.6/Corr.1	Corrigendum
PCNICC/2002/WGFYB/L.7	Report of the Working Group
PCNICC/2002/WGFYB/DP.2	Selection of the staff of the International Criminal Court – Proposal submitted by Argentina, Brazil, Chile, Colombia, Costa Rica, Paraguay, Spain and Venezuela: draft resolution
PCNICC/2002/WGFYB/DP.2/Rev.1	Selection of the staff of the International Criminal Court – Proposal submitted by Argentina, Brazil, Chile, Colombia, Costa Rica, Paraguay, Spain and Venezuela: draft resolution
PCNICC/2002/WGFYB/RT.5	Budget for the first financial period – Draft resolution to be adopted by the Assembly of States Parties: Proposal by the Coordinator (Scenario A – New York)
PCNICC/2002/WGFYB/RT.5/Rev.1	Budget for the first financial period – Draft resolution to be adopted by the Assembly of States Parties: Proposal by the Coordinator
PCNICC/2002/WGFYB/RT.6	Scale of assessments for the appointment of the expenses of the International Criminal Court – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.6/Rev.1	Scale of assessments for the appointment of the expenses of the International Criminal Court – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.7	Working Capital Fund for the first financial period – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.7/Rev.1	Working Capital Fund for the first financial period – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.8	General Fund for the first financial period – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.9	Budget for the first financial period – Draft resolution to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.10	Draft decision of the Assembly of States Parties relating to the scale of assessment – Proposal by the Coordinator
PCNICC/2002/WGFYB/RT.11	Draft decision of the Assembly of States Parties relating to the provision of funds for the Court – Proposal by the Coordinator
PCNICC/2002/WGFYB/RT.12	Proposed texts of provisions on plenary sessions of the Court subsequent to its Inaugural Meeting – Proposal by the Coordinator

PCNICC/2002/WGFYB/RT.13	Proposed texts of provisions on the conditions of service of judges of the International Criminal Court – Proposal by the Coordinator
PCNICC/2002/WGFYB/RT.14	Text of provisions on the issues related to a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, established pursuant to article 79 of the Rome Statute – Proposal by the Coordinator
PCNICC/2002/WGFYB/RT.15	Interim arrangements for the exercise of authority pending the assumption of office by the Registrar – Draft decision to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.16	Selection of the staff of the International Criminal Court – Draft resolution to be adopted by the Assembly of States Parties

## **WORKING GROUP ON FINANCIAL ISSUES – REMUNERATION OF JUDGES**

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGFI-RJ/DP.1	Proposal for an amendment submitted by the United Kingdom of Great Britain and Northern Ireland concerning non-full-time judges – Salaries, allowances and benefits
PCNICC/2002/WGFI-RJ/RT.2	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator
PCNICC/2002/WGFI-RJ/RT.2/Rev.1	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator
PCNICC/2002/WGFI-RJ/RT.2/Rev.2	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator

## WORKING GROUP ON FINANCIAL ISSUES – VICTIMS TRUST FUND

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGFI-VTF/L.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims
PCNICC/2002/WGFI-VTF/L.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims.
PCNICC/2002/WGFI-VTF/RT.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims
PCNICC/2002/WGFI-VTF/RT.1/Add.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims – Discussion paper proposed by the Coordinator
PCNICC/2002/WGFI-VTF/RT.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims - Discussion paper proposed by the Coordinator

## WORKING GROUP ON ASSEMBLY OF STATES PARTIES PREPARATORY DOCUMENTS

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGASP-PD/L.5	Election procedures of the committee on Budget and Finance of the International Criminal Court: comparative chart with the procedures of the Advisory Committee and Administrative and Budgetary Questions of the United Nations and the Finance Committee of the International Seabed Authority – Working paper by the Secretariat
PCNICC/2002/WGASP-PD/L.6	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court

PCNICC/2002/WGASP-PD/L.6/Corr.1	Corrigendum
PCNICC/2002/WGASP-PD/L.7	Draft report of the Working group – Draft resolution regarding the permanent secretariat of the Assembly of States Parties
PCNICC/2002/WGASP-PD/L.8	Draft report of the Working group – Draft recommendation of the Assembly of States Parties concerning seating arrangements for States Parties
PCNICC/2002/WGASP-PD/L.9	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Committee on Budget and Finance
PCNICC/2002/WGASP-PD/L.10	Draft report of the Working Group – Provisional agenda for the first meeting of the Assembly of States Parties, to be held at United Nations Headquarters from 3 to 10 September 2002
PCNICC/2002/WGASP-PD/DP.5	Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Proposal by Austria, Hungary and Liechtenstein, Romania, Sweden, and Switzerland concerning article 36(8)(a) of the Rome Statute
PCNICC/2002/WGASP-PD/DP.6	Proposal submitted by Spain – permanent Secretariat of the Assembly of States Parties
PCNICC/2002/WGASP-PD/DP.6/Corr.1	Corrigendum
PCNICC/2002/WGASP-PD/DP.7	Secretariat of the Assembly of States Parties: organization of a permanent secretariat – Proposal submitted by Belgium
PCNICC/2002/WGASP-PD/DP.8	Election of judges – Proposal submitted as a basis for discussion by the Assembly of States Parties by Austria, Belgium, Benin, Burundi, Denmark, Ecuador, Finland, France, Germany, Greece, Hungary, Italy, Kenya, Liechtenstein, Malawi, Mali, Mongolia, Mozambique, New Zealand, Norway, Paraguay, Portugal, Romania, Samoa, Senegal, Sierra Leone, South Africa, Sweden, Switzerland, the United Republic of Tanzania and Zambia
PCNICC/2002/WGASP-PD/RT.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Rolling text prepared by the Coordinator

## WORKING GROUP ON THE CRIME OF AGGRESSION

*Tenth session of the Preparatory Commission for the International Criminal Court (1-12 July 2002)*

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGCA/L.2	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression
PCNICC/2002/WGCA/L.2/Rev.1	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression
PCNICC/2002/WGCA/DP.2	Elements of the Crime of Aggression – Proposal submitted by Samoa
PCNICC/2002/WGCA/DP.3	Proposed text on the definition of the crime and act of aggression – Proposal submitted by the delegation of Colombia
PCNICC/2002/WGCA/DP.4	Draft resolution of the continuity of work in respect of the Crime of Aggression – Proposal by the Movement of Non-Aligned Countries
PCNICC/2002/WGCA/DP.5	Incorporating the crime of aggression as a leadership crime into the definition – Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand
PCNICC/2002/WGCA/RT.1/Rev.1	Discussion paper proposed by the Coordinator
PCNICC/2002/WGCA/RT.1/Rev.2	Discussion paper proposed by the Coordinator

## BACKGROUND – THE INTERNATIONAL CRIMINAL COURT <sup>10</sup>

More than fifty years ago the Nuremberg and Tokyo tribunals set the stage for efforts to create an international criminal court. These military war crimes tribunals came into existence almost a century after a permanent court was first called for by Mr. Gustav Moynier in response to the crimes of the Franco-Prussian war<sup>11</sup> and nearly three decades after the framers of the 1919 Versailles Treaty had envisaged an ad hoc international court to try war criminals. Even though roots go back to the early 19<sup>th</sup> Century, and in spite of repeated calls for an ICC by the 1948 Genocide Convention, efforts to establish a permanent court were delayed for decades by the cold war and refusal of governments to accept an international legal jurisdiction.

It was only with the establishment of temporary ad hoc tribunals for the former Yugoslavia and Rwanda respectively, that tables started to turn.<sup>12</sup> Discussions on a permanent Court were strengthened further during Preparatory Committee meetings and resulted in the negotiation of a treaty that was adopted in Rome on 17 July 1998. The treaty was welcomed by an overwhelming majority of states and by civil society at large.

The International Criminal Court (ICC) is a permanent court capable of investigating and trying individuals accused of the most serious violations of international humanitarian law, namely war crimes, crimes against humanity and genocide. Unlike the International Court of Justice (ICJ) in the Hague, whose jurisdiction is restricted to states, the ICC will consider cases against individuals; and unlike the Rwandan and Yugoslavian War Crimes Tribunals, created to consider crimes committed during these conflicts, its jurisdiction will not be situation specific. It should be emphasised that the ICC will be complementary to national criminal jurisdiction<sup>13</sup> and it has jurisdiction only with respect to crimes committed after the entry into force of the Statute.<sup>14</sup> States Parties to the Rome Statute, the Security Council and the Court's Prosecutor have the power to bring cases before the Court, which will be composed of judges from 18 different countries. It will have an independent Prosecutor elected through secret ballot by States Parties to the treaty.

The ICC treaty is named “the Rome Statute of the International Criminal Court”. It defines the crimes within the jurisdiction of the ICC, how the Court will work and what states must do to co-operate with it. Further, it stipulates that the Court will only come into existence following the creation of an Assembly of States Parties (ASP) after the 60th ratifications of the treaty.<sup>15</sup> The required sixty state ratifications were deposited by 11 April 2002, less than four years after the adoption of the Rome Statute, and the ICC treaty entered into force on 1 July 2002.

*“[The International Criminal Court] promises, at last, to supply what has for so long been the missing link in the international legal system, a permanent court to judge the crimes of gravest concern to the international community as a whole - genocide, crimes against humanity, war crimes, and the crime of aggression..”*

Kofi Annan,  
Secretary General of  
the United Nations

<sup>10</sup> By Espen Rostrup Nakstad, The European Law Students' Association Norway - espenn@gmx.net

<sup>11</sup> Gustav Moynier was one of the founders of the International Committee of the Red Cross and proposed a permanent court in response to the crimes of the Franco-Prussian War in 1872.

<sup>12</sup> The International Criminal Tribunal for former Yugoslavia - ICTY - established 1993 by the UN Security Council  
The International Criminal Tribunal for Rwanda - ICTR - established 1994 by the UN Security Council

<sup>13</sup> Article 1 of the Rome Statute

<sup>14</sup> Jurisdiction *ratione temporis* - Article 11 of the Rome Statute

<sup>15</sup> The Statute enters into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN. (Art. 126)

*Following the successful negotiations of an ICC treaty in Rome in 1998, ten Preparatory Commission meetings were convened at UN headquarters with the mandate to finalise the work of the Rome Diplomatic Conference, draft annexes to the statute and develop documents that will enhance a swift and fast change into action once the Court is established.*

## THE PREPARATORY COMMISSION

Following the successful negotiations of an ICC treaty in Rome in 1998, ten Preparatory Commission meetings were convened at UN headquarters with the mandate to finalise the work of the Rome Diplomatic Conference, draft annexes to the statute and develop documents that will enhance a swift and fast change into action once the Court is established.<sup>16</sup> These meetings were monitored by a worldwide coalition of non-governmental organisations, the CICC.<sup>17</sup> In accordance with the Rome Statute, the Preparatory Commission must complete its work to be presented to the Assembly of State Parties, which will meet after the 60th ratification. The framework of the Court will then be put into place and the Court's senior officials elected during an approximate 12-month time period between the entry into force of the Statute and the actual functioning of the Court.

The Preparatory Commission remains in existence until the conclusion of the first meeting of the Assembly of States Parties (3-10 September 2002). At its session in June 2000 the PrepCom adopted two key texts by consensus; one on Rules of Procedure and Evidence and the other on Elements of Crimes. The Rules cover such issues as composition and administration of the Court, penalties for crimes, obligations of international cooperation and assistance, as well as enforcement of sentences. On the matter of crimes initially within the Court's jurisdiction - genocide, war crimes and crimes against humanity - the Commission identified the elements that constituted those crimes.

The 2001-2002 Preparatory Commission Working Groups have focused on the following issues;<sup>18</sup> a definition of the crime of aggression; a relationship agreement between the Court and the United Nations; a relationship agreement between the Court and the host country of its headquarters (The Netherlands); financial rules and regulations for the Court; privileges and immunities of the Court; a first-year budget for the Court; and rules of procedure of the Assembly of States Parties.

As regards the Crime of Aggression, the Rome Conference specifically requested the Commission to prepare proposals on the elements and conditions under which the Court shall exercise its jurisdiction over the crime. Once agreement is reached on a legal definition of aggression, the draft text will be presented to an International Criminal Court amendment conference, which may be convened seven years after the Court becomes operational.<sup>19</sup> In the meantime, the working group has discussed various proposals on the subject. A review conference of States Parties would also have the authority to include other crimes under its jurisdiction. During the Rome Conference, some speakers called for such issues as terrorism, international drug trafficking and use or threat of use of nuclear weapons to be covered by the Court. There was concern, however, about overtaxing the Court in its initial stages. A door was left open, though, for their future inclusion.

*"This manual [ICC Handbook] prepared by ELSA constitutes an extremely handy and useful guide to the preparatory work of the International Criminal Court. It should find its way onto the desk of every delegate to the Diplomatic Conference, and everyone who is trying to follow the complexities of the drafting process."*

*Professor William Schabas*

<sup>16</sup> Resolution F of the Final Act of the Rome Diplomatic Conference, July 1998

<sup>17</sup> The European Law Students' Association is a member of the CICC steering committee.

<sup>18</sup> Eight session of the ICC PrepCom September-October 2001, ninth session April 2002, tenth session July 2002

<sup>19</sup> The Review Conference, Article 123 of the Rome Statute

## THE ASSEMBLY OF STATES PARTIES

The Assembly of States Parties will, in many ways, continue the work of the ICC Preparatory Commission. It is responsible for further modification of the rules of procedure of the Assembly, the Second Year Budget, and the Court's Financial Rules and Regulations. Further, the ASP shall consider and adopt recommendations of the Preparatory Commission and provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court. It is therefore likely that the Assembly of States Parties also will discuss the status of the Court, its jurisdiction, and the nature of cases brought to the Court, as well as the Court's cooperation with the United Nations and other states.

The first annual meeting of the Assembly of States Parties will be convened in New York 3-10 September 2002.<sup>20</sup> From the year 2003, ASP meetings are likely to be convened in The Hague. Non-governmental legal expert teams will have the same opportunities to monitor these meetings as has been the case at the Preparatory Commission and the meetings may exceed the PrepCom in terms of NGO legal expert teams and observers.

There is little doubt that the road to Rome was a long and contentious one. Nevertheless, the momentum for the International Criminal Court has been beyond all expectations in recent years. If one considers the governmental discussions in 1995-1998, it was presumed that it would take an estimated 20-25 years to create the Court. Now, only four years after the Statute was adopted, the instruments most vital to the treaty have been successfully completed and the required 60 state ratifications are in place. Unfortunately, these events do not guarantee for an effective and successful institution. Many other states will need to ratify the treaty to ensure that the Court has the widest possible jurisdiction. Furthermore, all states that ratify must ensure that their national laws have been modified to allow for complementarity and full cooperation with the Court. This is of great importance.

It is tempting to view the ICC's birth as a triumph of law over force. In reality, the ICC comes into the world under tough circumstances. Some major states refuse resolutely to become parties to the statute, and the ICC prosecutor could face a hard task in deciding which crimes to investigate. It is encouraging that, with the notable exceptions of the US and Turkey, most NATO states are parties to the treaty. So are a number of significant powers elsewhere, including Argentina, Nigeria and South Africa. The opposition of the US, however, based on the fear that a rogue ICC prosecutor might charge US servicemen with war crimes, has been much publicised despite the many safeguards in the statute that block any attempt of politically motivated prosecution.

Law without power is no law. International courts need the support of major powers if they are to operate effectively. The International Criminal Tribunal for the Former Yugoslavia in The Hague is a good example of how important it is to have suitable conditions for the gathering of evidence and, eventually, the arrest of suspects to function as intended. As for the ICC's list of crimes<sup>21</sup>, there is wide agreement that they make a sound basis for the Court. These crimes are based on solid law, and also on precedent from the Nuremberg tribunal in 1945-6, right down to the ongoing Yugoslav and Rwanda tribunals. The key challenge, however, is not what types of crimes the ICC will investigate, but which particular crimes, and in which countries.

*"A page in the history of humankind is being turned", said United Nations Under-Secretary General Hans Corell on 11 April 2002, well aware of the giant steps taken by 66 states to ratify the treaty, amend their constitutions and start implementing new legislation.*

*The result is an instrument that will strengthen international justice mechanisms concerning crimes that are universally condemned and help bring an end to centuries of impunity.*

<sup>20</sup> Eight session of the ICC PrepCom September-October 2001, ninth session April 2002

ICC PrepCom: the Preparatory Commission for the establishment of the International Criminal Court

<sup>21</sup> genocide, crimes against humanity and war crimes

The Court is expressly barred from pursuing a case that is being genuinely investigated or prosecuted within the state concerned.<sup>22</sup> Therefore, the ICC risk end up tackling a small number of cases, mainly

*“At the end of the day, the ICC’s greatest success may well be in getting states to take their obligations to implement international law seriously, and to investigate violations properly within their own legal systems, so that their nationals never see the dock in The Hague...”*

from third world states, in the foreseeable future. The Prosecutor will hold the most important and politically sensitive post in the Court<sup>23</sup> and will, like the UN Security Council, have a delicate task in deciding which cases to investigate and prosecute. It could be hard to build up confidence in the Court’s impartiality while being unavoidably selective in investigations; and even harder to secure the necessary minimum of cooperation from states that are not parties to the ICC

At the end of the day the ICC’s greatest success may well be in getting states to take their obligations to implement international law seriously, and to investigate violations properly within their own legal systems, so that their nationals never see the dock in The Hague. Like the nuclear deterrent, the ICC may have a function even if it is not used. It may also trigger further development of international law and a wider acceptance of universal jurisdiction.

“A page in the history of humankind is being turned”, said UN Under-Secretary General Hans Corell on 11 April 2002, well aware of the giant steps taken by 66 states to ratify the treaty, amend their constitutions and start implementing new legislation. The result is an instrument that will

strengthen international justice mechanisms concerning crimes that are universally condemned and help bring an end to centuries of impunity. Even though the Court will have to meet unrealistic expectations in its first operational years, with the capacity to indict a small number of criminals only, it has already fulfilled its main objective; perpetrators can no longer feel safe from prosecution.

July 2002

Espen Rostrup Nakstad



*The International Criminal Court, The Hague - 1 July 2002*

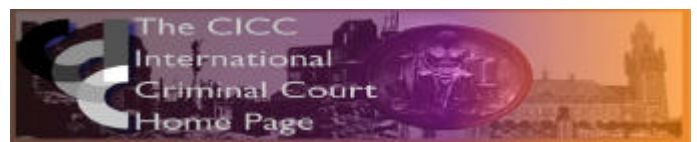
<sup>22</sup> The Rome Statute Article 1

<sup>23</sup> The Court will be composed of the following organs: The Presidency;

An Appeals Division, a Trial Division and a Pre-Trial Div; The Office of the Prosecutor; The Registry. (Art 34, Rome Statute)

## BACKGROUND

# THE ICC PROCESS AT A GLANCE



## WORKING GROUP REPORT

# FINANCIAL ISSUES

## A) REMUNERATION OF JUDGES<sup>24</sup>

## B) VICTIMS TRUST FUND<sup>25</sup>

The Working Group on Financial Issues (FI) used the 10<sup>th</sup> session to finalise its outstanding issues. The original FI Working Group had been split into several sub-Working Groups of which the Working Groups on (a) the Remuneration of (non full-time) Judges and (b) the Victims Trust Fund, met at the tenth session. The topics were discussed in separate sessions and under the moderation of different chairpersons. However, the results of the two Working Groups were reported to the First Year Budget Working Group (FYB) and had a direct impact on its proceedings.

Despite the enormous time pressure, the Coordinators for the Working Group on Remuneration of Judges, Mr. John Holmes of Canada, and for the Working Group on the Victims Trust Fund, Ms. Gaile Ramoutar of Trinidad & Tobago, succeeded in leading their groups to a conclusion for the results to be passed on to the FYB Working Group in time.

## A) REMUNERATION OF (NON FULL-TIME) JUDGES

### INTRODUCTION

The Working Group on Remuneration of Judges conducted two formal sessions and one informal meeting at the 10<sup>th</sup> PrepCom. The issue of Conditions of service of *full-time* judges was completed at the 9<sup>th</sup> PrepCom, and the task for this PrepCom was to finalize the conditions of service of *non-full-time* judges. The Secretariat had prepared a discussion paper on the latter at the 9<sup>th</sup> session, but some delegations wanted to give the issue more thought during the intersessional period and finalize the task of the Working Group at the 10<sup>th</sup> PrepCom. The main concern was that some of the judges might end up being non-full-time judges for a long period of time with very limited tasks. In light of this, the suggested annual allowance of Euro 60,000 was by many seen as too high.

<b>List of documents</b>	<b>Financial Issues; Remuneration of Judges</b>
<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGFI-RJ/DP.1	Proposal for an amendment submitted by the United Kingdom of Great Britain and Northern Ireland concerning non-full-time judges – Salaries, allowances and benefits
PCNICC/2002/WGFI-RJ/RT.2	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator
PCNICC/2002/WGFI-RJ/RT.2/Rev.1	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator
PCNICC/2002/WGFI-RJ/RT.2/Rev.2 <sup>26</sup>	Conditions of service of non-full-time judges of the International Criminal Court – Discussion paper by the Coordinator

<sup>24</sup> By Johanna Hautakorpi (ELSA Finland)

<sup>25</sup> By Roberta Ferrario (ELSA Milan)

## PROCEEDINGS

In the first formal session, the Coordinator introduced a discussion paper<sup>27</sup> which had been published on 6 June. This paper suggested the same allowances and benefits for non-full-time judges as those outlined in the proposal discussed at the 9<sup>th</sup> PrepCom, but the paragraph structure had been modified. At the same session the United Kingdom also presented a proposal for an amendment to the original proposal<sup>28</sup>, which they made available to delegations on 27 June 2002. The UK proposal differed from the Coordinator's proposal only in Part A, section 1, concerning the annual allowance. These two proposals were the basis for most discussions of the Working Group.

Since the paper that was adopted by the Working Group in the end was a revised version of the Coordinator's original proposal, the author of this report has decided to follow the structure of the Coordinator's proposal in the following. The Coordinator's proposal consists of two parts; part A concerning allowances and part B concerning benefits. Both parts are divided into three sections (1-3 and 4-6). The UK proposal is dealt with in relation to Part A, section 1 of the Coordinator's proposal because it is the only section that substantially differs from the Coordinator's proposal.

### Allowances (Annual Allowance) - Part A, Section 1 and the UK proposal

The Coordinator's proposal was that a non-full-time judge would receive an annual allowance of € 60,000. The UK was worried about the cost-effectiveness of this section and suggested that the salary of non-full-time judges merely be *subsidised to* € 60,000 if the salary of their main employment did not reach the amount of € 60,000 per year, or if judges had to give up their main employment because it would be incompatible with their position as an ICC judge. Otherwise, the judges would only receive the special allowance for the days that they actually spent working in the Court. Many other delegations shared this concern about the cost-effectiveness of the Coordinator's proposal. On the other hand, many delegations saw the UK proposal as a very complicated solution. It was also pointed out that the annual allowance should best be seen as a type of *compensation* for the sacrifices which a judge had to make in order to assume his or her position, rather than as a mere salary.

A compromise solution was found during the informal meeting: judges will receive an annual allowance of € 20,000, and in addition those judges whose annual income is less than € 60,000 will receive a top-up payment which will raise their overall income to € 60,000.

### Allowances (Special Allowances) - Part A, Section 2

Part A, Section 2 of the Coordinator's proposal was adopted in the first formal session. Judges will receive € 270 for each day they are engaged on the business of the Court.

### Allowances (Subsistence Allowance) – Part A, Section 3

Concerning Part A, section 3, the changes made to the Coordinator's proposal were technical in nature. During the first formal meeting, the third paragraph had been agreed to in principle. Since the UN has several rates for different categories of employees under its various agencies, the exact meaning of the term "subsistence allowance" raised confusion. Therefore, a technical change was approved in the second formal session regarding paragraph 3, where subsistence allowance was more clearly defined as being the same as that received by *ICJ judges*.

### Benefits – Part B, Section 4

Part B, Section 4 was unresolved after the first formal session because there was a dispute about the fairness of the provision. According to section 4, judges with non-full-time status were not entitled to a pension benefit. Judges of the International Tribunal for the Law of the Sea (*ITLOS*), on the other hand, who also work on a non-full-time basis, *are* entitled to a pension benefit. The issue seemed quite complicated, since full-time judges are not automatically entitled a pension benefit either. Full-time

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<sup>26</sup> PCNICC/2002/WGFI-RJ/RT.2/Rev.2 was the document that was finally adopted in the final plenary 12 July 2002. It is identical with the document PCNICC/WGFI-RJ/RT.2 apart from sections 1 and 3 from part A.

<sup>27</sup> PCNICC/2002/WGFI-RJ/RT.2

<sup>28</sup> PCNICC/2002/WGFI-RJ/DP.1

judges are only entitled to a pension benefit after having served three years and for a full pension benefit only after having served nine years in the Court. In the end, delegates agreed *not* to give pension benefits to non-full-time judges. Delegates seemed to be of the opinion that most likely all judges will be called to work full-time after a short transitional period. The section was adopted according to the Coordinator's proposal in the second formal session without any changes.

### **Benefits (Health Insurance, Travel Costs) – Part B, Sections 5 and 6**

Sections 5 and 6 of part B were adopted in the first formal session of the Working Group according to the Coordinator's proposal, saying that judges are to be responsible for their own health insurance and that business-class travel to official meetings will be covered.

### **CONCLUSION**

In its second formal session, the Working Group adopted document PCNICC/WGFI-RJ/RT.2/Rev.2. As explained above, a substantive change to the Coordinator's original proposal PCNICC/WGFI-RJ/RT.2 was made only concerning Part A, section 1, and a technical change was made to Part A, section 3. The Working Group has completed its tasks and the documents were finalised for approval by the Assembly of States Parties in September 2002.

## **B) VICTIMS TRUST FUND<sup>29</sup>**

### **INTRODUCTION**

The purpose of this chapter is to give an up-to-date account of; (1) the results that the Working Group on the Trust Fund for Victims (a Sub-Working Group of the Preparatory Commission's Working Group on Financial Issues); and (2) what the Assembly of States Parties will have to undertake at its first formal meeting in September 2002 with regards to the establishment of a Trust Fund for Victims.<sup>30</sup>

<b>List of documents</b>	<b>Financial Issues: Victims Trust Fund</b>
<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGFI-VTF/L.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims
PCNICC/2002/WGFI-VTF/L.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims.
PCNICC/2002/WGFI-VTF/RT.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims
PCNICC/2002/WGFI-VTF/RT.1/Add.1	Draft resolution of the Assembly of States Parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and for the families of such victims – Discussion paper proposed by the Coordinator
PCNICC/2002/WGFI-VTF/RT.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims - Discussion paper proposed by the Coordinator <sup>31</sup>

<sup>29</sup> Report by Roberta Ferrario, ELSA Milan.

<sup>30</sup> The establishment of a trust fund is one of the Assembly's obligations pursuant to Article 79 of the Rome Statute.

<sup>31</sup> On the basis of a previous proposal of the French Delegation, 8<sup>th</sup> Session of the Preparatory Commission

### Summary of negotiations at previous sessions

The Preparatory Commission began discussions on the establishment of a Trust Fund for Victims at its sixth session.<sup>32</sup> The Chairman of the Preparatory Commission, Mr. Philippe Kirsch of Canada, then established a Working Group on the Court's Financial Regulations and Rules. Even though the Coordinator of this Working Group, Mr. Georg Witschel of Germany, highlighted the importance of the establishment of the Trust Fund for Victims during the sixth and seventh sessions, the issue was not discussed in any detail. However, the French delegation did submit a Proposal<sup>33</sup> at the time and the Norwegian delegation made a statement calling for flexibility in the Trust Fund.

During the eighth session<sup>34</sup> the Coordinator of the Working Group on Financial Regulations and Rules submitted a Discussion Paper entitled *"Draft resolution of the Assembly of States parties on the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims"*<sup>35</sup>, which was taken into consideration by the Working Group. The paper was structured in two parts of which the first part dealt with sources of financing for the Trust Fund and the second part with both the criteria for accepting voluntary contributions and the management structure of the fund. An agreement was reached only on Paragraph 1 (obligation incumbent upon the Assembly of States Parties to establish a Trust Fund for the benefit of the Victims) and on Paragraph 2 (sources of financing the Trust Fund for Victims) of the Discussion Paper,<sup>36</sup> which was amended as in Paragraph 5 of the Annex to the French Proposal.<sup>37</sup>

During the ninth Session of the Preparatory Commission<sup>38</sup> the French delegation submitted a Proposal only on the Annex to the Discussion Paper PCNICC/2001/WGFIRR/RT.5, concerning voluntary contributions and the management structure. The Working Group held one formal meeting on the subject which gave the French delegation an opportunity to present its Proposal concerning a Trust Fund for the benefit of Victims; PCNICC/2002/WGFI-VTF/DP.1. The Delegations generally welcomed the French Proposal, even though several questions were raised during the discussions within the Working Group (i.e.: size of the Board of Directors, its location in the structure of the Court, workload of the Board of Directors, financial implications of the French Proposal, independence in the management of the Trust Fund). On the whole, delegates considered the French Proposal as a workable basis for further discussions during the 10<sup>th</sup> and final Session of the Preparatory Commission. Several formal and informal sessions were scheduled in order to allow the Working Group to complete its work on this issue at the tenth Preparatory Commission.

### PROCEEDINGS AT THE 10<sup>TH</sup> SESSION

The Working Group on Financial Issues - Trust Fund for Victims, coordinated by Ms. Gaile Ramoutar of Trinidad and Tobago, conducted two formal sessions and three informal sessions at the tenth session. The discussion within the Working Group focused on the Proposal submitted by France at the ninth Session (PCNICC/2002/WGFI-VTF/DP.1), regarding the management structure and administration of the Trust Fund for Victims and the voluntary contributions issues.

#### The French Proposal (PCNICC/2002/WGFI-VTF/DP.1)

The French delegation briefly commented on the background of the Proposal and reminded to the Working Group that an agreement had already been reached at the 9<sup>th</sup> Session as to the "sources of

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<sup>32</sup> One of the PrepCom's tasks, set out in Article 79 of the Rome Statute of the ICC,

<sup>33</sup> Cfr. Document: PCNICC/2000/WGFIRR/DP.33.

<sup>34</sup> Eight session of the PrepCom; September 24 - October 5, 2001

<sup>35</sup> Document: PCNICC/2001/WGFIRR/RT.5

<sup>36</sup> PCNICC/2001/WGFIRR/RT.5.

<sup>37</sup> Cfr. PCINN/2002/WGFI-VTF/DP.1, page 3.

<sup>38</sup> Ninth session of the Prepcom; New York, 8-19 April 2002

financing” (Paragraph 4(1) and (2) of PCNICC/2002/WGFI-VTF/DP.1), as amended in Paragraph 5 of the Annex to the French Proposal on page 3). The discussion was not reopened on this point.

The first Paragraph of the Annex (page 4 of the French Proposal<sup>39</sup>) is designed to ensure that a Board of Directors would be established in order to manage the Trust Fund for the benefit of the victims. Autonomy from the Court is necessary to deal with the distribution of the sources of the Trust Fund coming from voluntary contributions. It is necessary to isolate the Court from such problems and to entrust the management of such funds to an independent Board of Directors (Paragraph 1, 2 3 and 5 of the Annex to the French Proposal on page 4). The Board will be a subsidiary body of the Assembly of States Parties pursuant to Article 112 of the Rome Statute of the ICC. The criteria for the election of the members of the Board are directly taken from Article 36(8), which sets the criteria used for the nomination and elections of the Judges of the ICC. It was established that the Members of the Board of Directors must have a recognised international competence in assisting victims of grave crimes. France responded in this way to the criticism that had been addressed to its former proposal presented in the 8<sup>th</sup> Session<sup>40</sup>. The French Delegation changed its proposal by saying that experts would be expert in victims’ issues instead of being financial experts.

The most sensitive issue was the role of the Registrar of the Court<sup>41</sup>. The French position was clear on this point: France wanted to establish a strong connection between the Trust Fund for the benefit of victims and the International Criminal Court. France was aware that NGOs criticised this aspect of its proposal, but did not share the NGO’s position because the Fund does not only have one function.

The Trust Fund for Victims is supposed to (a) pay reparations in order to fulfil the orders of the ICC (Rule 98(1) of the Rules of procedure and Evidence), and (b) to benefit the victims of serious crimes under the jurisdiction of the Court and the family of such victims (Article 79(1) of the Rome Statute and Rule 98(5) of the Rules of procedure and Evidence). The Trust Fund shall also help the Court in providing compensation for victims. Therefore, according to France, it is necessary to establish a clear and strong relationship between the Trust Fund and the ICC and have an independent unit within the Registrar to ensure the management of the Trust Fund, if possible a unit for participation and reparation to victims or another unit within the Registry.

As regards voluntary contributions, France stated that this source of income should be submitted to the Board for approval, in accordance with the principles settled down in Paragraphs 7, 8 and 9 of the Annex on page 4 of the French Proposal<sup>42</sup>. The Board has to report all voluntary contributions to the Assembly of States Parties, regardless of whether they are accepted or refused.

As an agreement was not reached neither on the management structure nor on the voluntary contribution's issue, the discussion within the Working Group was reopened at the tenth Session of the Preparatory Commission. The working basis was still the French Proposal (PCNICC/2002/WGFI-VTF/DP.1) and the Chairman of the Working Group opened the floor for general comments before doing a “paragraph-by-paragraph review” in order to reach a final agreement and complete the PrepCom’s work.

In the following a summarised presentation will be given of: (a) the position of France as stated in the French Proposal<sup>43</sup> and in the working material of the Working Group; (b) a report on the comments of the delegations in relation to each paragraph of the French text; (c) a report on the results reached by the Working Group at its final Session; (d) a list of documents approved by the Preparatory Commission which will form the basis of the work of the Assembly of States Parties at its first meeting in September 2002 as to the establishment of a Trust Fund for the Victims.

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<sup>39</sup> Cfr. PCNICC/2002/WGFI-VTF/DP.1

<sup>40</sup> PCNICC/2001/WGFIRR/DP.33

<sup>41</sup> See paragraph 4 of the French Proposal (PCNICC/2002/WGFI-VTF/DP.1)

<sup>42</sup> See PCNICC/2002/WGFI-VTF/DP.1.

<sup>43</sup> PCNICC/2002/WGFI-VTF/DP.1.

### **PCNICC/2002/WGFI-VTF/DP.1: The sources of income of the Trust Fund for Victims**

An agreement had already been reached on Paragraph 4 (1) and (2) of the document PCNICC/2001/WGFIRR/RT.5, as amended during the ninth Session of the Preparatory Commission<sup>44</sup> (see paragraph 5 on page 3 of the document PCNICC/2002/WGFI-VTF/DP.1.)

In view of this agreement, the discussion on Paragraph 4 of the French proposal was not reopened during the first formal session of the Working Group. The Preparatory Commission agreed that the Trust Fund for Victims would benefit from four sources of funding:

- a) Resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence;
- b) Money or other property collected through fines and forfeiture transferred to the Trust Fund if ordered by the Court pursuant to Article 79(2) of the Rome Statute of the International Criminal Court;
- c) Voluntary contributions from Governments, international organizations, individuals, corporations or other entities, in accordance with relevant criteria adopted by the Assembly of States Parties;
- d) Such resources, *other than assessed contributions* (amendment to the original document PCNICC/2001/WGFIRR/RT.5 stated at the eighth Session of the Preparatory Commission), which the Assembly of States Parties can decide to allocate to the Trust Fund.

These two different and independent types of sources of funding are strictly related to the fact that the Trust Fund for Victims can be used in two different ways:

- i) To fulfil the orders of the Court to pay reparations through the Trust Fund, in accordance with Rule 98 (1) to (4) of the Draft Rules of Procedure and Evidence. In this case the Trust Fund for Victims is only the device through which the Court is operating, but the Court has the power to decide on the allocation of the funds;
- ii) To benefit the victims of crimes under the jurisdiction of the Court and the families of such victims in accordance with article 79(1) and rule 98(5). In this case the Court doesn't have power over the funds, and the Trust Fund for Victims is independent in deciding their allocation.

The agreement on the sources of financing does not fit the principles on the establishment of the Trust Fund for Victims set by the NGOs. The NGOs should have preferred a broader and more flexible list of sources of income than those strictly listed in the approved paragraph 2 of the document PCNICC/2002/WGFI-VTF/TR.1.

### **PCNICC/2002/WGFI-VTF/DP.1: Management Structure**

Since the Trust Fund for Victims has two different tasks, the management structure and the administration of the Trust Fund for Victims must reflect both these tasks. This is particularly relevant due to the fact that the Fund exercises also an independent activity. As to the management structure, the first proposal, contained in document PCNICC/2001/WGFIRR/RT.5, envisaged for this task either the Registry, but does not fit because an organ of the Court cannot exercise a function that the whole Court doesn't have, or the Committee on Budget and Finance, which raised concerns among the delegations because it is composed of financial experts and not of experts on victims' issues.

This solution was not adopted and the French delegation proposed a new management system: a Board of Directors in charge with the management of the Trust Fund and a Secretariat within the Registry (a unit of the Registry) to provide the daily legal and administrative support to the Board.

### **PCNICC/2002/WGFI-VTF/DP.1: The Board of Directors**

In the French Proposal, the necessity of a politically independent Board of Directors, created by the Assembly of the States Parties, which will have its seat at the Headquarters of the Court and will be in charge with the management of the Trust Fund for Victims, is clearly stated in Paragraphs 1 and 2 on page 4 of the document PCNICC/2002/WGFI-VTF/DP.1.

According to Par. 2, the Members of the Board of Directors, shall be elected by the Assembly of States Parties, following the same criteria stated for the nomination and election of Judges to the International

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<sup>44</sup> Agreed version in PCNICC/2002/WGFI-VTF/RT.1, par. 1 and 2

Criminal Court: equitable geographical distributions; equitable gender distribution; representation of the principal legal system of the world; established competence at the international level in the field of protection and of assistance to victims of serious crimes (Art. 36 (8) of the Rome Statute).

The Board of Directors would be responsible for determining the activities and the projects of the fund and the allocation of the property and the money available as well as approving the voluntary contributions.

A question, strictly related to the cost of this structure was the number of the Members of the Board of Directors. Canada raised this question. The French Proposal stated that the Board of Directors should be composed of 12 Members (French Proposal, Par. 1) but that this number was open to negotiations. The members should have experience in assisting victims of severe human rights violations and acting on a pro bono basis. The Board of Directors would be a subsidiary body of the Court pursuant to Article 112 of the Rome Statute, so the expenses connected to the meetings and activities of this Board comes under the Court's Budget, while the members of the Board would act on a voluntary basis.

**Table: Comments from delegations concerning the number of members of the Board of Directors:**

Canada	Taking into consideration the costs of this management structure, the Canadian delegation suggested to reduce the number of the Members of the Board from 12 to 7.
The Netherlands	The delegation agrees with the proposal of Canada to reduce the number of the Members of the Board from 12 to 7.
United Kingdom	The delegation agrees with the proposal of Canada to reduce the number of the Members of the Board from 12 to 7.
France	There is no problem for the French delegation to adopt the solution proposed by Canada.
Germany	The Delegation agrees with the Canadian Proposal
Uganda	In favour to contain and reduce the costs

During the meeting of the Working Group on the Trust Fund for Victims, Austria proposed to add the words "on a pro bono basis" at the end of Paragraph 2. Only the Philippines raised a comment on this issue, stating that they agree with this Proposal, but necessary expenses must be reimbursed.

As to the criteria for the election of the Members of the Board, the French proposal referred to the Article 36(8) of the Rome Statute of the ICC (Paragraph 2 of the Annex on page 4 of the French proposal).

### **The Coordinators' discussion paper**

A Discussion Paper was proposed by the Coordinator of the Working Group and approved by the Preparatory Commission, PCNICC/2002/WGFI-VTF/RT.1. The paper states the following;

- a) in Paragraph 1 of the Annex: The Assembly of the States Parties must establish a Board of Directors of the Trust Fund for Victims;
- b) in Paragraph 2 of the Annex: The number of the Members of the Board of Directors is reduced from 12 to 5. The Members serve in an individual capacity on a pro bono basis;
- c) in Paragraph 3 of the Annex: the Members of the Board are elected with the same criteria used for the election of judges of the ICC, pursuant to Article 36(8) of the Rome Statute. They must have competence in the assistance to victims of serious crimes.

As to the nomination and election of the members of the Board of Directors, the Preparatory Commission approved a document PCNICC/2002/WGFI-VTF/RT.2 "Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of the members of the Board of Directors of the Trust Fund for the benefit of the victims."

- d) in Paragraph 7 of the Annex: the Board of Directors is responsible for determining the activities of the Trust Fund for Victims as well as approving voluntary contributions. A new Unit in the

Registry would serve as the Secretariat of the Board, providing the daily support and would play a consultative role in deciding the activities of the Trust Fund.

The Assembly of the States parties must refer to these documents (PCNICC/2002/WGFI-VTF/RT.1; PCNICC/2002/WGFI-VTF/RT.2) for the election of the Members of the Board of Directors.

### **The Role of the Registrar of the Court**

Paragraph 4 of the French Proposal was thoroughly discussed during the first formal session of the Working Group and regards the relationship between the Court and the Registrar. It proposes that the Registrar of the Court, through a specialized unit, would serve as Secretariat of the Board providing the necessary administrative and legal assistance for the proper functioning of the Board carrying out its tasks. The Registrar or his/her representative should also take part in the meetings of the Board of Directors in an advisory capacity and should be responsible for submitting observations on the activities and projects envisaged by the Trust Fund and on the allocation of the property and money available to the Fund.

**Table: Comments on the Role of the Registrar of the Court**

Country	Comments	In accordance with NGO position
Belgium	Agrees with Switzerland.	Yes
Bosnia	Agrees with France on the role of the Registrar. In her opinion, it is desirable that the Registrar is responsible for the administration of the Trust Fund, because of its Unit for victims and witnesses. Sharing the Unit expertise is important to ensure consistency to victims.	No
Canada	Agrees with France on the role of the Registrar. It is important, in his opinion, to maintain a link between the Trust Fund and the Court, when executing orders of reparation of the Court. Canada could support to remove "and legal" and, in this way to change the focus on administrative assistance by the Registrar.	No
Gambia	Day-to-day management to the Board of Directors and not to the Registrar.	Yes
Germany	Agrees with the French proposal. If the Fund is located within Registrar, it seems natural to give Registrar a voice in the Board of Directors.	No
Japan	In favor of the French Proposal.	No
Mali	Agrees with France on the role of the Registrar	No
The Netherlands	Day-to-day management of the Trust Fund with the Registrar. Although the second function of the Trust Fund (assistance in broad sense to the victims), is something different from the reparations from the Court, there must be, in any case, a link between them (the Registrar)	No
Philippines	Hesitations on the role of the Registrar as in the French Proposal	Neutral
Samoa	Administration of the Trust Fund under the Registrar. Hesitant to form a new body such as a Board of Directors, due to the costs that this structure will imply	No
Senegal	Agreeing with France	No
Switzerland	More in favour of a structure with a Board of Directors either with its own Secretariat or with a Secretariat set up temporarily under the Registrar, but that the Registrar should not be too involved with the work of the Trust Fund. The workload is already very great for the Registrar	Yes
Uganda	Support of linking the Fund with the Registrar. Uganda is not in favor to create a Board of Directors, because it duplicate the work and the costs.	No
United Kingdom	Question whether the Registrar should be given a voice at the level of the Board of Directors	Neutral

As this was the last Session of the Preparatory Commission and the Coordinator wanted to reach an agreement on the issue of the Trust Fund for Victims, an annex to the discussion paper was prepared and discussed in informal sessions. The Working Group documents were approved at the last formal session on Wednesday 10 July 2002, with amendments, and then approved by the Preparatory Commission at its final plenary.

In Paragraph 5 of the Annex of the Discussion Paper (PCNICC/2002/WGFI-VTF/RT.1), the assistance that the Registrar of the Court has to provide to the Board of Directors has been generalized. The Registrar is responsible for providing "such assistance" as is necessary for the proper functioning of the Board in carrying out its tasks, without referring anymore to legal or administrative assistance. The Registrar still has the right to participate in the meetings of the Board of Directors in an advisory capacity. The conclusion doesn't really fit the principles expressed by NGOs concerning the establishment of a Trust Fund for the Victims. Many NGOs believe that assigning the Registrar of the Court with the responsibility of providing assistance to the Board of Directors will hamper the independence of the Trust Fund and make it difficult for it to provide assistance to victims of crimes within the jurisdiction of the Court who are not involved in specific cases before the Court.

### **The Executive Director**

In Paragraph 6 of the Annex of the Discussion Paper submitted by the Coordinator it is stated that the Assembly of State Parties has to consider the appointment of an Executive Director, either within or outside the Registrar, on the recommendation of the Board and after consulting the Registrar, to provide further assistance in the day by day administration of the Trust Fund. This is a great achievement for the NGOs who preferred an Executive Director of the Trust Fund, appointed directly by the Board to act permanently with important responsibilities in the daily management of the Fund. (A "consultative voice" in determining the activities of the Fund, review of voluntary contributions).

### **Voluntary contributions**

Both the French Proposal and the Discussion Paper proposed by the Coordinator of the Working Group, dealt with the criteria to accept voluntary contributions affected to a specific project or purpose.

All voluntary contributions should be in keeping with the goals and activities of the Trust Fund, and donations affected to a specific purpose or project should not lead to an inequitable distribution of the available funds among the different groups of victims. The voluntary contributions should be submitted to the Board of Directors for approval. The Board of Directors has to follow the rules stated in paragraphs 9, 10 and 11 of the Annex of the document PCNICC/2002/WGFI-VTF/RT.1.

As NGOs suggested, the Board of Directors should submit a detailed report on the acceptance and refusal of voluntary contributions to the Assembly of the States Parties every year (paragraph 11 of the Discussion Paper proposed by the Coordinator of the Working Group).

## **CONCLUSION**

The Working Group on Financial Issues - Trust Fund for Victims completed its tasks at the last Preparatory Commission. The Working Group approved the following documents; PCNICC/2002/WGFI-VTF/RT.1; PCNICC/2002/WGFI-VTF/RT.1/Add.1; and PCNICC/2002/WGFI-VTF/RT.2. At the first meeting of the Assembly of the States Parties,<sup>45</sup> the Trust Fund for Victims will be established following the provisions contained in the documents approved by the PrepCom at its final session.

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<sup>45</sup> First ASP meeting 3-10 September 2002

## WORKING GROUP REPORT

# FIRST YEAR BUDGET<sup>46</sup>

- Introduction
- Proceedings
- Adoption
- Table of documents discussed and adopted
- Individual Items: Budget Part One: Structure and Administrative Arrangements
  - Budget Part Two: Estimates for the first financial period of the Court
  - Table of Meetings (Dates, Duration, Location, Costs)
  - Additional Papers Implemented by means of L.5 and/ or L.6
  - Victims Trust Fund
  - Working Capital Fund
  - External Audit and Outsourcing Procurements
  - Adopted Additional Papers
  - Selection of ICC Staff
  - UN Joint Pension Staff Fund
  - Scales of Assessment
  - Director of Common Services to carry out functions of Registrar

## INTRODUCTION

The Working Group on the Budget for the First Financial Period of the Court (*FYB*)<sup>47</sup> was first established at the 8<sup>th</sup> PrepCom and continued its work at the 9<sup>th</sup> and 10<sup>th</sup> sessions where it concluded its work and succeeded in adopting the Budget in full.<sup>48</sup>

In order to conclude its discussions on the Budget and to be able to fill the whole Budget with exact figures, the FYB Working Group had to rely on the findings of several other Working Groups. By way of example, the decisions taken in the two Working Groups on Financial Issues, Remuneration of (non full-time) Judges and the Victims Trust Fund, had a direct impact on the final Budget.<sup>49</sup> The discussions in these other Working Groups are set out elsewhere in this ELSA report, but it is important to remember that cross-references to the results of other Working Groups will be made.

The Coordinator for the First Year Budget, Mr. Valentin Zellweger of Switzerland, really pushed delegations to reach agreement on the Budget. By meeting with delegations bilaterally and continuously insisting during the meetings that problems be solved instead of created anew, he managed to complete his task in an impressively efficient and speedy manner.

The Working Group's final Budget fixed the estimate for the total cost for the first financial period of the Court at €30,893,500 (plus an extra €300,000 which the Netherlands as host country have decided to contribute). Readers of this report may consider this figure to be fairly meaningless in isolation, which is probably true for most of us unfamiliar with budgets of international organisations or financial issues in

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<sup>46</sup> By Cornelia Schneider, ELSA London. This report aims to be concise rather than necessarily precise and will thus inevitably miss out some essential points. It is hoped that these shortcomings will not distort the reliability of the statements made herein. Please direct any comments and corrections to [connieschneider@gmx.net](mailto:connieschneider@gmx.net)

<sup>47</sup> The Working Group was referred to interchangeably as being either on the "first financial period" or the "first year period" or "budget". The reason for this confusing terminology is that, although the budget period will generally run for one *year*, the very first financial period will actually run for a period of 16 months (from the first meeting of the Assembly of States Parties in September 2002 to the end of 2003).

<sup>48</sup> Although note that several figures have remained outstanding which will be decided by Committee decisions or the Assembly of States Parties.

<sup>49</sup> For a full list of issues that affected the final form of the Budget, see the "Task List for the preparation of the discussion on a draft budget for the first financial period of the Court at the 10<sup>th</sup> PrepCom", PCNICC/2002/L.1/Rev.1/Add.1.

general. Those wishing to dismiss the FYB Working Group as a whole as dry and boring, however, should remember that it was this Working Group which dealt with the widest variety of issues of concern to the ICC. It incorporated the decisions of many other Working Groups and thereby set a framework for the whole Court, which in all likelihood will be carried through many other financial periods. Without the commitment of States Parties to contribute the necessary funds, the Court would be dead in its tracks. Delegations and NGOs alike recognised the importance of this Working Group, which was noticeable in its proceedings inside and outside the Conference Room. This excitement helped participants get through many extremely technical issues, and by following the proceedings in the Working Group, participants also gained a wider understanding of the various organs and sections of the Court.

Lastly, please note that this report is intended to give a concise overview of the major issues discussed and focus mainly on the final results. It is *not* meant to provide a lengthy analysis of the various provisions and scenarios that were originally proposed and discussed. For detailed notes of the proceedings in the PrepCom, please see the ad verbatim notes of all formal meetings available at <http://groups.yahoo.com/group/icc-info/> (for the period of 1 – 12 July 2002).<sup>50</sup> We also recommend that you refer to the actual PCNICC documents listed in this report (available on the UN website <http://www.un.org/law/icc/prepcomm/prepfra.htm>), as they are essential to a full understanding of the issues involved.

## PROCEEDINGS

The Working Group conducted three formal sessions and various informal meetings. The objectives of the Working Group, as reiterated by the Coordinator, Mr Valentin Zellweger of Switzerland, were: (a) to agree on the provisions of the second part of the Budget for the first financial period of the Court, and (b) to adopt the entire Budget and put it forward to the Assembly of States Parties for approval.

The entire Budget consists of “Part One” of the Budget (which had already been provisionally adopted at the 9<sup>th</sup> PrepCom, but had to be confirmed at this PrepCom) and “Part Two”. Whereas Part One sets out the structure and administrative arrangements of the Court (seat, premises requirements, assembly of states parties, presidency, office of the prosecutor, registry, etc), Part Two of the Budget is more concerned with actual *figures*, or cost estimates. Delegations had to first agree what functions they actually wanted the Court to carry out and how they wanted these to be implemented (Part One) before specific details and figures could be inserted in Part Two. It was also a main concern of the Coordinator that the Budget – as a “constitutional document” which will set precedents for years to come – combined the two aspects of flexibility and scalability. Flexibility to allow officials to use the funds available as necessity and efficiency may from time to time dictate; scalability by allowing for full accountability and records.

In the first formal session on Wednesday, 3 July, the Coordinator went through document **L.3**<sup>51</sup>, the revised Part Two of the Budget (prepared by the Secretariat and made available on 6 June 2002) and pointed out the changes compared to the original document **L.1**<sup>52</sup>. Individual delegations then commented on the provisions.

In the second formal session on Friday, 5 July, the Coordinator introduced some of the additional papers that had been made available and invited comments from the delegations. The additional papers specifically introduced were (in the order mentioned): **RT.12** (plenary sessions of the Court subsequent to the inaugural meeting), **L.4** (External Audit, Working Capital Fund, Outsourcing Procurement), **RT.8** (General Fund), **RT.7** (Working Capital Fund), **RT.5** (Budget Resolution for the 2<sup>nd</sup> Assembly of States Parties, Location A), **RT. 9** (Budget Resolution for the 2<sup>nd</sup> Assembly of States Parties, Location B), **RT.6** (Scale of Assessment), **RT.10** (Provision of Funds for the Court), **RT.11** (Adaptation of Budget by Registrar), **RT.4** (UN Joint Pension Fund), **DP.1/Rev.1** (Appointment of Staff).

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<sup>50</sup> Prepared by members of ELSA and ISC-ICC who attended the 10<sup>th</sup> PrepCom and to whom the author would like to express her sincerest thanks.

<sup>51</sup> References are to “PCNICC/2002/WGFYB” documents, unless stated otherwise.

<sup>52</sup> Please note that the latest version of document L.1 is PCNICC/2002/WGFYB/L.1/Rev.1/Add.1. For ease of reference, I will be referring to that document as “L.1”.

The third, and final, formal session on Thursday, 11 July, focused on adopting the documents that had been discussed in informal meetings. The conduct of the meeting exemplified the extreme time pressure that the Working Group was under: the time allocated for a formal meeting was taken up mostly by informal consultations (until 12.30), the formal meeting which ensued had to be broken up into informals on two occasions so that final changes could be agreed, and the final minutes of the Working Group were held without interpretation and with the threat of an electricity cut off at 13.30! With all this in mind (and with the Coordinator continuously reminding the delegates), the Working Group managed to reach conclusion on all outstanding issues just in time.

## ADOPTION

In brief, the Working Group decided to adopt **Part One** of the Budget (PCNICC/2002/L.1/Rev1/Add1 to be read in conjunction with L.5 “proposed changes to Part One”); and **Part Two** of the Budget (L.3 to be read in conjunction with L.6 “proposed changes to Part Two”). They also adopted several of the additional documents which were discussed during the Session – these are marked with an asterisk in the following table. Documents marked with a + were not adopted as such by the Working Group, but their wording was incorporated into document L.5 and therefore Part One of the Budget.

Documents (discussed or adopted)	First Year Budget – 10 <sup>th</sup> session
<p>” * ” denotes those documents that were actually adopted by the Working Group                      ” + ” denotes those documents whose wording was incorporated into document L.5                      Documents L.1 and L.3 were not officially adopted at the 10<sup>th</sup> session, but adopted by reference.</p>	
PCNICC/2002/L.1/Rev.1/Rev.1/Add.1, sect. A (referred to herein as “L.1”)	Revised draft <b>budget</b> for the first financial period of the Court
PCNICC/2002/WGFYB/L.3	Revised draft <b>budget</b> for the first financial period of the Court (Text of <b>Part Two</b> )
+ PCNICC/2002/WGFYB/L.4	Proposal by Secretariat concerning an <b>External Audit</b> , a <b>Working Capital Fund</b> , and <b>Outsourcing Procurement</b> (including an Annex)
* PCNICC/2002/WGFYB/L.5	Proposed changes to the text of <b>Part One</b>
* PCNICC/2002/WGFYB/L.6	Proposed changes to the text of <b>Part Two</b>
PCNICC/2002/WGFYB/DP.1	Proposal by France regarding <b>Vacancy Rate</b>
PCNICC/2002/WGFYB/DP.1/Rev.1	Proposal by Spain and Chile for the <b>appointment of staff</b>
PCNICC/2002/WGFYB/DP.2	Proposal by Argentina, Brazil, Chile, Colombia, Costa Rica, Paraguay, Spain and Venezuela for the <b>selection of staff</b> in the ICC
* PCNICC/2002/WGFYB/DP.2/Rev.1	Proposal by Argentina, Brazil, Chile, Colombia, Costa Rica, Paraguay, Spain and Venezuela for the <b>selection of staff</b> in the ICC (Addendum)
PCNICC/2002/WGFYB/RT.3	<b>Task List</b> for the preparation of the discussion on a draft budget for the first financial period of the Court at the tenth session of the Preparatory Commission
* PCNICC/2002/WGFYB/RT.4	Draft Decision of the Assembly of States Parties relating to participation of the International Criminal Court in the <b>United Nations Joint Staff Pension Fund</b>
PCNICC/2002/WGFYB/RT.5	Budget Resolution for the second Assembly of States Parties, <b>Location A</b>
* PCNICC/2002/WGFYB/RT.5/Rev.1	Draft Resolution for <b>Budget and Finance</b> for the first financial period to be adopted by the Assembly of States Parties
* PCNICC/2002/WGFYB/RT.6	<b>Scale of assessments</b> for the apportionment of the expenses of the International Criminal Court
PCNICC/2002/WGFYB/RT.7	<b>Working Capital Fund</b> for the first financial period
PCNICC/2002/WGFYB/RT.7/Rev.1	Draft Resolution for the <b>Working Capital Fund</b> for the first financial period to be adopted by the Assembly of States Parties
PCNICC/2002/WGFYB/RT.8	<b>General Fund</b> for the first financial period (6.1 of the Financial Rules)
PCNICC/2002/WGFYB/RT.9	Budget Resolution for the second Assembly of States Parties, <b>Location B</b>
* PCNICC/2002/WGFYB/RT.10	Proposed Decision of the Assembly of States Parties relation to the <b>provision of funds</b> for the Court (5.5 of the Financial Rules)
PCNICC/2002/WGFYB/RT.11	Proposed Decision for the adaptation of the Budget by the <b>Registrar to account for an increase</b> in the Assembly of States Parties during the first financial period
+ PCNICC/2002/WGFYB/RT.12	Proposed texts of the provisions on <b>plenary sessions</b> of the Court subsequent to its Inaugural Meeting
+ PCNICC/2002/WGFYB/RT.13	Proposed texts of the provisions on the <b>conditions of service of judges</b> to the ICC
+ PCNICC/2002/WGFYB/RT.14	Proposal for the establishment of a <b>Trust Fund for Victims</b> pursuant to Article 79 of the Rome Statute
* PCNICC/2002/WGFYB/RT.15	Proposal for the <b>Director of Common Services</b> to carry out the functions of the <b>Registrar</b> before the appointment of the latter (except the moving of money from one budget category to another)

## INDIVIDUAL ITEMS

As stated above, the FYB Working Group adopted the entire Budget by the end of the 10<sup>th</sup> PrepCom, namely Part One (mainly discussed at the 9<sup>th</sup> PrepCom), Part Two (discussed at the 10<sup>th</sup> PrepCom) and several additional documents as listed above (\*).

The author of this report considered brief explanations of the relevant issues preferable to a discussion of the proceedings in chronological order. This should hopefully ensure an understanding of the final budget as adopted and avoid getting lost in the “jungle” of lengthy proceedings full of repetition, amendments and cross-references.

It should be noted at the beginning, however, that the Working Group opted for two different ways of adopting their agreements. On the one hand, they adopted two documents outlining changes to the original Budget (L.5 and L.6). These documents incorporated the wording of a lot of additional papers which had been discussed during the 10<sup>th</sup> PrepCom (e.g. RT.7 on a Working Capital Fund). There was therefore no need to specifically adopt those already incorporated additional papers (thus, the fact that several “RT” documents in the table above are not marked with an asterisk does *not* mean that the ideas behind them have not been adopted). On the other hand, the Working Group specifically adopted several additional papers, for example RT.15 on the functions of a Director of Common Services. This gives the Assembly of States Parties the option to discuss these issues separately, without jeopardizing the adoption of the Budget as a whole. It therefore appears that the more controversial issues were adopted as separate additional papers which might be amended at a later stage.

### **Budget Part One: Structure and Administrative Arrangements**

This part was mostly agreed on during the 9<sup>th</sup> PrepCom, although certain changes were implemented at the 10<sup>th</sup> session of the PrepCom (see document L.5). It outlines the structure and administrative arrangements of the Court and deals with the following issues in particular:

- I. The Seat of the Court
- II. Premises requirements
- III. Assembly of States Parties
- IV. Bureau of the Assembly
- V. Inaugural Meeting of the Court
- V.bis Subsequent Meetings of the Court in plenary session (new)
- V.ter Meeting of the Board of Directors of the Victims Trust Fund (new)
- VI. Committee on Budget and Finance
- VII. Critical needs of the Court during the first financial period
- VIII. The Presidency
- IX. Judges other than those comprising the Presidency
- X. Office of the Prosecutor
- XI. The Registry
- XII. Common Services Division
- XII.bis External Audit (new)
- XIII. Furniture and Equipment

Thus, Part One makes provisions for the financial requirements<sup>53</sup> of the *organs* and *divisions* of the Court in the first financial period (those established directly by the Rome Statute, such as the Registry, as well as others which were considered necessary at a later stage, such as the Common Services Division). Part One also set a yardstick for general issues that needed to be considered. For example, by the inclusion of a section on furniture and equipment it brought home the point that without money being provided for this cause (in Part Two of the Budget), the Court would not be able to function.

The most important changes that were agreed during the 10<sup>th</sup> PrepCom were the inclusion of provisions for two plenary sessions of the Court subsequent to the Inaugural Meeting, a meeting of the Board of

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<sup>53</sup> For expenses such as staff salaries and meetings.

Directors of the Victims Trust Fund and for costs related to the Inaugural Meeting. It also inserted provisions for an external audit and the establishment of a Working Capital Fund, amended the duration envisaged for meetings of the Court and the Assembly of States Parties (see table below) and effected other minor changes. The main changes are discussed in more detail below.

### **Budget Part Two: Estimates for the first financial period of the Court**

Part Two provides the content which fills the skeleton of Part One “with flesh”. It gives the provisional estimates for the first financial period of the Court, and as such provides specific details, numbers and the precise allocation of funds. It is divided as follows:

- I. Summary of Estimates
- II. Work Programme  
(General running costs: salary, travel, furniture etc. for the main organs; including a reserve for unforeseen expenses)
- III. Meetings of certain parties and organs  
(Meetings of the Assembly of States Parties, of the Bureau, Inaugural Meeting of the Court, Meeting of the Budget and Finance Committee, including conference-serving and non-conference-serving costs, as well as programme support costs and contingency reserve)
- IV. Annexes  
(Annexes 1 and 2 provide a chart and a list of post requirements for the organs for illustrative purposes; Annex 3 shows detailed break downs of the cost estimates for the meetings, Annex 4 the breakdown of provisions for the reserve for unforeseen circumstances; Annex 5 lists the Netherlands` contribution to the Court in terms of premises, furniture etc.)

The changes made to the cost estimates were affected as a direct consequence of changes to Part One or the adoption of additional papers. The estimate of the overall costs was moderately revised from €1,995,400/ €1,682,400 to €0,893,500. These and other small changes are shown in the revised tables and charts laid out in document L.6 which amends document L.3.

The overall costs consist mainly of expenses for staff salaries and meetings. They were amended in mainly two aspects: (i) decisions were taken on the duration and location of various meetings, and (ii) the overall number of staff was amended.

(i) In the previous versions of the Budget, two cost scenarios were given which were based meetings taking place in either New York or The Hague. These two scenarios had slight cost implications reflected in the overall estimate. At the 10<sup>th</sup> session, the Working Group decided the location for every meeting, a detailed list of which can be found in the table on the next page.

(ii) The Working Group also implemented the decision of the Working Group on the Victims Trust Fund to create one P-3 position dealing exclusively with the Fund.<sup>54</sup>

<b>Meeting</b> (chronological order)	<b>Time and Duration</b> (revised)	<b>Location</b> (revised)	<b>Costs</b> (estimate)	<b>Provisions in the Budget</b> (revised)
First Meeting of the ASP	September 2003 Six days	New York	€ 2,582,200	Para 6 (Part One), L.1 , L.5/ Annex III (Part Two), L.3, L.6
Resumed Special Meeting of the ASP	January/ February 2003 Five days	New York	€ 1,571,800	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6

<sup>54</sup> Although note that this position is originally only intended for six months.

Meeting (chronological order)	Time and Duration (revised)	Location (revised)	Costs (estimate)	Provisions in the Budget (revised)
Inaugural Meeting of the Court	early 2003; after the Resumed Special Meeting	The Hague	€97,000 (only for travel, since otherwise financed by the Netherlands)	Paras 6 and 7 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6
Resumed Special Meeting of the ASP	April 2003 Three days	New York	€746,200	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6
Meeting of the Bureau of the ASP	June 2003 One day	New York	€96,600	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6
“Second” Meeting of the ASP	September 2003 Five days	New York	€1,187,700	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6
Committee on Budget and Finance	August 2003 Five days	New York	€845,000	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6
Board of Directors (VTF)	2003 Three days	The Hague	€26,100	Para 6 (Part One), L.1, L.5/ Annex III (Part Two), L.3, L.6

#### Additional Papers Implemented by means of L.5 and/ or L.6

#### **Victims Trust Fund**

The discussions in the FYB Working Group on this topic were closely coupled with those taking place in the Working Group on a Victims Trust Fund (VTF). The latter decided that a fund should be established for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.<sup>55</sup> The VTF Working Group also decided, *inter alia*, that the Fund should be headed by a board of directors consisting of five (pro bono) members.

These decisions had a direct impact on the Budget. Discussions were based on document RT.14 which suggested two insertions into Part One of the Budget (L.1) and one insertion into Part Two of the Budget (L.3):

- (i) A new Chapter V ter (new paragraph 29 quater) in Part One, making provisions for funds to be allocated to a three-day meeting of the Board of Directors at The Hague in 2003 (including business class travel and daily subsistence allowance).
- (ii) A new paragraph 87 bis in Part One, making provisions for funds to be allocated to a P-3 post dealing exclusively with matters related to the Victims Trust Fund (to be created within the Victims Participation and Reparation Unit of the Registry). Costs for this post for the first financial period are estimated at € 48,000.
- (iii) A new Chapter C bis (new paragraph 170 bis) – in the end adopted as new Chapter D bis (new paragraph 171 primo) - in Part Two, allocating €26,100 for a meeting of five Directors of the Victims Trust Fund to be held at The Hague in 2003.

All suggestions contained in RT.14 were taken on board by the Working Group and implemented, but they were adopted as part of changes outlined in documents L.5 and L.6 and are therefore directly incorporated into the Budget (L.1 and L.3).

#### **Working Capital Fund**

The Working Capital Fund is meant to ensure that the Court will have sufficient capital to meet short-term liquidity requirements pending the receipt of assessed contributions from States Parties.

<sup>55</sup> The establishment of such a fund is pursuant to Article 79 of the Rome Statute.

The establishment of a Working Capital Fund was dealt with in documents L.4 as well as RT.7/Rev.1. It seems that the two documents are quite incompatible (for example, L.4 states that the Working Capital Fund shall be established “pursuant to regulation 6.2 of the draft Financial Regulations”, whereas RT.7/Rev.1 insists that advances shall be made “as an exception to regulation 6.2”). However, it also appears that *both* documents were incorporated/ adopted by the Working Group.

On 11 July, when going through the list of additional papers that the Working Group had to decide on, the Coordinator stated that document RT.7/Rev.1 was adopted.<sup>56</sup> Document L.5, on the other hand, states that paragraph 11 (bis) is to be inserted into document L.1 (Part One of the Budget). Without knowledge of the discussions that took place at the informal meetings, it is difficult to decide what the correct approach is. However, since document L.4 was orally amended (indication an intention to amend the proposal rather than rejecting it outright), we will assume that the Working Capital Fund will be established in accordance with the provisions outlined in L.4.

L.4 establishes that parties will have to contribute to the Fund in the proportions set out in the scale of assessment (but their contributions shall be held on account of the Parties which have made such payments<sup>57</sup>). The exact amount of the Fund has not yet been determined, but it will amount to 1/12 of the operation costs of the Court.<sup>58</sup> The establishment of the Fund is based on regulation 6.2 of the draft Financial Regulations.<sup>59</sup>

### External Audit and Outsourcing of Procurement

In line with what the Coordinator had proclaimed to be one of the fundamental aims which the Working Group was trying to achieve, the Working Group decided to make provisions for an external audit – this will go a long way in achieving transparency and accountability of the Court and in preventing or investigating misconduct.

Discussions on these two issues were based on document L.4 which suggested the insertion of five new paragraphs into Part One of the Budget. These were all accepted as follows (although with minor oral amendments):

(i) A new paragraph **98 bis** explaining that during the initial phase, the Court ought to outsource procurement, but only on a limited time and extent basis. A staff member of the Court is to be placed within the entity providing such procurement services so that the Court may develop its own internal procurement capability.

(ii) A new paragraph **98 ter** establishing that the position of Procurement Officer within the Procurement Section (already set up by the original budget L.3) could be assigned the task outlined in paragraph 98 bis. It also reiterates that provision was already made in document L.3 for €382,600 for the outsourcing of procurement.

(iii) a new paragraph **109 bis** stating that an external auditor is to be appointed by the Assembly of States Parties to conduct audits in conformity with generally accepted common auditing standards. This also fulfills the requirement set out in Regulation 12 of the draft Financial Regulations of the Court.<sup>60</sup>

(iv) a new paragraph **109 ter** requesting an initial audit for the period from the Court’s very first activities until such time when the Registrar takes up his or her duties. This also takes account of the fact that the first financial period will be for an extended period (16 months rather than 12 months).

(v) a new paragraph **109 quater** setting the estimate for the total cost of the audit at €40,000, a figure which was already reflected in Part Two of the Budget (L.3).

All suggestions contained in L.4 were taken on board by the Working Group and implemented (although with minor oral amendments), but they were adopted as part of changes outlined in document L.5 and are therefore directly incorporated into the Budget (here L.1).

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<sup>56</sup> See ad verbatim notes of the meeting on 11 July taken by ELSA and ISC-ICC students, which are available at <http://groups.yahoo.com/group/icc-info/>.

<sup>57</sup> This is an oral amendment to L.4 which was made during negotiations at the 10<sup>th</sup> PrepCom.

<sup>58</sup> This is based on the practice of the United Nations.

<sup>59</sup> PCNICC/2001/1/Add.2.

<sup>60</sup> PCNICC/2001/1/Add.2.

## Adopted Additional Papers

### **Selection of ICC Staff**

Discussions on this issue in the Working Group were based on a proposal submitted originally by Spain and Chile, but later also supported by Argentina, Brazil, Colombia, Costa Rica, Paraguay and Venezuela (DP.2/Rev.1).

This was a hotly debated proposal aiming to set up guidelines for the selection and appointment of ICC staff (until the adoption of Staff Regulations in accordance with the Rome Statute). The revised proposal (DP.2/Rev.1) was adopted by the Working Group, although with some oral amendments agreed in the final session on 11 July.

The guidelines do not establish binding quotas on gender or geographical terms, although candidates of given nationalities or gender may be given preferential consideration “where appropriate”.<sup>61</sup> Candidates will, *inter alia*, be assessed on grounds of analytical and drafting skills (where this is required for their position). This initial assessment stage will be followed by an oral interview on English or French. Knowledge of another official language (Arabic, Chinese, English, French, Russian and Spanish) will be an advantage to candidates.

Staff members of a “P” position (professional rather than general service staff)<sup>62</sup> shall be selected in accordance with a scheme of geographical representation which is to be “guided in principle by”<sup>63</sup> the system of geographical representation of the United Nations. States Parties and states engaged in the process of ratification or accession to the Rome Statute will be given “adequate representation”, but applications by nationals of non-member states will also be considered.

### **UN Joint Pension Fund**

The Working Group adopted document RT.4 which comes in the form of a draft decision of the Assembly of States Parties relating to the participation of the ICC in the United Nations Joint Staff Pension Fund.

Once adopted by the Assembly, the decision will in effect become a request to the Registrar of the ICC to apply for membership (on behalf of the ICC) in the United Nations Joint Staff Pension Fund. Participation in the Fund will ensure that ICC staff members have the same access to the Staff Pension Fund as other UN employees. The scheme is administered by the UN and overseen by the UN Administrative Tribunal.

### **Scales of Assessment**

Document R.6, on which discussions in the Working Group were based, defines that the applicable scale of assessments for the apportionment of the expenses of the Court shall be those of the United Nations applicable for the period 2002-2003 (although adjustments will have to be made to reflect the fact that membership of the Rome Statute is less than membership of the United Nations). France also made a request for an amendment which would reflect the wording of the Rome Statute, Article 117, and Article 5.2 of the Financial Regulations. They suggested to add to the end of the paragraph outlined in RT.6 the wording: “in accordance with the principles upon which the scale of the UN is based.”

Document RT.6, together with the additional wording suggested by France, was adopted in the final session of the Working Group on 11 July.

### **Director of Common Services to carry out functions of Registrar**

This proposal RT.15 was submitted by Spain on the morning of 11 July (the same day the Working Group voted on all its proposals). The author has not had a chance to review the exact wording of the proposal, but it seems that the Registrar’s functions will be carried out by the Director of Common Services until the Registrar gets appointed. The Director will have the same rights as the Registrar, although he will not be entitled to move money from one budget category to another.

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<sup>61</sup> It is interesting to note that the original proposal submitted by Spain and Chile (DP.1/Rev.1) did not make any reference to gender balance at all.

<sup>62</sup> This only applies for established (budgeted) posts and appointments of at least 12 months duration.

<sup>63</sup> This wording was subject to much debate, with various delegations favouring “the selection ... shall be subject to [the UN system]”, “...shall bear in mind”, and “shall be guided by”. The wording “shall be guided in principle” was a compromise solution adopted at the last minute.

WORKING GROUP REPORT

# ASSEMBLY OF STATES PARTIES – PREPARATORY DOCUMENTS <sup>64</sup>

## **I ELECTION OF JUDGES**

## **II ELECTION OF THE PROSECUTOR AND THE DEPUTY PROSECUTORS**

## **III ELECTION OF THE REGISTRAR**

## **IV SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES**

## **V COMPOSITION OF THE COMMITTEE ON BUDGET AND FINANCE AND ELECTION OF THE MEMBERS**

## **VI COMPOSITION OF THE BUREAU OF THE ASSEMBLY OF STATE PARTIES**

### **INTRODUCTION**

The Working Group on the Assembly of States Parties met for the second time at this session and was chaired by Mr. Saeid Mirzaee-Yengejeh of the Islamic Republic of Iran. It conducted three formal and nine informal meetings, as well as further informal meetings during the weekend, and concluded its work on Friday 12 July 2002. On the agenda of the Working Group were items which had not been finished at the last session, i.e. procedures for the election of the judges, the Prosecutor, the Deputy Prosecutors and the Registrar, measures necessary for the establishment of a Secretariat of the Assembly of States Parties, and the agenda for the first meeting of the Assembly of States Parties. In addition, the Working Group had to deal with two new issues: the selection procedure for the members of the Committee on Budget and Finance, as well as the composition of the Bureau of the Assembly.

In the course of its consultations, the Working Group adopted a draft agenda for the first meeting of the Assembly of States Parties,<sup>65</sup> which did not give rise to lengthy discussions. Another draft resolution was adopted on seating arrangements for the Assembly. Accordingly, States Parties will not sit in alphabetical order in the Assembly, but in an order to be determined by lot.<sup>66</sup>

Most of the time was spent on considerations concerning the election of the judges. In the following, this central issue, as well as other key issues, will be presented in full detail.

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<sup>64</sup> Introduction, I-Election of judges, II Election of the Prosecutor and the Deputy Prosecutors, and III – Election of the Registrar by Matthias Goldmann (ELSA Würzburg/Germany); IV – Secretariat of the Assembly, V – Composition of the Committee on Budget and Finance, and VI – Composition of the Bureau of the Assembly by Andreas Stomps (ELSA Marburg/Germany).

<sup>65</sup> Draft report of the Working Group – Provisional agenda for the first meeting of the Assembly of States Parties, to be held at United Nations Headquarters from 3 to 10 September 2002, UN Doc. PCNICC/2002/WGASP-PD/L.10 of 10 July 2002.

<sup>66</sup> Draft report of the Working Group – Draft recommendation of the Assembly of States Parties concerning seating arrangements for States Parties, UN Doc. PCNICC/2002/WGASP-PD/L.8 of 8 July 2002.

List of documents submitted at the 10<sup>th</sup> session:

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGASP-PD/L.5	Election procedures of the Committee on Budget and Finance of the International Criminal Court: comparative chart with the procedures of the Advisory Committee on Administrative and Budgetary Questions of the United Nations and the Finance Committee of the International Seabed Authority, 1 July 2002
PCNICC/2002/WGASP-PD/L.6 and Corr.1	Draft Report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutor of the International Criminal Court, 8 July 2002, and Corrigendum, 10 July 2002
PCNICC/2002/WGASP-PD/L.7	Draft report of the Working Group – draft resolution regarding the permanent secretariat of the Assembly of States Parties, of 8 July 2002
PCNICC/2002/WGASP-PD/L.8	Draft report of the Working Group – Draft recommendation of the Assembly of States Parties concerning seating arrangements for States Parties, 8 July 2002
PCNICC/2002/WGASP-PD/L.9	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Committee on Budget and Finance, 10 July 2002
PCNICC/2002/WGASP-PD/L.10	Draft report of the Working Group – Provisional agenda for the first meeting of the Assembly of States Parties, to be held at United Nations Headquarters from 3 to 10 September 2002, 10 July 2002
PCNICC/2002/WGASP-PD/RT.2	Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Rolling text prepared by the Coordinator, 26 April 2002
PCNICC/2002/WGASP-PD/DP.4	Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Proposal by Austria, Hungary and Liechtenstein on an alternative procedure for the first election of the judges to the International Criminal Court to the proposal contained in PCNICC/2002/WGASP-PD/RT.2, annex, 14 June 2002
PCNICC/2002/WGASP-PD/DP.5	Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Proposal by Austria, Bosnia and Herzegovina, Croatia, Hungary, Liechtenstein, Romania, Sweden and Switzerland concerning article 36 (8) (a) of the Rome Statute, 17 June 2002
PCNICC/2002/WGASP-PD/DP.6	Proposal submitted by Spain – Permanent Secretariat of the Assembly of States Parties, 1 July 2002
PCNICC/2002/WGASP-PD/DP.7	Secretariat of the Assembly of States Parties: organization of a permanent secretariat – Proposal submitted by Belgium, 1 July 2002

## I – ELECTION OF JUDGES

### Overview

At the ninth session of the PrepCom, the Working Group had agreed on many points of the election procedure. The Co-ordinator had prepared a rolling text between the sessions, which provided a good basis for the deliberations of the Working Group at this session.<sup>67</sup> Most of the provisions of the rolling text were not controversial, as they reflected the agreements reached at the last session. Some minor amendments were made to the text in order to provide that the diplomatic channel be used for all communications between the States Parties and the Secretariat of the Assembly. The Working Group finally adopted a draft resolution on the procedure of nomination and election to be submitted to the Assembly of States Parties.<sup>68</sup>

However, as to two crucial issues, a final agreement had not been achieved at the last session: the deadline until which States would have to ratify the Rome Statute in case they had not yet done so, but wished to submit nominations for the election of judges, still had to be fixed. Also, an election procedure that would lead to a balanced and truly universal composition of the bench of the Court had not been found yet.<sup>69</sup>

### Nominations Submitted by non-States Parties

The provisional agreements of the last session on this issue are reflected in the rolling text. Accordingly, the nomination period should close on 1 November 2002 (para. 10 of the rolling text). States that have already started the ratification process should be able to submit provisional nominations, which would become definitive if the nominating State deposited its instrument of ratification before the closure of the nomination period (para. 7 of the rolling text). If the elections were to be held in January, this timeline would have ensured that all nominating States would have become States Parties according to Article 126 (2) of the Statute by the day of the elections. This was considered necessary to meet the requirements of Article 36 (4) (a), which provides that “any State Party” may submit nominations.

However, a considerable number of delegations, hoping to complete their ratification process before the first election of judges, but probably not before 1 November 2002, advocated for an extension of the deadline for ratification. A respectable argument was made that more candidates would be available, especially from Asia, a region that is considerably underrepresented in the Assembly, if the deadline for the deposit of the instrument of ratification was postponed. And the representative of the Republic of Korea pointed out that ratification was a definitive act and that the process of becoming a State Party would be irreversible once the instrument of ratification would be deposited.

As a consequence, the nomination period was extended until 30 November 2002 (para. 10 of the draft resolution). Nominating States will have to have submitted their instruments of ratification before that date. A later date would not have been possible as the UN Secretariat, which provides secretariat services for the first meetings of the Assembly, will need up to six weeks for the translation of the accompanying documents.

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<sup>67</sup> Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Rolling text prepared by the Coordinator, UN Doc. PCNICC/2002/WGASP-PD/RT.2 of 26 April 2002.

<sup>68</sup> Draft Report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutor of the International Criminal Court, UN Doc. PCNICC/2002/WGASP-PD/L.6 of 8 July 2002 and Corr.1 of 10 July 2002.

<sup>69</sup> For a comparative study on the procedures of other international courts and tribunals see Falzon, N./Goldmann, M./Khutshishvili, K. (eds.), *Nomination and Election of Judges to International Courts*, ELSA Legal Research Paper (2002), downloadable at [www.iccnw.org/html/ELSAprepcom9annex.pdf](http://www.iccnw.org/html/ELSAprepcom9annex.pdf).

### Composition of the Court

This issue was probably the most contentious one of the whole meeting of the PrepCom. As to the outset, the various provisions of Article 36 of the Rome Statute concerning the qualifications of the judges and the composition of the Court needed to be implemented. Accordingly, the Court

- a) must comprise at least 9 judges with established competence in criminal law (candidates elected from list A) and at least 5 judges with established competence in international law (candidates elected from list B), cf. Article 36 (5);
- b) should include judges with legal expertise on specific issues, such as violence against women and children, cf. Article 36 (8) (b).

Further, the Court should be composed in a manner as to ensure

- c) equitable geographical representation;
- d) the representation of the principal legal systems of the world; and
- e) fair representation of men and women. (cf. Article 36 (8)).

The Working Group now faced the difficulty to develop a selection procedure that would take all these criteria into account, a rather complex task. For that purpose, Mr Gerard Dive from Belgium was appointed sub-coordinator.

At the last session, various more or less ambitious approaches were discussed.<sup>70</sup> Two of them were still on the table at this session:

#### *(1) Two-Phase Procedure (annexed to the rolling text)*

Provisions for a procedure featuring an election in two-phases were annexed to the rolling text.<sup>71</sup> This procedure had been set up by the sub-coordinator at the last session as a result of informal consultations. The purpose of the two-phase approach was to ensure that the requirements of Article 36 (5), which are generally regarded as binding, are fulfilled. Accordingly, exactly 9 candidates from list A and 5 candidates from list B should be elected in the first phase. Should less than 9 or 5 candidates from the respective lists be elected, additional ballots would be held. Should more than 9 or 5 candidates be elected, only those candidates with the highest number of votes would be considered elected.

The remaining four seats should be filled in the second phase, which would take place at least 24 hours after the end of the first phase. This time should allow States Parties to consult on voting strategies in order to achieve a balanced composition of the Court.

Austria, Hungary and Liechtenstein submitted a proposal for the amendment of this procedure.<sup>72</sup> The idea behind this proposal was to give full effect to Article 36 (6) (a) of the Statute, which states that a candidate that has received the required majority will be considered elected. Article 36 (5), on the other hand, provides only that there need to be *at least* 9 judges from list A and 5 from list B. In other words, it would not be violated if not more than 13 candidates from list A or not more than 9 candidates from list B were elected. Consequently, it was proposed to return to a one-phase procedure and to invalidate only the 14<sup>th</sup> and subsequent election of a candidate from list A and the 10<sup>th</sup> and subsequent election of a candidate from list B.

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<sup>70</sup> Cf. ELSA Report of the ninth session of the Preparatory Commission, p. 17-18.

<sup>71</sup> Rolling text prepared by the Coordinator, UN Doc. PCNICC/2002/WGASP-PD/RT.2 of 26 April 2002, p.6.

<sup>72</sup> Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Proposal by Austria, Hungary and Liechtenstein on an alternative procedure for the first election of the judges to the International Criminal Court to the proposal contained in PCNICC/2002/WGASP-PD/RT.2, annex, UN Doc. PCNICC/2002/WGASP-PD/DP.4 of 14 June 2002.

## *(2) Minimum Voting Requirements (DP.5)*

Hungary, Liechtenstein and other co-sponsoring delegations submitted a proposal on a procedure that had been developed during the last session of the PrepCom (hereinafter referred to as proposal DP.5).<sup>73</sup> In order to avoid a strict quota system as well as to reduce the need to invalidate the election of certain candidates due to incompatibilities with the requirements of the Statute, the underlying idea of the proposal was to focus on the voting pattern.

Accordingly, State Parties would have to vote for at least two candidates from each regional group and six candidates from each gender. These minimum voting requirements would be combined with the procedure envisaged by proposal DP.4 (one-phase elections with up to 13 judges from list A or 9 judges from list B). After each ballot the minimum voting requirements would be adjusted depending on the candidates elected so far. Should it become impossible to meet one of the requirements due to the number of remaining seats to be filled or to the composition of the pool of candidates still available, the requirement would be discontinued.

A few other informal proposals were also made in the course of the session. But discussions concentrated on proposal DP.5. Unfortunately, no agreement could be reached on important issues at this session. As the discussion will therefore need to be continued, its main points shall be reiterated in the following.

In the first formal meeting of the Working Group, the proposal DP.5 gave rise to a controversial discussion. Some delegations expressed principal objections because they favoured either a procedure that would guarantee a certain outcome (especially some African States), or because they were of the opinion that a procedure with as few restrictions as possible would be the best option (among others, the United Kingdom, Germany, the Netherlands, France). However, the majority of the delegations wanted to take the proposal as a basis for further discussions.

Apart from this fundamental criticism, some individual aspects of the proposal gave rise to objections. In the course of the session, the proposal was amended and re-amended several times. Additional minimum voting requirements were introduced for candidates from list A and list B, and the language was changed in order to make it easier to understand. Furthermore, the following issues were discussed:

### *“FORCED ELECTIONS”*

Some delegations expressed their concerns about elections where there would be no real choice between candidates, because only as many candidates had been nominated from one geographical region or one gender as votes would need to be cast for candidates of the respective category. In this way, the proposal would rather discourage than encourage delegations to make as many nominations as possible and might lead to agreements within regional groups.

In order to avoid elections without a real choice, it was proposed that the minimum voting requirements should not be fixed, but rather depend on the number of candidates available from each category.

### *ABSTENTIONS*

A number of delegations did not want to accept that their ballot paper would be invalidated entirely if they did not meet the minimum voting requirements. In particular, they wanted to preserve the right to abstain. On the other hand, some delegations spoke against allowing States Parties to abstain, as this could undermine the whole system of the minimum voting requirements.

A very elaborate solution was eventually found in order to enable States Parties to make abstentions: if the minimum voting requirements were not met, the ballot paper would be invalidated, unless this could be explained as a consequence of abstentions. For example, if a State Party cast 17 votes and voted for only 1 candidate from Eastern Europe (instead of 2, as required) and for only 5 female candidates (instead

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<sup>73</sup> Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court – Proposal by Austria, Bosnia and Herzegovina, Croatia, Hungary, Liechtenstein, Romania, Sweden and Switzerland concerning article 36 (8) (a) of the Rome Statute, UN Doc. PCNICC/2002/WGASP-PD/DP.5 of 17 June 2002.

of 6), the ballot paper would not be invalidated if the requirements could have been met with the last remaining vote. This would only be the case if there was at least one female candidate from Eastern Europe that the State Party could have voted for. However, some delegations had their doubts about the practicability of such a procedure.

#### *EQUAL GENDER REPRESENTATION*

With respect to equal representation of men and women in the Court, there was agreement that States Parties should have to vote for at least six candidates from each gender. Argentina, Costa Rica and Portugal advocated to increase this number, but the argument was made against this that the voting requirements were only a minimum and not a maximum, and that higher minimum voting requirements would render the voting procedure and the decision of States Parties how to vote more difficult.

#### *REPRESENTATION OF THE PRINCIPAL LEGAL SYSTEMS OF THE WORLD*

Some delegations pointed out that account should also be taken of this criterion. But because there is no generally accepted definition of the principal legal systems of the world, it was agreed that no provision on this criterion should be included. Moreover, the issue would be sufficiently addressed by rules for an equitable geographical representation.

#### *DISCONTINUATION OF MINIMUM VOTING REQUIREMENTS*

It was further decided that the minimum voting requirements should be discontinued after three ballots, because it was feared that a too lengthy voting procedure might challenge the legitimacy of the judges elected in later ballots and thus undermine the Court's authority.

#### *EQUITABLE GEOGRAPHICAL REPRESENTATION*

The repartition of seats between the different regional groups was an issue of high controversy. In particular African delegations were concerned about their group being underrepresented and favoured quotas guaranteeing a certain outcome. A compromise was found that the minimum voting requirements for the three regional groups with the most States Parties, i.e. the African group, the group of Western European and other States and the group of Latin American and Caribbean States should be increased to three, while the ones for the Asian group and the Eastern European group should remain two. This proposal, however, was not acceptable for many Asian delegations. They pointed out that the Asian group was probably the most diverse group and that the number of States Parties of that region would grow in the near future. Several delegations suggested going back to two votes for all regional groups, but a compromise could not be reached any more.

It was not only for the disagreement on the geographical distribution, but also for other remaining differences that no compromise could finally be achieved, although a number of delegations had spared no pains to find a solution, while others, recognising that there was no solution that would satisfy everybody, had given up their critical attitude in a remarkable spirit of compromise towards the end of the session.

Thus, no provision on these issues was included in the draft resolution. Still, the need to implement the requirements of Article 36 of the Rome Statute remains. It remains to be seen if the Assembly of States Parties will decide to take up the issue and to continue discussion on the *status quo* as of the end of the PrepCom

#### **Extension of the Nomination Period**

In the course of the discussions, delegations became more and more aware that not even the best election procedure, and in particular the Hungarian/Liechtenstein proposal would work if not a sufficient number of qualified candidates was available from each region, gender, etc. To address these concerns, the NGO Coalition suggested that the Bureau should provide updates on the development of the pool of candidates. Should at the end of the nomination period certain regional groups, gender or candidates with certain qualifications be underrepresented, the nomination period should be extended.

This proposal was integrated in the draft resolution. According to para. 10bis,<sup>74</sup> the President of the Assembly is requested to report to the States Parties on 1 November 2002 if there is an insufficient number of candidates of a certain category. In order to determine what ‘insufficient’ means, a mixed approach was chosen, combining fixed minimum numbers (3 from each region, 9 from each gender, 13 on list A and 9 on list B) with provisions designed to achieve a balanced pool of candidates (e.g., the number of candidates from a regional group must be at least one fourth the number of States Parties belonging to that group).

If at the end of the nomination period the number of candidates should still be less than 3 from each regional group, 9 from each gender, less than 9 on list A or 5 on list B, the nomination period will be extended until 8 December 2002 (para. 10ter of the draft resolution). All these measures, however, will only apply to the first election.

## II – ELECTION OF THE PROSECUTOR AND THE DEPUTY PROSECUTORS

The above mentioned draft resolution provides for the selection procedure of the Prosecutor and the Deputy Prosecutors.<sup>75</sup> Generally, no extensive discussions were conducted on this issue and only some minor modifications were made on the rolling text.

For the nomination of the Prosecutor, the procedure for the nomination of candidates for judges will be applied *mutatis mutandis*. Thus, it is secured that the nomination procedure will meet a high standard of transparency. The rolling text took up a proposal by Switzerland and Greece made at the last session to elect the Prosecutor by consensus,<sup>76</sup> which had been approved by a vast majority of delegations. However, should all efforts to reach a consensual election be in vain, the candidate receiving an absolute majority of the members of the Assembly will be elected. If no candidate receives the required majority after four ballots, subsequent ballots will be restricted to the two candidates receiving the highest number of votes.

Regarding the Deputy Prosecutors, the rolling text was slightly amended: first, as it is the Prosecutor who is competent for the nomination of candidates, the duty of the Prosecutor to take into account that the Deputy Prosecutors shall be of a different nationality than the Prosecutor and the other Deputy Prosecutors (Article 42 (2) of the Rome Statute) is now repeated in the draft resolution (para. 35). However, the election of a Deputy Prosecutor being of the same nationality as the Prosecutor or another Deputy Prosecutor will not be annulled, as opposed to the election of judges (cf. para. 19 of the draft resolution).

Further, the same information as with the Prosecutor shall be provided on the candidates for the post of a Deputy Prosecutor, and the nomination procedure shall be as transparent. This means that the nominations and the accompanying statements will be made accessible on the web site of the Court as soon as they are received.

As to the election procedure, the draft resolution refers to the election procedure for the Prosecutor. Para. 38 of the draft provides that in case more candidates should be elected than there are posts to be filled, those obtaining the highest number of votes shall be considered elected. However, what is missing in the resolution is a provision for the event of a tie between two candidates for Deputy Prosecutor. If this should ever happen, the most reasonable way out would be to apply para. 18, which deals with ties in the context of an election of judges.

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<sup>74</sup> The paragraphs of the draft resolution (document L.6 and Corr.1) will be renumbered before submittal to the Assembly. Thus, para. 10bis will become para. 11, and para. 10ter will become para. 12. The numbers of the subsequent paragraphs will change accordingly.

<sup>75</sup> Draft Report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutor of the International Criminal Court, UN Doc. PCNICC/2002/WGASP-PD/L.6 of 8 July 2002.

<sup>76</sup> Nomination of the Prosecutor – Proposal submitted by Greece and Switzerland, UN Doc. PCNICC/2002/WGASP-PD/DP.3 of 16 April 2002.

### **III – ELECTION OF THE REGISTRAR**

Unlike last time, this issue was not addressed at this session. At the last session, no agreement was achieved if rules should be set up for recommendations by the Assembly with regard to the election of the Registrar (cf. Article 43 (4) of the Rome Statute). But as the Registrar will probably not be elected earlier than spring 2003, the Assembly will still have time to consider if a recommendation should be made and what the leading principles should be in doing so. At the last session, concerns were raised that the key positions in the Court should be held by individuals from different regional groups.

### **IV – SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES**

At the ninth session of the PrepCom, a draft resolution was adopted to the extend that the Secretariat of the UN should be requested to carry out the functions of the ASP Secretariat for a provisional period, the end of which had not been determined yet.<sup>77</sup> Therefore, the question remained whether and how a permanent Secretariat of the Assembly should be established after the end of the provisional period. The discussion concentrated on measures necessary for the early establishment of a definitive secretariat of the Assembly.

Two proposals were introduced, one from Belgium, another one from Spain.<sup>78</sup> They both aimed at the same purpose, a timely establishment of an independent Secretariat which is to start the framework of a permanent secretariat of the Assembly, within the ICC institutional system,. Although the proposals were introduced in the first formal meeting, they have been subject to discussion only in the informal meetings.

The Spanish proposal intends to request the Bureau to study the question of the permanent secretariat of the Assembly, and to submit appropriate proposals for the establishment of a Secretariat at its session in 2003. According to Spain, the study is necessary to settle two basic questions: first, to get a more complete definition of the functions and composition of the secretariat, and of the budgetary implications. Secondly, to reach a decision on the date on which the permanent secretariat of the Assembly would start to function.

The Belgian proposal, which its sponsor did not consider incompatible with the Spanish proposal, suggested that a core number of staff (in the proposal they suggested a minimum of three individuals) be recruited as soon as possible, i.e. already in the first financial period, in order to provide for a smooth and timely establishment of a permanent secretariat.

The two proposals were not seen as contradictory, but as complementary. Attempts were made to produce an integrated version of both proposals in order to address all aspects taken up in either of the proposals and to see how the transition could be effected from the UN Secretariat to a permanent secretariat of the Assembly of States Parties.

As a result of these deliberations, the Working Group adopted a draft resolution regarding the permanent secretariat of the Assembly of State Parties.<sup>79</sup> This resolution requests the Bureau to study the question of the permanent secretariat of the Assembly and to submit related proposals, including an assessment of the budgetary implications for the 2004 budget, to the Assembly so that it can take a decision thereon at its regular session in the second half of 2003. The Bureau was further requested to examine in that regard the

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<sup>77</sup> Cf. Draft resolution on the Assembly of States Parties concerning the provisional arrangements for the Secretariat of the Assembly of States Parties, UN Doc. PCNICC/2002/WGASP-PD/L.4 of 17 April 2002. See also ELSA Report of the 9<sup>th</sup> session of the PrepCom, p. 20.

<sup>78</sup> Proposal submitted by Spain – Permanent Secretariat of the Assembly of States Parties, UN Doc. PCNICC/2002/WGASP-PD/DP.6 of 1 July 2002; Secretariat of the Assembly of States Parties: organization of a permanent secretariat – Proposal submitted by Belgium, UN Doc. PCNICC/2002/WGASP-PD/L.7 of 1 July 2002.

<sup>79</sup> Draft report of the Working Group – draft resolution regarding the permanent secretariat of the Assembly of States Parties, UN Doc. PCNICC/2002/WGASP-PD/L.7 of 8 July 2002.

modalities for the progressive replacement of the provisional secretariat by the permanent secretariat in an efficient and expeditious manner, in consultation with the Secretariat of the United Nations. However, no decision was made as to the character of the Secretariat, that is if should be independent from the UN Secretariat, staffed by it or even part of it.

The draft resolution will be submitted to the Assembly of States Parties in September for adoption.

## **V – COMPOSITION OF THE COMMITTEE ON BUDGET AND FINANCE AND ELECTION OF THE MEMBERS**

Last year, the PrepCom had adopted a draft resolution for the establishment of a Committee on Budget and Finance.<sup>80</sup> At this session, the Chairman of the PrepCom charged the Working Group with the task to set up rules for the election of the members of that Committee. Ms Flores from Mexico was appointed sub-coordinator for the issue.

At the first formal meeting, the Secretariat introduced a comparative chart in which the Advisory Committee on Administrative and Budgetary Questions of the UN and the Finance Committee of the International Seabed Authority were analysed in order to provide a starting point for discussions on the composition of the Committee.<sup>81</sup> Three informal meetings were held on the issue. As a result, the Working Group adopted a draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Committee on Budget and Finance,<sup>82</sup> which will be submitted to the first Assembly for adoption.

Section A of this draft resolution pertains to the nomination of candidates for the election of the members of the Committee. The nomination procedure is taken *mutatis mutandis* from the procedure that had previously been adopted for the nomination of the judges: for example, it is also provided for an extension of the nomination period in case there should be too few candidates. However, candidatures will not be placed on the web site of the Court.

Section B specifically refers to the geographical distribution of the 12 seats of the Committee, which will apply only for the first elections. Accordingly, the African, Asian, Eastern European, as well as the group of Latin American and Caribbean States are each entitled to two seats, while Western European and other States will get four. Thus, the distribution does not so much reflect the status of ratification of each geographical group than the financial contributions that each group will make to the Court's budget.

Section C refers to the elections, especially in terms of the voting procedure. The main idea is to reach a consensus on the election. To this end, the Bureau is requested to make a recommendation. Should there be only as many candidates as posts to be filled, it might be dispensed with an election. Otherwise, the election procedure is construed along the lines of the election procedure for judges.

The nominating State will have to bear the expenses of the member of the Committee necessary for the performance of its functions.

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<sup>80</sup> Cf. Draft resolution of the Assembly of States Parties on the establishment of the Committee on Budget and Finance, UN Doc. PCNICC/2001/1 of 8 January 2002, Annex I.

<sup>81</sup> Election procedures of the Committee on Budget and Finance of the International Criminal Court: comparative chart with the procedures of the Advisory Committee on Administrative and Budgetary Questions of the United Nations and the Finance Committee of the International Seabed Authority, UN Doc. PCNICC/2002/WGASP-PD/L.5 of 1 July 2002.

<sup>82</sup> Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of members of the Committee on Budget and Finance, UN Doc. PCNICC/2002/WGASP-PD/L.9 of 10 July 2002.

## **VI – COMPOSITION OF THE BUREAU OF THE ASSEMBLY OF STATE PARTIES**

Another new topic at this session was the composition of the Bureau of the Assembly of States Parties. According to Mr Christian Much of Germany, who had been appointed sub-coordinator for this issue, the Working Group agreed that no resolution should be adopted to this end. Instead, he presented a common understanding of the Working Group on the distribution of five key positions within the Bureau and the Assembly.

Those five key positions are the President and the two Vice-Presidents of the Assembly, as well as a the post of a rapporteur, which is not provided for in the Statute, but which was considered useful. Each one of these four positions will be assigned to the African group, the Asian group, the group of Western European and Other States and the GRULAC group. No agreement was reached as to which group should hold which post. Further, the post of the Chairman of the Credentials Committee, another subsidiary body of the Assembly to be established under rule 25 of the Rules of Procedure of the Assembly of States Parties will be regarded as the fifth key position, which will be assigned to the Eastern European group.

Prince Zaid Ra'ad Zaid Al-Hussein of Jordan was designated to be the first President of the Assembly. It is expected that the assignment of the five key positions to the regional groups will be subject to the principle of rotation.

## WORKING GROUP REPORT

# THE CRIME OF AGGRESSION

## INTRODUCTION<sup>83</sup>

Article 5 paragraph 1 of the Rome Statute of the International Criminal Court (hereafter “the Rome Statute”) states that:

“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.”

The Crime of Aggression is thus one of the four core crimes within the jurisdiction of the International Criminal Court. The definitions of the first three crimes are found in articles 6 through 8 of the Rome Statute. The delegations to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (July 1998) were, however, unable to reach consensus with regards to the definition of the Crime of Aggression, its elements and the conditions for the existence of its jurisdiction. The dissension arose around two points: some remained uncertain about how to establish the paradigms of aggression in a criminal statute; and several states wanted reassurances that the ICC could remain independent of a politicised Security Council.

Therefore, Resolution F paragraph 7 of the Final Act of the 1998 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court mandates the Preparatory Commission to: “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.”

Article 5 paragraph 2 of the Rome Statute states that the Court “*shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with article 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise its jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*”

The working group on the crime of aggression was established at the third session of the Preparatory Commission. The chair of the Preparatory Commission, Philippe Kirsch (Canada), appointed Tuvaku Manongi (United Republic of Tanzania) to lead the working group on the Crime of Aggression. Mr. Manongi oversaw discussions on aggression from the third through the sixth sessions. Before the start of the seventh session, Mr. Manongi indicated that he could no longer continue as coordinator, thus the chair appointed Silvia Fernandez de Gurmendi (Argentina) to succeed Mr. Manongi.

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<sup>83</sup> Submitted by Heidi Bentzen, ELSA Oslo/Norway

Throughout the years, several delegations have submitted proposals on the subject of the crime of aggression. All the proposals are still on the table. The following documents were submitted during the tenth session:

#### List of documents submitted during the 10<sup>th</sup> session – the Crime of Aggression

<i>Symbol</i>	<i>Description</i>
PCNICC/2002/WGCA/L.2	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression
PCNICC/2002/WGCA/L.2/Rev.1	Draft report of the Working Group – Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression
PCNICC/2002/WGCA/DP.2	Elements of the Crime of Aggression – Proposal submitted by Samoa
PCNICC/2002/WGCA/DP.3	Proposed text on the definition of the crime and act of aggression – Proposal submitted by the delegation of Colombia
PCNICC/2002/WGCA/DP.4	Draft resolution of the continuity of work in respect of the Crime of Aggression – Proposal by the Movement of Non-Aligned Countries
PCNICC/2002/WGCA/DP.5	Incorporating the crime of aggression as a leadership crime into the definition – Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand
PCNICC/2002/WGCA/RT.1/Rev.1	Discussion paper proposed by the Coordinator
PCNICC/2002/WGCA/RT.1/Rev.2	Discussion paper proposed by the Coordinator

Determining the future and continuity of the work was deemed the priority issue by the delegations to the tenth preparatory commission. Significant progress was made on substantive issues, including the elements of the crime of aggression.

#### **Proposal Submitted by Samoa**

At the formal meeting of the working group on crime of aggression on July 5, 2002, the delegate of Samoa, Professor Roger S. Clark, introduced a proposal, "Elements of the Crime of Aggression," PCNICC/2002/WGCA/DP.2. The paper built upon the discussion paper proposed by the Coordinator on April 1, 2002 at the 9<sup>th</sup> Session of the Preparatory Commission for the International Criminal Court (PCNICC/2002/WGCA/RT.1).

The proposal attempted to advance the dialogue on the crime of aggression by focusing on the elements of the crime<sup>84</sup> and bracketing some of the more controversial issues for future debate. Professor Clark stated that a discussion of the elements of the crime was important "for its own sake" and also "for the light it might shed on the technical aspects of the 'definition' and 'conditions'."<sup>85</sup> In a meeting during the 10<sup>th</sup> PrepCom with the CICC strategy team for the crime of aggression, he noted that focusing on the elements was also a political strategy to advance the dialogue on the crime of aggression by attempting to

<sup>84</sup> Professor Clark has defined the elements of a crime as "those basic building blocks (mental and physical/material) which fit together to constitute 'a crime.'" See Roger Clark, *The Mental Elements in International Criminal Law*, *Criminal Law Forum* 12, 317, 2002.

<sup>85</sup> PCNICC/2002/WGCA/DP.2

reach consensus on relatively minor issues in order to facilitate understanding on the more contentious issues.

According to Professor Clark, analysing criminal responsibility in respect of a particular event means thinking about what the Rome Statute terms material elements, mental elements and grounds for exclusion of criminal responsibility and the mixture between them.<sup>86</sup> According to Professor Clark, these terms are found, but not fully explained in articles 30 and 32 of the Rome Statute.<sup>87</sup> PCNICC/2002/WGCA/DP.2 tries to elucidate the material elements of the crime of aggression, namely the "conduct," consequences," and "circumstances" that give rise to a criminal act of aggression. At the end of the 10<sup>th</sup> Preparatory Commission, the Coordinator for the working group on the crime of aggression presented PCNICC/2002/WGCA/RT.1/Rev. 2, a paper intended to reflect the final state of discussions in the working group. Section 2 of PCNICC/2002/WGCA/RT.1/Rev. 2 contained a section of the elements of the crime of aggression, which was based upon Samoa's proposal and the subsequent discussions of the Samoa proposal.

In general, delegations responded favourably to Samoa's proposal and the proposal generated a modest amount of discussion. Most delegations agreed that it would be helpful to decide upon the elements of the crime as a path forward in the debate. Time was very limited at the 10<sup>th</sup> PrepCom, however, and there were a number of critical issues to decide, so only a very small amount of progress appeared to be made on the substantive issues addressed in the Samoan proposal. It should be noted that the Syrian delegation, speaking on behalf of the Arab League, rejected the proposal outright as an intellectual obfuscation of the key issues, in particular the role the security council is to play in determining whether a crime of aggression has been committed.

PCNICC/2002/WGCA/DP.2 consists of three parts, an introduction, a draft section on the elements, and final comments. The draft section of the elements of the crime of aggression consists of six proposed elements, each with accompanying notes. Several delegations, such as Spain and Egypt, amongst others, thought it was premature to discuss the proposal at all because other more pressing outstanding issues remained to be decided by the working group. Therefore, many states declined to comment at all on the proposal.

Elements 1 and 2 were the least problematic elements listed in the proposal, and they were incorporated into PCNICC/2002/WGCA/RT.1/Rev. 2 as elements 5 and 6, respectively. However, unlike the Samoan proposal, in element 5 of PCNICC/2002/WGCA/RT.1/Rev. 2, General Assembly Resolution 3314 (XXIX) of 14 December 1974, is explicitly mentioned in the element. It is not mentioned at all in the elements of the Samoan proposal, although reference is made to it in the notes to the elements. CICC team members approve of explicitly referring to the resolution in the definition of the crime. The Coordinator expressed a strong preference for explicitly mentioning the resolution in the elements, stating in a CICC strategy meeting that it is not within the mandate of the working group to redefine the term and that deference must be paid to the 30 years the General Assembly spent on arriving at a definition of state aggression.

Element 3, which provided "[An appropriate organ of the United Nations] has determined that the State's actions amounted to an act of aggression" was roundly criticized. Only Samoa and Belgium thought this jurisdictional precondition should be conceptualised as an element of the crime. The CICC team on the working group of aggression also criticized the inclusion of the condition as an element. Delegates expressed great disagreement over what organ of the United Nations, if any, needed to determine that the State committed an act of aggression. Many delegations thought that the ICC itself should decide whether the act had occurred, whereas others argued that the Security Council, the ICJ or the General Assembly should be entrusted with the decision. The rejection of the inclusion of the precondition as a element of the crime is reflected in PCNICC/2002/WGCA/RT.1/Rev. 2, which does not list the precondition as an element of the crime.

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<sup>86</sup> Statement made by Professor Clark on behalf of the delegation of Samoa at the formal meeting of the working group of the crime of aggression, July 8, 2002.

<sup>87</sup> Id.

Element 4 listed several different options for carving out from the broader category of the crime of aggression a more serious example of aggression. In the notes to the element, Professor Clark stated that in Samoa's view, the entire element was unnecessary. Other delegations disagreed. Belgium stated its preference for option 2, although it added that element 4 may not be needed at all. Hungary stated a preference for option 3, and emphasized that the Hungarian delegation believes that it is important to include this element.<sup>88</sup> The element survived in the form of element 7 of PCNICC/2002/WGCA/RT.1/Rev. 2 and no consensus was reached on how to phrase the element.

Element 5 provided that the perpetrator be in a position to control the actions of the State responsible for the act of aggression. The draft element suggested several different ways to phrase the element. Cuba agreed with the general premise of the element that the perpetrator need not be a member of the government or military, as did Venezuela and Russia. Belgium, New Zealand, Thailand and Venezuela stated the term "effective" should be used, rather than "actual." China and Belgium thought that the word effective should be placed in a different position in the sentence, so the sentence would read "the perpetrator, who need not formally be a member of the Government or the military, was in a position to effectively exercise control." The Solomon Islands expressed its preference for the term "committed" rather than "was responsible for." Venezuela also thought that the term "committed," rather than "was responsible for" should be used because it thought it was less restrictive.

Element 6 was met with general approval. Cuba agreed that element 6 was a conduct element. New Zealand stated it was mostly pleased with the element. It survives as element 3 of PCNICC/2002/WGCA/RT.1/Rev. 2.

Although the Samoan proposal may have advanced the discussions of the working group in a small way, the primary problem for the working group remains the inability of delegations to reach a consensus on the role of the Security Council in determining whether a state act of aggression had taken place. Some countries, such as Syria, speaking on behalf of the Arab League, appeared to view the Samoan proposal with suspicion because it seemed to them to either be a preliminary attempt to smuggle a role for the Security Council into the definition of the elements of the crime or to sidestep the issue altogether. Other countries welcomed the opportunity to focus on the elements of the crime, viewing it as an area where some consensus can be reached.

### **Colombia's Proposal**

The Colombian delegation submitted a proposal regarding the definition of the crime and act of aggression. This proposal was not extensively debated. The Colombian delegate presented the proposal to the Working Group on the Crime of Aggression during the July 5, 2002 formal meeting, and other delegates commented on the proposal at the July 8, 2002 formal meeting. The Colombian proposal separated the definition of the 'crime of aggression' from the definition of the 'act of aggression.'

#### *Crime of Aggression*

Colombia's proposal attempted to distinguish between two kinds of perpetrators who would be culpable of the crime of aggression. Thus, the proposal separated the crime of aggression into two subsets of behaviour. Under the first definition of the crime of aggression, Art. 1 § (a), a person would be guilty of the crime of aggression who: (1) is in a position to exercise control or effectively direct the political or military action of the state, and (2.1) intentionally orders an act of aggression, or (2.2) actively and knowingly participates in the planning of an act of aggression.

The second person the Colombian proposal contemplates holding accountable for the crime of aggression is outlined in Art. 1 § (b). A person guilty under Art. 1 § (b) would be someone who: (1) is in a position to contribute to or effectively cooperate in shaping in a fundamental manner the political or military action

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<sup>88</sup> Hungary stated that in choosing option three, it was concurring with the choice of the delegation of Belgium. However, according to our minutes of the formal meeting on the crime of aggression on July 5, 2002, Belgium stated a preference for option 2.

of the state, (2) actively participates by means of an essential act in the planning of an act of aggression, (3) knowing that the act will take place, and (4) the act of aggression takes place.

The second above-mentioned definition attempts to cover a person who is not necessarily in a position to effectively exercise control in the state. The Colombian proposal would thus have a broader reach over individuals involved in the planning of an act of aggression. Nevertheless, the second definition limits its reach by requiring that individuals commit 'essential acts' that further lead to an act of aggression taking place. In contrast, the first definition of a crime of aggression in the Colombian proposal does not require that the act of aggression occur in order for a person to be guilty of the crime.

#### *Act of Aggression*

The Colombian delegation proposed a definition of an act of aggression that combined the General Assembly Resolution 3314 with other elements. The proposal included an act of aggression as that which would constitute a war of aggression, or a violation of territorial integrity or political independence as recognized by the U.N. Charter.

#### **Responses to the Proposal**

After Colombia initially presented its proposal, Spain indicated during a formal meeting that it disliked Colombia's separation of the crime of aggression into two separate definitions. Later, during the July 8th 2002 formal meeting, the Solomon Islands suggested that the word "effective" be inserted before "position" in Art. 1 § (a). The same delegate commented that both the Colombian and the Samoan proposals omitted the requirement that the Security Council first make a determination of whether an act of aggression had occurred. Colombia did not indicate whether they had omitted this requirement because they had intended for the ICC or another U.N. organ to make that determination.

During the July 11, 2002 formal meeting, the working group did not discuss the Colombian proposal, but rather focussed exclusively on the Coordinator's revised proposal. The Coordinator's revised proposal incorporated a number of elements from the previous Samoan proposal. The revised Coordinator's draft would not give the ICC the ability to reprimand an individual who is not able to exercise effective control in the state that commits an act of aggression, as the Colombian proposal would. Furthermore, the Coordinator's revised proposal also requires that the act of aggression actually occur. In contrast, Colombia's proposal contemplates that the ICC would have a broader reach over individuals who have either planned or executed an act of aggression.

#### **The Draft Resolution on the Continuity of Work in respect of the Crime of Aggression proposed by the Movement of Non Aligned Countries.**

This proposal<sup>89</sup> was submitted by the Movement of Non Aligned Countries (herein after referred to as the "NAM") and presented by Iran during a formal meeting of the Crime of Aggression working group on July 5<sup>th</sup> 2002<sup>90</sup>. The delegate from Iran expressed his wish that the working group complete its mandate by the end of the Preparatory Commission, but went on to recognise that this would not be a possibility. He placed great emphasis on the importance of the work of the group and stated that at this late stage of the Preparatory Commission all that could be done was to ensure that the work of the group continued. It was to this end that NAM had submitted a draft resolution of the Assembly of States Parties which was concerned with the future of the work in respect of the crime of aggression.

The draft proposal contained two perambulatory paragraphs and five operative paragraphs.

#### *Paragraph 1 and 2*

*"Takes note with appreciation of the progress report of the Preparatory Commission for the International Criminal Court on the crime of aggression;*

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<sup>89</sup> PCNICC/2002/WGCA/DP.4

<sup>90</sup> This Formal Meeting had been scheduled to take place on July 3<sup>rd</sup> 2002, however the meeting was postponed due to a plenary session on July 3<sup>rd</sup> 2002.

*Decides to establish a special working group of the Assembly of States Parties on the Crime of Aggression, to be open to all States Members of the Preparatory Committee*<sup>91</sup>”

Delegates agreed with the sentiment of these two paragraphs, however there were a number of issues raised concerning the wording of the text. Many countries expressed their concerns that the wording used in paragraph 2 should allow all states who wished to participate to do so and that all states who wished to participate should be able to do so on an equal footing. The statement made by the delegate from Portugal during the Formal meeting on July 5<sup>th</sup> 2002 is typical of the concerns expressed on this point,

“The NAM proposal is a timely and useful proposal and we favour very much that the work on aggression must continue, and we favour that the working group should be open to all states and as far as possible that it should be based on the equal standing of all states”

The delegate from Canada also raised the point during the same formal session, pointing out that it was important that non state parties and new states be allowed to participate to ensure that the text on the crime of aggression be widely accepted. Other delegates also expressed concerns that newly formed states who had become members of the United Nations, such as East Timor, should be able to participate in the special working group should they wish to. All delegates were in agreement that new states should be able to participate.

The final text of the proposal contained in PCNICC/2002/WGCA/L.2 reflected this concern by replacing the wording of paragraph 2 with the following; “Decides to establish a special working group on the crime of aggression, open on an equal footing to all States members of the United Nations or members of specialized agencies or of the Atomic Energy Agency, for the purpose of elaborating proposals for a provision on aggression in accordance with paragraph 2 article 5 of the Statute and paragraph 7 of resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998”.

The above text was seen as allowing the widest possible participation in the special working group set up by the ASP.

During the Final formal meeting of the crime of aggression working group Turkey brought up the issue of the participation of the ICRC as it felt that it would not be able to participate under the final draft of the resolution. The delegate expressed the view that the ICRC had a specific role to play under the Geneva convention, it would be unwise not to provide for their participation. This concern was addressed as the rules relating to the Assembly were consulted and it appeared that the ICRC would be able to participate.

The CICC team on the crime of aggression produced an internal paper, which expressed the concerns of the team with regard to the NAM proposal. One of the these concerns<sup>92</sup> was the lack of any mention of NGO participation in the “special working group”. “In terms of NGO access, Rule 93 para. (a),(b),(d) and Rule 42 para 3 would be particularly relevant. Yet since the proposal speaks of a special working group and provides for a specific rule with regard to the openness to States it would be advisable to include expressly a reference to the regular rules on participation, availability of documents and public meetings important to NGO’s and other participants.”

This was not however directly addressed in the final text of the proposal which was adopted.

### *Paragraph 3*

The text of paragraph 3 of PCNICC/2002/WGCA/DP.4 reads as follows;

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<sup>91</sup> Paragraph 2 of the proposal contains a typographical error corrected by the delegate from Iran during his presentation of the proposal. Instead of “States members of the Preparatory Committee” the text should read “States members of the Commission”.

<sup>92</sup> Paragraph III of the Internal Paper entitled “Some initial thoughts regarding the Proposal by the Movement of Non-Aligned Countries for a Draft Resolution on the continuity of the work in respect of the crime of aggression, PCNICC/2002/WGCA/DP.4”

“Decides also that the special working group for shall continue to elaborate proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The special working group shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the statute. The provisions relating to the crime of aggression shall enter into force for all States Parties in accordance with the relevant provisions of the Statute;”

Although the wording of paragraph 3 has been condensed in the final draft there is no real change in the wording of the paragraph.

#### *Paragraph 4*

The text of paragraph 4 of PCNICC/2002/WGCA/DP.4 reads as follows; “Decides further that the special working group shall meet during the regular sessions of the Assembly of States Parties” Concerns were expressed by delegates that this paragraph may not leave room for the special working group to meet more often if it was felt necessary. The text of the final draft reflected this concern by inserting the words, “*or at any other time the Assembly deems appropriate and feasible*” at the end of the paragraph.

#### *Paragraph 5*

During the final formal meeting of the crime of the aggression Greece proposed the addition of the phrase “*with a view to holding the first meeting in 2003*” to the text of paragraph 5 of PCNICC/2002/WGCA/L2. Many other delegates agreed with the addition proposed by the Greek delegate as they were all concerned that the momentum gained should not be wasted. The addition was therefore adopted.

The final text therefore reads; “Requests the bureau of the assembly to prepare a proposal for the meetings of the special working group and to submit it, as early as possible, together with its budgetary implications to a session of the Assembly in 2003, with a view to holding the first meeting in 2003”.

#### **Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand**

The purpose of this proposal (DP.5), put forth by Belgium, Cambodia, Sierra Leone and Thailand, is to incorporate into the definition of aggression the idea that it is a leadership crime. This is based on the notion that the jurisprudence of both the Nuremberg tribunals and those created under Control Council Law No. 10 support the idea that aggression is a “*leadership crime which may only be committed by persons who have effective control of the State and military apparatus on a policy level*.” The language of the proposal expresses concern that, should this rationale not be included in the definition of aggression, the precept may be “subsequently diluted” for various reasons, including the application of Article 10 of the Rome Statute.

To assure that future events will not result in “subsequent dilution” of this long-standing principle, the proposal suggests that the word “effectively” be included prior to the words “exercise control” in the formal definition of aggression. Consequently, the language would read as such: “*For the purpose of this Statute, a crime of aggression means an act committed by a person who, being in a position to effectively exercise control over or direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of an act of aggression.*”

#### **The Coordinator’s Discussion Paper<sup>12</sup>**

The Coordinator of the Working Group on the Crime of Aggression, Silvia Fernandez de Gurmendi, submitted a discussion paper at the 9<sup>th</sup> session of the Preparatory Commission

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<sup>12</sup> Submitted by Myriam Bouazdi, ELSA France.

(PCNICC/2002/WGCA/RT.1)<sup>13</sup> that continued to be discussed on the 10<sup>th</sup> session of the Prepcom. However those discussions within the Working Group lead to a new proposal by the Coordinator, which was issued during the 10<sup>th</sup> Preparatory Commission on July 11<sup>th</sup> 2002 (PCNICC/2002/WGCA/RT.1/Rev.2). This second draft text differs from the first one in its structure: as the first draft was focusing on the definitions of the crime and the act of aggression in its first two paragraphs and on the preconditions required for the exercise of jurisdiction in its last two paragraphs, the second draft also considers those issues in its part I but adds in its part II a list of the elements of the crime brought up by the Samoan proposal<sup>14</sup>.

### ***Part I: The definitions of the act of aggression and of the crime of aggression***

#### *Paragraph 1*

The consensus reached in the first discussion paper about the definitions of an act of aggression as the one committed by a state and of the crime of aggression as the one committed by an individual<sup>15</sup> is still agreed on in the revision of the draft. However one can notice the adjunction of the word «effectively» concerning the exercise of control over or the direction of political or military action of a state when committing a crime of aggression. This emphasizes the will of the Working Group's delegates to make sure the actual responsible of the crime of aggression is indicted instead of the official and symbolic representative. Another element included in the definition of the crime of aggression is that the individual must act «intentionally» and «knowingly» when leading an act of aggression. But intent and knowledge will also be dealt with later in part II of the document as moral elements of the crime. Eventually, the act of aggression must constitute a «flagrant violation of the Charter of the United Nations» (some delegations were really eager to see the word manifest replaced by flagrant). Then, we have three options as regards to what an act of aggression is : the first two options partially use terms of the General Assembly resolution 3314 referring to a war of aggression and an occupation the first one starting by the words «such as, in particular», the second one by «and amounts to», the first one presenting these as example whereas the second proposition makes the war of aggression and the occupation exclusive cases. A third option has been added on the demand of several delegations who were not happy with a partial use of resolution 3314 and reads «Neither of the above».

#### *Paragraph 2*

The second paragraph of this draft deals with the exact definition of the act of aggression and refers therefore to the General Assembly resolution 3314 in accordance to which it must be determined that the State concerned has met the requirements of the resolution and has then committed an act of aggression. There are two options here: the first one referring to paragraphs 4 and 5 of the same draft (with which we shall deal later on) and the second one submitting the determination of an act of aggression to the UN Security Council.

#### *Paragraph 3*

The third paragraph of the Coordinator's paper excludes the use of some provisions of the Rome Statute contained in article 25 paragraph 3, article 28 and article 33 which respectively deal with individual criminal responsibility, responsibility of commanders and other superiors and superior orders and prescription of law<sup>16</sup>. This exclusion is perfectly understandable here since the provisions made in this very draft tend to allow indictment of the individuals these provisions of the Rome Statute exempt from jurisdiction of the Court.

#### *Paragraph 4*

This paragraph states the prosecutor of the ICC «must ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned» before undertaking action. And in the case the Security Council has not made such a determination then the Court shall notify the

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<sup>13</sup> See ELSA report on the 9<sup>th</sup> session of the PrepCom. pages 26 to 28 for analysis.

<sup>14</sup> See « Proposal submitted by Samoa » above.

<sup>15</sup> See ELSA report on the 9<sup>th</sup> session of the PrepCom. same pages.

<sup>16</sup> See Rome Statute at <http://www.un.org/law/icc/statute/romefra.htm> part 3 General Principles of Criminal Law.

Security Council so that it may take action. However two options are submitted here as regards to which legal provisions the Security Council's action shall be submitted to: article 39 of the Charter of the UN<sup>17</sup> (option 1) or relevant provisions of the Charter of the UN (option 2). Option 2 offering of course a wider range of legal provisions to the Security Council in order to declare the commission of an act of aggression by a State.

#### *Paragraph 5*

The last paragraph of part I of the coordinator's draft considers the case in which the Security Council, in spite of the Court's notification, does not make any determination as to the existence of an act of aggression. It then offers five options for the Court: either the Court may proceed with the case or dismiss the case (options 1 and 2); or the Court may request a General Assembly recommendation in accordance of articles 12, 14 and 24 of the UN Charter<sup>18</sup> within twelve months in the absence of which the court may proceed with the case (option 3); or the Court may request the General Assembly (variant a) or the Security Council (variant b) to seek an advisory opinion from the International Court of Justice (ICJ) as to whether an act of aggression has been committed or not and if the ICJ gives a positive advice as to this question the Court may then proceed with the case (option 4); and, eventually, the Court may proceed with the case if it ascertains the ICJ has made a finding in accordance with chapter 2 of its statute that an act of aggression has been committed by the State concerned (option 5).

This paragraph then is more politically focused since the issue at stake here is which UN organ (and under which conditions) will allow the Court to undertake action in case the Security Council would fail declaring the commission of an act of aggression. The choice of this organ would of course influence the chances for the Court to undertake action in case of a Security Council disapproval.

Paragraph 5 also offers the possibility to use these procedures, or not, in case the Security Council invokes article 16 of the Rome Statute within six months from the date of notification. This article enables the Security Council to keep the Court from the exercise of its jurisdiction for a renewable period of 12 months over a case on which the Security Council would have voted a resolution under the prescriptions of chapter VII of the Charter of the UN for the Court not to undertake action<sup>19</sup>.

### ***Part II: The elements of the crime***

A footnote related to the title of part two mentions that the elements of the crime of aggression are drawn from the Samoan proposal and have not been thoroughly discussed in the working group. Therefore, the second part of the draft is rather a compromising listing of all the elements of the crime that were agreed on by most delegates but on which no substantial discussion has taken place yet and it shall be discussed in the special working group during the Assembly of States Parties.

#### ***Precondition***

This part makes, in addition to the general preconditions contained in the Rome Statute, the determination by an appropriate organ of the commission of an act of aggression a precondition to the very existence of a crime of aggression. The delegate of Portugal raised the issue that if this is a precondition to the existence of the crime of aggression it may not be conform to the first part of the draft relating to the definition of the crime of aggression in paragraph 5 where the hypothesis of the Security Council not making any determination is considered as a possibility. The Portuguese delegate declared he was seeking conformity and wanted the elements of the crime to conform completely in the definition of the crime. As regards to the reference to an appropriate organ a footnote has been added to it referring to options 1 and 2 of paragraph 2 part I<sup>20</sup> meaning the term "appropriate organ" does not refer to a well defined organ yet and the note adds a mention to the rights of the accused which could be challenged by this precondition and should therefore be considered in connection with it as pointed out by the Philippines' delegate. Indeed the determination of the crime by an individual by an external organ where he has no rights to question witnesses may challenge the rights of the accused in a significant manner.

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<sup>17</sup> See Charter of the UN at <http://www.un.org/Overview/Charter/contents.html> chapter VII.

<sup>18</sup> See Charter of the UN, same URL, chapters IV and V.

<sup>19</sup> See Security Council Resolution 1422 at <http://www.un.org/Docs/scres/2002/res1422e.pdf> for example.

<sup>20</sup> See report above.

## ***Elements***

### ***Paragraph 1***

This paragraph refers to the effective position of the perpetrator to exercise control over or direct the action leading to a crime of aggression. Again, the use of the word “effectively” demonstrates the will of the working group to indict the actual responsible of the crime and no head of state or army...etc who would be more of a symbolic figure than the actual responsible individual.

### ***Paragraph 2***

This paragraph sets up a condition of knowledge as regards to the effective position referred to above.

### ***Paragraph 3***

The third paragraph underlines the requirement for an active participation of the accused in the planning, preparation or execution of the act of aggression.

### ***Paragraph 4***

This paragraph requires the accused to have actively participated in planning, preparation or execution of an act of aggression with intent and knowledge. France and Senegal have both expressed their views on the uselessness of these two terms but other delegations did not agree upon this idea and thus this paragraph was kept in the final draft.

### ***Paragraph 5***

Here the need to ensure that an act of aggression according to the definition of the General Assembly Resolution 3314 was committed by a state is underlined as being an element of the crime of aggression.

### ***Paragraph 6***

This paragraph adds to the elements of the crime of aggression the knowledge by the perpetrator that the actions of the State amounted to an act of aggression.

### ***Paragraph 7***

This paragraph requires that “the act of aggression by its character, gravity and scale, constituted a flagrant violation of the Charter of the UN” and then offers three options to clarify the concept of flagrant violation of the Charter of the UN. The first two options refer to a war of aggression and occupation of or annexing the territory of another state but while the first option reads “such as a war of aggression...” the second option reads “And amounts to a war of aggression...” which is a lot more narrow options since it does not seem to allow anything else than the cases mentioned whereas option 1 seems to be giving a non-exhaustive list of examples. Eventually the third and last option reads “neither of the above” which leaves the choice to put the first two options aside if not considered satisfying.

### ***Paragraph 8***

The last paragraph imposes the condition of intent and knowledge of the perpetrator as regards to the elements listed in paragraph 7.

There is a note at the end of part II of the document referring to the elements listed in paragraphs 2, 4, 6 and 8 (all related to knowledge of the perpetrator) and stating that in the case nothing were said, the default rule of article 30 of the Rome Statute would then apply (this rule attributes the burden of proof of the knowledge to the prosecutor who must demonstrate the knowledge of the accused). The note then underlines the fact that the requirement for both knowledge and intent might be meaningless in some legal systems and that this fact should be taken in account when considering this draft.

ANNEX I



The European Law Students' Association

An Introductory Report to  
the Preparatory Commission for  
the International Criminal Court (ICC PrepCom)

UN Headquarters, New York City 2001



By Espen Rostrup Nakstad  
The European Law Students' Association  
espenn@hotmail.com

## Introductory report to the ICC Preparatory Commission for the International Criminal Court<sup>93</sup>

### THE INTERNATIONAL CRIMINAL COURT

The proposed International Criminal Court (ICC) will be the world's first permanent international court with jurisdiction to prosecute individuals accused of the most serious crimes of concern to international community, namely *genocide, war crimes, and crimes against humanity*.<sup>94</sup> Unlike the International Court of Justice<sup>95</sup> (ICJ) in the Hague, whose jurisdiction is restricted to States, the ICC will have the capacity to investigate, indict, and bring to justice *individuals*. As a permanent and global court, the ICC will likewise differ from the special International Criminal Tribunals created by the UN Security Council for atrocities in the Former Yugoslavia and Rwanda<sup>96</sup>. It will not become another ad hoc tribunal but a *permanent institution*. The Court's jurisdiction will not be chronologically limited, although when the ICC takes effect, it will not be retroactive. The International Criminal Court will be complementary to national criminal jurisdiction (Art.1 of the Rome Statute).

### THE ROME STATUTE<sup>97</sup>

The Rome Statute defines the crimes within the jurisdiction of the ICC, how the Court<sup>98</sup> will work and what states must do to co-operate with it. The Rome Statute enters into force once 60 states have ratified the treaty, and the Court will come into existence following an Assembly of States Parties that have ratified the Statute.

### THE ROME CONFERENCE<sup>99</sup>

The ICC treaty was negotiated and the Rome Statute adopted at *the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* 17 July 1998.

NGO conferences in recent years: - *The Hague Appeal for Peace* (CICC), a major end-of-century campaign and conference dedicated to the delegitimation of war, and concurrent with the 100 year anniversary of the first Hague Peace Conference in 1899. - *The "Power of Peace" Conference* was the capping stone of ELSA's 1997-99 IFP<sup>100</sup> theme, and took place parallel to the Hague conference.

### THE PREPARATORY COMMISSION

The Preparatory Commission (PrepCom) for the International Criminal Court was established by the United Nations General Assembly pursuant to a mandate, embodied in Resolution F<sup>101</sup> of the Final Act of the Rome Diplomatic Conference which adopted the Rome Statute of the International Criminal Court on 17 July 1998.

### MANDATE OF THE PREPCOM<sup>102</sup>

The mandate of the Commission (PrepCom) is *to prepare proposals for practical arrangements for the establishment and coming into operation of the Court*. The PrepCom drafts annexes to the Rome Statute and develops documents that will enhance a swift and fast change into action once the Court is established, like the draft texts on "The Elements of Crimes"<sup>103</sup> and "The Rules of Procedure and Evidence" that were approved the PrepCom on 30 June 2000. The *United Nations General Assembly*, in

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<sup>93</sup> By Espen Rostrup Nakstad, ELSA Norway ([espenn@gmx.net](mailto:espenn@gmx.net)) - updated version; April 2002

<sup>94</sup> Article 5 par. 2 of the Rome Statute.

<sup>95</sup> The International Court of Justice - <http://www.icj-cij.org/>

<sup>96</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) - <http://www.un.org/icty/index.html>;

The International Tribunal for Rwanda (ICTR) - <http://www.icttr.org/>

<sup>97</sup> The Rome Statute of the International Criminal Court, 17 July 1998: <http://www.un.org/law/icc/statute/romeofra.htm>

<sup>98</sup> The Court = The [International Criminal] Court

<sup>99</sup> See "UN Diplomatic Conference of Plenipotentiaries on the Establishment of ICC July 1998 [www.un.org/icc/index.htm](http://www.un.org/icc/index.htm)

<sup>100</sup> IFP - ELSA's "International Focus Programme" - see [www.elsa.org](http://www.elsa.org)

<sup>101</sup> UN Resolution F - See ANNEX I - or [http://www.un.org/law/icc/statute/final.htm#resolution\\_f](http://www.un.org/law/icc/statute/final.htm#resolution_f)

<sup>102</sup> Mandate of the Preparatory Commission - See ANNEX I - or <http://www.un.org/law/icc/prepcomm/prepfra.htm>

<sup>103</sup> The Elements of Crimes are not binding guidelines, but shall assist judges in the interpretation and application of art 6,7, 8.

resolution 53/105 of 8 December 1998,<sup>104</sup> requested the Secretary-General to convene the Preparatory Commission to carry out the mandate of the resolution and, in that connection, also to *discuss ways to enhance the effectiveness and acceptance of the Court*. The Assembly of States Parties shall consider and adopt, as appropriate, recommendations of the Preparatory Commission. (Art.112.2.a)

## THE COURT'S JURISDICTION

Part 2 of the Rome Statute concerns crimes within the Court's jurisdiction (Art.5), the role of the Security Council, the admissibility of cases and the applicable law for cases coming before the Court. The Court initially will have jurisdiction over war crimes, genocide and crimes against humanity<sup>105</sup> (Art. 6,7, and 8). Additionally, the Court will exercise jurisdiction over *the crime of aggression* once agreement can be reached on its definition at some point in the future. The Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute (Jurisdiction *ratione temporis* - Art. 11).

## PRECONDITIONS TO THE EXERCISE OF JURISDICTION

In accordance with Article 12 of the Rome Statute the Court may exercise its jurisdiction only if:

1. the crime has been committed in the territory of a state party to the Rome Statute (including crimes committed aboard a vessel/aircraft when the state of registration is of the above mentioned), or
2. the accused person is a national citizen of a State Party to the Statute, or
3. a state which has not ratified the Statute makes a declaration accepting the Court's jurisdiction over the crime, or
4. when crimes have been committed in a situation which threatens or breaches international peace and security and the UN Security Council has referred the situation to the Court pursuant to Chapter 7 of the UN Charter.<sup>106</sup>

## TRIGGER MECHANISMS<sup>107</sup>

The Rome Statute provides that cases can originate in the Court three different ways:

**1. The Court's Prosecutor can initiate an investigation** into a situation where one or more of the crimes have been committed, based on information from any source, including the victim or the victim's family, but only if the Court has jurisdiction over the crime and individual. (Art 15.1)

**2. Situation referred by a State Party:** States that have ratified the Statute may ask the Prosecutor to investigate a situation where one or more of the crimes have been committed, but only if the Court has jurisdiction. (Art 13.a)

**3. Situation referred by the UN Security Council:** The UN Security Council, acting under Chapter VII of the UN Charter, can ask the Prosecutor to investigate a situation where one or more of the crimes have been committed. Unlike methods 1 and 2, the ICC will have jurisdiction when the UN Security Council refers the situation to the Prosecutor, *even if the crimes occurred in the territory of a state that has not ratified the Rome Statute or was committed by the national of such a state*. (Art. 13.b)

In each of these situations it is up to the Prosecutor, not the states or the Security Council, to decide whether to open an investigation and, based on that investigation, whether to prosecute subject to judicial approval. *The Court can only investigate and prosecute cases which national governments are unable or unwilling to prosecute* (Art. 17 - "Issues of admissibility").

## ICC HISTORY<sup>108</sup>

The history of the ICC initiative begins with the unsuccessful efforts to establish an international tribunal after World War I. After World War II, the Nuremberg and Tokyo military war crime tribunals set the stage for efforts to create a permanent court. Though called for in the 1948 Genocide Convention, efforts to establish a permanent court were delayed for decades by the cold war and refusal of governments to

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<sup>104</sup> Most relevant General Assembly Resolutions, see ANNEX II. Other relevant Resolutions [www.un.org/law/icc/gares/garesfra.htm](http://www.un.org/law/icc/gares/garesfra.htm)

<sup>105</sup> The Court will have jurisdiction over crimes occurring both in international and internal armed conflicts and over *crimes against humanity* such as disappearances that occur in the absence of conflict.

<sup>106</sup> The UN Charter is available at <http://www.un.org/Overview/Charter/contents.html>

<sup>107</sup> Trigger mechanisms: Art 13-16 of The Rome Statute

<sup>108</sup> See "History of the International Criminal Court" or "The Rome Conference Report (ELSA)", E. Nakstad, Dec 2000.

accept an international legal jurisdiction. The establishment of a temporary ad hoc tribunal for Bosnia-Herzegovina in 1993 strengthened the discussions for a permanent Court. In 1994 the Rwanda war made the Security Council establish a second ad hoc tribunal for Rwanda. In 1994 the International Law Commission (ILC)<sup>109</sup> presented a final draft Statute on the ICC to the General Assembly and recommended that a conference of plenipotentiaries were convened to negotiate a treaty to enact the Statute. Through resolution 49/73 of 9 December 1994 the General Assembly decided to establish an ad hoc committee on the ICC to review the draft Statute presented by ILC. This committee was open to all State Members of the United Nations or members of specialised agencies.

From 1996-98 the General Assembly convened six Preparatory Committee meetings to continue drafting the ICC Statute, leading up to "the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court"<sup>110</sup> in Rome June-July 1998, in which 160 countries participated. Member states overwhelmingly voted in favour of the Rome Statute for the ICC (120 in favour/ 7 against/ 21 abstentions). In February 1999 Senegal became the first State Party to ratify the Rome Statute, followed by Trinidad and Tobago, San Marino and Italy. **As for April 2002 the Rome Statute has a total of 139 Signatories and 66 Ratifications.**<sup>111</sup>

The globalisation of justice, led largely by the historic ICC process, marks a decade of rapid changes of international affairs. However, UN Secretary General Kofi Annan was more careful when he described the establishment of the Court at the 1998 Diplomatic Conference as "a gift of hope to future generations, and a march forward towards universal Human Rights and the rule of law".

## PREPCOM WORK

The Preparatory Commission gathers representatives from UN member states world-wide, mostly Diplomats, to carry out the work of the Preparatory Commission under its mandate established by resolution F of the Final Act of the UN Diplomatic Conference in Rome July 1998.<sup>112</sup> The Commission's work is divided into separate working groups, with co-ordinators for each working group, and meet in formal meetings (open to NGOs) and informal meetings (closed meetings, no translation services, not open to NGOs). The Commission's work is often based on draft texts prepared by the UN Secretariat.

Provisional Work Plans are available at <http://www.igc.org/icc/html/>.<sup>113</sup>

**The Bureau of the PrepCom** has continued its work with the following composition; as Chairman; Mr. Philippe Kirsch (Canada), Vice-Chairmen; Mr. George Winston (Trinidad and Tobago), Mr. Medard R. Rwelamira (South Africa), and Mr. Muhamed Sacirbey (Bosnia and Herzegovina). Rapporteur: Mr. Salah Suheimat (Jordan).

## CICC/ ELSA WORK AT THE PREPCOMS

The NGO Coalition for an International Criminal Court (CICC)<sup>114</sup> brings together a broad network representing over 1,000 NGOs, international law experts and other civil society groups. ELSA is member of the CICC Steering Committee<sup>115</sup> and has been represented at Preparatory Committee meetings from 1996 to 1998<sup>116</sup>, at the Rome Conference in 1998, and at all sessions of the Preparatory Commission (1998-2002).

The main purpose of the CICC is to advocate for the creation of an effective, just and independent International Criminal Court. CICC convenor is William R. Pace and the Secretariat is located on 1<sup>st</sup> avenue, 777 UN Plaza.

*In between Preparatory Commissions* the Coalition works on education campaigns to raise awareness and increase understanding of the ICC. Many governments use CICC as a provider of information, and as a consultant when it comes to legal questions and implementation of legislation. However, the Coalition has a *consultative role*, and is *not a negotiator*.

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<sup>109</sup> The International Law Commission - <http://www.un.org/law/ilc/index.htm>

<sup>110</sup> See "UN Diplomatic Conference of Plenipotentiaries on the Establishment of ICC July 1998 [www.un.org/icc/index.htm](http://www.un.org/icc/index.htm)

<sup>111</sup> Ratification Status, constantly updated web page: <http://www.un.org/law/icc/statute/status.htm>

<sup>112</sup> Mandate of the Preparatory Commission - See ANNEX I - or <http://www.un.org/law/icc/prepcomm/prepfra.htm>

<sup>113</sup> 7<sup>th</sup> PrepCom Working Plans - Soon to come: <http://www.igc.org/icc/html/> [scroll down to [www.igc.org/icc/html/2001...](http://www.igc.org/icc/html/2001...)]

<sup>114</sup> Website of the NGO Coalition for an International Criminal Court (CICC): [www.iccnw.org](http://www.iccnw.org)

More info: ELSA Synergy Magazine No 2/2000, Previous PrepCom reports, or [www.elsa.org](http://www.elsa.org)

<sup>115</sup> Members of the CICC Steering Committee; See ANNEX VI - or <http://www.iccnw.org/html/coalition.htm>

<sup>116</sup> See the ELSA Report from the 5th PrepCom Session [www.elsa.org](http://www.elsa.org)

During Preparatory Commissions the CICC monitor the work of the PrepCom working groups, breaking down the draft texts and working in teams corresponding to the official working groups of the commission. The Coalition has daily strategy meetings and team meetings where various legal issues are being discussed. The teams follow all formal meetings of the PrepCom and give daily reports from the sessions to the NGO Coalition and its network.

**ICC ratifications and signatures:** The Coalition also works to promote signatures and ratifications of the Rome Statute. On 17 July 2000 the CICC launched a two-year ratification campaign. A primary goal is to make sure that countries from all regions of the world are represented in the Assembly of States Parties when the Court comes into existence.

## **RATIFICATION OF THE ROME STATUTE<sup>117</sup>**

Is it essential for the success of the ICC that an overwhelming number of States ratify the Rome Statute. The Prosecutor can only initiate an investigation where the crime has been committed in the territory of a state party to the Statute or the accused person is a national citizen of a state party to the Statute, unless the Security Council refers a situation to the Court.<sup>118</sup> The reluctance of the Security Council to establish ad hoc tribunals over the past fifty years suggests that it is not likely to refer many situations to the Court. Therefore, to a great extent the Court's effectiveness will be measured by how many and which states ratify the Statute.

## **IMPLEMENTATION OF THE ROME STATUTE**

A state which ratifies the Statute will, in most cases, have to enact implementing legislation in order to fulfil its obligations under the treaty. *States which become parties must undertake two fundamental obligations:*

**1. Complementarity:** In accordance with the principle of Complementarity in the Preamble, Article 1 and Article 17 of the Rome Statute state that parties recognise that *states*, not the International Criminal Court, *have the primary responsibility for bringing those responsible for genocide, crimes against humanity and war crimes to justice.*

**2. Full co-operation:** Once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, states parties agree under Article 86 to *"Co-operate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court"*.

## **THE COURT'S STRENGTH**

The Court will not come into existence before 60 states have ratified the treaty (Art.11) and its strength will, to some extent, be measured by geographical representation and by how many larger states finally ratify. Moreover, the ICC has certain limitations to its jurisdiction. It is based on a treaty that gives the Court "Territorial, Personal and Universal jurisdiction" (Art.12 3a & b of the Rome Statute), which means that the Court will have jurisdiction only when a conduction occurs on the territory of a state that has ratified the treaty or accepted the jurisdiction of the court, or when the accused is of such nationality, regardless of where the crime is committed. This means that, unless a situation is referred by the Security Council acting under Chapter VII of the UN Charter<sup>119</sup>, non-signatories who neither ratify the treaty nor accept the Court's jurisdiction can – to a large extent – act unaffected by the ICC and the rule of International Law within their national borders.

## **A JUST AND NON-POLITICAL COURT?<sup>120</sup>**

The Rome Statute has many safeguards to ensure that investigations and prosecutions are pursued solely in the interest of justice, not politics. Although the Security Council and States can refer situations to the ICC Prosecutor, it will be up to the Prosecutor to decide whether to seek authorisation to open an investigation. Moreover, the Prosecutor will not be dependent on Security Council or state referrals, but will be able to open investigations based on information from any source. The Prosecutor must naturally

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<sup>117</sup> More information on ICC ratifications; see Amnesty fact sheets, link from [www.iccnw.org](http://www.iccnw.org)

<sup>118</sup> Trigger mechanisms: Art 13-16 of The Rome Statute.

<sup>119</sup> The UN Charter is available at <http://www.un.org/Overview/Charter/contents.html>

<sup>120</sup> More info: Amnesty International Fact sheets ([www.iccnw.org](http://www.iccnw.org)) and "The Rome Conference Report" (Nakstad, Dec 2000)

be of high moral character and be highly competent and have extensive practical experience in the prosecution or trial of criminal cases. *The Prosecutor is required to act independently and must request authorisation from the Pre-Trial Chamber both to open an investigation and to begin a prosecution, whereby both requests can be challenged by states.*

## CHALLENGES

The International Criminal Court is based on an extremely detailed and supplemented Rome Statute. It has complicated ties to domestic legislation and a disputed territorial, personal and universal jurisdiction. One of the core crimes of the court, "the crime of aggression", has yet to be defined. Moreover, the ICC will be complementary to one hundred different sets of national criminal legislation, and many states already face problems with the implementation of the Rome Statute. One could argue that history doesn't give much credit to the project either, after 50 years of unsuccessful attempts to create something like an international, independent court. However, ever since the successful work on the "Elements of Crimes"<sup>121</sup> and "Rules of Procedure and Evidence", finalised 30 June 2000 by consensus in the Preparatory Commission, the International Criminal Court has been well on its way to The Hague with an accelerated pace of ratifications. The momentum for the ICC has been beyond comparison in recent years. Whereas delegates to the Rome Conference in 1998 estimated entry into force after approximately 20-25 years, the 60<sup>th</sup> instrument of ratification was deposited on 11 April 2002, less than four years after the adoption of the Rome Statute.

## ELSA AND THE ICC<sup>122</sup>

*The European Law Students' Association*<sup>123</sup> has taken part in the process towards the establishment of an International Criminal Court from the first drafting commissions began their work eight years ago. ELSA has received gratitude for its work in various meetings over the past years and its participation in the PrepComs is highly appreciated by other NGOs. ELSA currently has a special consultative status<sup>124</sup> with the Economic and Social Council (ECOSOC)<sup>125</sup> of the United Nations, a status based on Article 71 of the UN charter and ECOSOC resolution 1996/31, and is also member of the steering committee of the Coalition for an International Criminal Court (CICC). The CICC Steering Committee consists of 13 NGOs<sup>126</sup>, among these are Amnesty International, Human Rights Watch, and No Peace Without Justice<sup>127</sup>. In accordance with paragraph 6 of resolution 54/105, non-governmental organisations (NGOs) may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, and in accordance with the rules of procedure of the Commission, receive copies of the official documents and make available their materials to delegates.

## ITEMS OF THE PREPCOM AGENDA<sup>128</sup>

ROPE	The Rules of Procedure and Evidence	(finalised June 2000)
EoC	The Elements of Crimes	(finalised June 2000)
ICC-UN	A relationship agreement between the Court and the UN	(finalised Oct 2001)
APIC	An Agreement on Privileges and Immunities of the Court	(finalised Oct 2001)
RP/ASP	The Rules of Procedure of the Assembly of States Parties	(finalised Oct 2001)
FRR	Financial Regulations and Rules	(finalised Oct 2001)
HQA	Basic principles governing a headquarters agreement	(finalised April 2002)
FYB	Budget for the first year of the Court's operation	(10 <sup>th</sup> session item, 2002)
CA	Proposals for a provision on Aggression, including its definition, elements and the conditions under which ICC shall exercise jurisdiction with respect to the crime.	(10 <sup>th</sup> session item, 2002)
ASP-PD	Assembly of States Parties - Preparatory Documents	(10 <sup>th</sup> session item, 2002)
RFI	Remaining Financial Issues (Rem.of judges, Prosecutor, Registrar, victims trust fund)	(10 <sup>th</sup> ses.)

<sup>121</sup> The Elements of Crimes are not binding guidelines, but shall assist judges in the interpretation and application of art 6,7, 8.

<sup>122</sup> More info: Synergy Magazine No 2/2000, Previous PrepCom reports, or [www.elsa.org](http://www.elsa.org)

<sup>123</sup> ELSA International web site: [www.elsa.org](http://www.elsa.org)

<sup>124</sup> NGOs in consultative status with ECOSOC; <http://www.un.org/esa/coordination/ngo/faq.htm>

<sup>125</sup> ECOSOC Resolution 1996/31: [http://www.un.org/esa/coordination/ngo/Resolution\\_1996\\_31/index.htm](http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm)

<sup>126</sup> Members of the CICC Steering Committee; See ANNEX VI - or <http://www.iccnw.org/html/coalition.htm>

<sup>127</sup> NPWJ - No Peace Without Justice - was organiser of the 2<sup>nd</sup>-anniversary Rome Conference 16-18 July 2000

<sup>128</sup> Documents are available at <http://www.un.org/law/icc/prepcomm/>

## GUIDE TO

# The Rome Statute of The International Criminal Court <sup>129</sup>

*The Rome Statute defines the crimes within the jurisdiction of the International Criminal Court, how the Court will work and what states must do to co-operate with it. The Statute enters into force once 60 states have ratified the treaty, and the Court will come into existence following an Assembly of States Parties which have ratified the Statute.*<sup>130</sup>

### Part 1: Establishment of the Court

Part 1 of the Statute concerns the establishment of the court and its relationship with the United Nations. The Court is to be established by a treaty and based in the Hague, The Netherlands. The relationship between the Court and the UN is determined by an agreement negotiated by the Preparatory Commission.

### Part 2: Jurisdiction, Admissibility and Applicable Law

Part 2 concerns crimes within the Court's jurisdiction (Art.5), the role of the Security Council, the admissibility of cases, and the applicable law for cases coming before the Court. The Court initially will have jurisdiction over *war crimes*, *genocide*, and *crimes against humanity*. Additionally, the Court will exercise jurisdiction over *the crime of aggression* once an agreement can be reached on a definition of this crime at some point in the future. Part 2 defines the crimes within the Court's jurisdiction (and, notably, includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other forms of sexual violence).

### Part 3: General Principles of Criminal Law

Part 3 involves principles of criminal law drawn from different legal systems. This section upholds *the principle of non-retroactivity*, whereby the Court will not have jurisdiction over conduct committed prior to the Statute's entry into force. It recognises *the principle of individual criminal responsibility*, which makes it possible to prosecute individuals for serious violations of international law. Part 3 also addresses the responsibility of leaders for actions of subordinates, the age of responsibility, the statute of limitations, and an individual's responsibility for both an act and an omission.

### Part 4: Composition and Administration of the court

Part 4 details the structure of the Court and the qualifications and independence of judges.

### Part 5: Investigation and Prosecution

Part 5 addresses the investigation of alleged crimes and the process by which the Prosecutor can initiate and carry out investigations. Part 5 also defines the rights of individuals suspected of a crime.

### Part 6: The trial

Part 6 deals with trial proceedings, the question of a trial in the absence of the accused or following an admission of guilt and the rights and protection of the accused. The Statute states that *everyone shall be presumed innocent until proved guilty in accordance with law*. This section also details the rights of victims and witnesses and the ability of the court to order a guilty person to make reparation and to determine the extent of damages.

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<sup>129</sup> by Espen R. Nakstad, The European Law Student's Association, Norway December 2000

Sources; The Coalition for an International Criminal Court (CICC) - [www.iccnw.org](http://www.iccnw.org), The ELSA Report from the Inter-Governmental Conference on the Rome Statute and the ICC, July 2000 (E. Nakstad), The Rome Statute of the International Criminal Court - <http://www.un.org/law/icc/statute/romefra.htm>

<sup>130</sup> Article 126 of the Rome Statute

### **Part 7: Penalties**

Part 7 covers applicable penalties for persons convicted of a crime, which include: life imprisonment, imprisonment for a designated number of years and fines, among other sentences. The death penalty is not a sentence of the court. Part 7 also establishes a trust fund for the benefit of victims of crimes within the jurisdiction of the court, and of the families of victims.

### **Part 8: Appeal and Review**

Part 8 includes appeal against judgement or sentence, appeal proceedings, the revision of conviction or sentence, and the compensation to a suspect, accused, or convicted person. A person or the Prosecutor may bring an appeal before the Court on grounds that the fairness of the proceedings was affected. The Statute states that anyone wrongfully arrested, detained or convicted is entitled to compensation from the Court.

### **Part 9: International Cooperation and Judicial assistance**

Part 9 addresses international co-operation and judicial assistance between States and the Court. It involves the surrender of persons to the court, the Court's ability to make provisional arrests, and State responsibility to cover costs associated with requests from the Court.

### **Part 10: Enforcement**

Part 10 includes the recognition of judgements, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, parole and commutation of sentences.

### **Part 11: Assembly of States Parties<sup>131</sup>**

Part 11 establishes an Assembly of States Parties, formed by one representative for each State Party, to oversee the various organs of the Court, its budget, reports and activities of the Bureau of the Assembly. Representatives would have one vote and decisions would be reached either by consensus or some form of a majority vote.

### **Part 12: Financing of the court**

Part 12 states that funding for the Court shall be provided by three sources: (a) assessed contributions from States Parties<sup>132</sup> (b) funds provided by the United Nations; and (c) voluntary contributions from governments, international organisations, individuals, corporations and other entities.

### **Part 13: Final Clauses**

Part 13 addresses the settlements of disputes, reservations and amendments of the Statute, and its ratification. Part 13 states that no reservations may be made to the Statute. However, seven years after the Court has entered into force, any State Party may propose amendments to the Statute. This Part calls for the Statute to be open for signature by all States in Rome, at the Food and Agricultural Organisation premises, on July 17, 1998 and to remain open for signature until December 31, 2000. The Statute allows for a State Party to withdraw from the statute by notifying the Secretary-general of the United Nations in writing.

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Rome Statute of the International Criminal Court

United Nations Resolution F -

Other relevant General Assembly resolutions

The UN Charter is available at;

<http://www.un.org/law/icc/statute/romefra.htm>

[http://www.un.org/law/icc/statute/final.htm#resolution\\_f](http://www.un.org/law/icc/statute/final.htm#resolution_f)

<http://www.un.org/law/icc/gares/garesfra.htm>

<http://www.un.org/Overview/Charter/contents.html> - and

<http://www.un.org/aboutun/charter/>

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<sup>131</sup> The Assembly of States Parties shall consider and adopt, as appropriate, recommendations of the Preparatory Commission, - Art.112.2.a of the Rome Statute

<sup>132</sup> (a) is likely to be the major source of income (see report from the FRR team at the 6<sup>th</sup> Session)

## HISTORY - The International Criminal Court

**SUMMARY<sup>133</sup>:** The history of the ICC initiative begins with the unsuccessful efforts to establish an international tribunal after World War I. After World War II, the Nuremberg and Tokyo military war crime tribunals set the stage for efforts to create a permanent court. Though called for in the 1948 Genocide Convention, efforts to establish a permanent court were delayed for decades by the cold war and refusal of governments to accept an international legal jurisdiction. However, the establishment of a temporary ad hoc tribunal for Bosnia-Herzegovina in 1993 strengthened the discussions for a permanent Court, and in 1998 governments from all over the world approved a Statute to establish a permanent International Criminal Court.

The "road to Rome" was a long and often contentious one.<sup>134</sup> While the Court has roots in the early 19<sup>th</sup> Century, the story begins in 1872, when Gustav Moynier, one of the founders of the International Committee of the Red Cross, proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call came after World War I, with the 1919 Treaty of Versailles. Framers of the Treaty envisaged an ad hoc international court to try the Kaiser and German war criminals. Then, after World War II, the Allies set up the Nuremberg and Tokyo tribunals to try Axis war criminals. The world, reflecting on the Holocaust, cried "never again". The call for an international institution to try individuals for the most heinous crimes resonated throughout the world - and many thought the founding of the United Nations would bring the world closer to a permanent Court. Yet more than 50 years would pass before the world's leaders would meet to prepare a treaty establishing a permanent International Criminal Court.

### **The ICC chronology - some highlights<sup>135</sup>**

**October 1946** - Soon after the Nuremberg Judgement, an international congress meets in Paris and calls for the adoption of an international criminal code prohibiting crimes against humanity and the prompt establishment of an international criminal court (ICC).

**9 December 1948** - The UN General Assembly (GA) adopts the *Convention on the Prevention and Punishment of the Crime of Genocide*. It calls for criminals to be tried "by such international penal tribunals as may have jurisdiction" Separately, members ask the International Law Commission (ILC) to study the possibility of establishing an ICC.

**10 December 1948** - The GA adopts the *Universal Declaration of Human Rights*, detailing human rights and fundamental freedoms.

**1949 - 1954** - The ILC drafts statutes for an ICC, but opposition from powerful states on both sides of the Cold War stymies the effort and the GA effectively abandons the effort pending agreement on a definition of the crime of aggression and an international *Code of Crimes*.

**1974** - The UN General Assembly agrees on a definition of aggression, *UN Resolution 3314 (1974)*

**Dec 1981** - The General Assembly asks the ILC to return to the questions of establishing a *Code of Crimes*.

**1989** - The end of the Cold War brings a dramatic increase in the number of UN peace keeping operations and a world where the idea of establishing an International Criminal Court is more viable.

**June 1989** - Motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrect the proposal for an ICC. The GA asks the ILC to prepare a draft statute.

**1992** - The GA requests the ILC to complete a draft statute for an International Criminal Court.

**1993** - War in Bosnia-Herzegovina, clear violations of the *Genocide* and *Geneva Conventions*, and the establishment of a temporary *ad hoc tribunal* for Bosnia-Herzegovina (in 1993) strengthens the discussions for a permanent Court.

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<sup>133</sup> based on the ELSA Report from the July 2000 Rome Inter-Governmental Conference on the Rome

Statute and the ICC (E. Nakstad) - and the CICC fact sheet on the Rome Statute (December 2000) provided by Amnesty Int.

<sup>134</sup> More background information on ICC; See the ELSA Report on "The Crime of Aggression" - ELSA Report from the 6th Session of the UN PrepCom; [www.elsa.org](http://www.elsa.org)

<sup>135</sup> see web links from the Coalition for an International Criminal Court (CICC) homepage; [www.iccnw.org](http://www.iccnw.org)

**June 1993** - *Vienna Declaration and Programme of Action* expresses support for the Establishment of an ICC.

**1994** - War in Rwanda leads the Security Council to establish a *second ad hoc tribunal for Rwanda*.

**1994** - The International Law Commission (ILC) presents a final draft Statute on the ICC to the General Assembly and recommends that a conference of plenipotentiaries was convened to negotiate a treaty to enact the Statute. Through resolution 49/73 of 9 December 1994 the General Assembly decides to establish an ad hoc committee on the ICC to review the draft Statute presented by ILC. This committee is open to all States Members of the United Nations or members of specialised agencies held three 2-week meetings at UN headquarters in December 1995.

**December 1995** - The General Assembly establishes a Preparatory Committee (PrepCom) to finalise a text to be presented at a convention of plenipotentiaries.

**September 1997** - The 14 nations of the South African development Community (SADC) set out 10 basic principles to be included in forming the ICC Statute.

**December 1997** - The UK defects from the position of another permanent Security Council members and backs the *Singapore Compromise* proposal to limit Security Council authority over the Court.

**From 1996-98** - The General Assembly convene six Preparatory Committee meetings to continue to draft the ICC Statute, leading up to "the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court"<sup>18</sup> in Rome June-July 1998.

**January 1998** - Chairs of working groups and co-ordinators of the PrepCom meet in Zutphen, The Netherlands "to facilitate the work of the last PrepCom". *The Zutphen Report* consolidates the various draft texts produced over two years of PrepCom meetings.

**February 5 - 6, 1998** - In Dakar, Senegal, representatives of 25 African governments meet to discuss the establishment of an ICC. They adopt *the Dakar Declaration* calling for an effective and independent Court.

**March 26, 1998** - In a letter to Secretary of State, Madeleine Albright, US Foreign Relations Committee Chairman Jesse Helms declares any ICC Statute "dead on arrival" in the US Senate unless the US has veto control over the court.

**17 July 1998** - *160 countries participate at the UN Diplomatic Conference of Plenipotentiaries. Member states overwhelmingly vote in favour of the Rome Statute for the ICC (120 in favour/ 7 against/ 21 abstentions)*. In February 1999 Senegal becomes the first State Party to ratify the Rome Statute, followed by Trinidad and Tobago, San Marino, and Italy.

**1999-2001** - The General Assembly convenes a series of additional PrepCom meetings to address outstanding issues of the Rome Statute.<sup>136</sup>

**11 April 2001** – ten instruments of ratification are deposited simultaneously during a special UN ceremony in New York, taking the number of state parties of the treaty above the required 60.

**1 July 2002** - The Rome Statute enters into force.

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<sup>136</sup> For more information on ICC History; see homepage of Prof. Benjamin B. Ferencz; <http://www.benferencz.com> , and the ELSA report from the 6<sup>th</sup> ICC PrepCom - "The Crime of Aggression".

## Annex II - Further reading

### ICC WEB LINKS

#### GENERAL INFORMATION – ICC

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Main provider of ICC documents and web links -	<a href="http://www.un.org/law/icc/index.html">http://www.un.org/law/icc/index.html</a>
Overview on the ICC -	<a href="http://www.un.org/law/icc/general/overview.htm">http://www.un.org/law/icc/general/overview.htm</a>
UN Public Information on ICC -	<a href="http://www.un.org/law/icc/general/public.htm">http://www.un.org/law/icc/general/public.htm</a>
UN Website for the ICC -	<a href="http://www.un.org/law/icc/index.html">http://www.un.org/law/icc/index.html</a>
International Criminal Court fact sheet (prepared by DPI) -	<a href="http://www.un.org/News/facts/iccfact.htm">http://www.un.org/News/facts/iccfact.htm</a>
ICC Ratification Status (constantly updated web page) -	<a href="http://www.un.org/law/icc/statute/status.htm">http://www.un.org/law/icc/statute/status.htm</a>

#### CICC (the NGO Coalition for an International Criminal Court)

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CICC web page (ICC information) -	<a href="http://www.iccnw.org">http://www.iccnw.org</a>
CICC Composition and Steering Committee -	<a href="http://www.iccnw.org/html/coalition.htm">http://www.iccnw.org/html/coalition.htm</a>
Country-by-country ratification status report -	<a href="http://www.iccnw.org/html/country.html">http://www.iccnw.org/html/country.html</a>
INDEX of /icc/html	<a href="http://www.iccnw.org/html/">http://www.iccnw.org/html/</a>

#### DOCUMENTS

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The Rome Statute of the International Criminal Court -	<a href="http://www.un.org/law/icc/statute/romefra.htm">http://www.un.org/law/icc/statute/romefra.htm</a>
United Nations Resolution F -	<a href="http://www.un.org/law/icc/statute/final.htm#resolution_f">http://www.un.org/law/icc/statute/final.htm#resolution_f</a>
Other relevant General Assembly Resolutions -	<a href="http://www.un.org/law/icc/gares/garesfra.htm">http://www.un.org/law/icc/gares/garesfra.htm</a>
The UN Charter -	<a href="http://www.un.org/Overview/Charter/contents.html">http://www.un.org/Overview/Charter/contents.html</a>
UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 1998	<a href="http://www.un.org/icc/index.htm">http://www.un.org/icc/index.htm</a>
Documents issued at the 1998 UN Diplomatic Conference -	<a href="http://www.un.org/law/icc/docs.htm">http://www.un.org/law/icc/docs.htm</a>
Final Act of the 1998 UN Diplomatic Conference -	<a href="http://www.un.org/law/icc/statute/finalfra.htm">http://www.un.org/law/icc/statute/finalfra.htm</a>

#### PREPARATORY COMMISSIONS

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Homepage of the Preparatory Commission	<a href="http://www.un.org/law/icc/prepcomm/prepfra.htm">http://www.un.org/law/icc/prepcomm/prepfra.htm</a>
Documents of the tenth session of the Preparatory Commission	<a href="http://www.un.org/law/icc/prepcomm/tenth.htm">http://www.un.org/law/icc/prepcomm/tenth.htm</a>
Preparatory Commission documents (1999 -> )	<a href="http://www.un.org/law/icc/prepcomm/docs.htm">http://www.un.org/law/icc/prepcomm/docs.htm</a>

#### UN ECOSOC AND HIGH COMMISSIONER FOR HUMAN RIGHTS

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UN Web page on the Economic & Social Council (ECOSOC)	<a href="http://www.un.org/esa/">http://www.un.org/esa/</a>
ECOSOC Resolution 1996/31:	<a href="http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm">http://www.un.org/esa/coordination/ngo/Resolution_1996_31/index.htm</a>
NGOs in consultative status with ECOSOC:	<a href="http://www.un.org/esa/coordination/ngo/faq.htm">http://www.un.org/esa/coordination/ngo/faq.htm</a>
High Commissioner for Human Rights: Position Paper on the Establishment of a Permanent International Criminal Court	<a href="http://www.unhchr.ch/html/menu2/2/iccpp.htm">http://www.unhchr.ch/html/menu2/2/iccpp.htm</a>

#### ICC RELATED SITES

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The International Law Commission	<a href="http://www.un.org/law/ilc/index.htm">http://www.un.org/law/ilc/index.htm</a>
The International Court of Justice	<a href="http://www.icj-cij.org/">http://www.icj-cij.org/</a>
International Criminal Tribunal for the former Yugoslavia	<a href="http://www.un.org/icty/index.html">http://www.un.org/icty/index.html</a>
International Tribunal for Rwanda	<a href="http://www.ict.rw/">http://www.ict.rw/</a>
UN web site on International Law	<a href="http://www.un.org/law/">http://www.un.org/law/</a>
United Nations homepage	<a href="http://www.un.org/">http://www.un.org/</a>
On-line virtual tour through UN Headquarters, New York	<a href="http://www.un.org/pubs/cyberschoolbus/untour/untour.htm">http://www.un.org/pubs/cyberschoolbus/untour/untour.htm</a>
Website of Prof. Benjamin B. Ferencz (ICC Articles/ Lectures)	<a href="http://members.aol.com/benferen">http://members.aol.com/benferen</a>

#### ELSA LINKS

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ELSA's involvement in Human Rights	<a href="http://www.elsa.org/humanrights.asp">http://www.elsa.org/humanrights.asp</a>
ELSA Human Right news	<a href="http://www.elsa.org/news/index.asp?Category=6">http://www.elsa.org/news/index.asp?Category=6</a>
ELSA International web site	<a href="http://www.elsa.org">http://www.elsa.org</a>
ELSA Report from the 5 <sup>th</sup> Session of the ICC PrepCom	<a href="http://www.lns.nl/elsa/Ib/index.html">http://www.lns.nl/elsa/Ib/index.html</a>
ELSA Report from the 9 <sup>th</sup> Session of the ICC PrepCom	<a href="http://www.iccnw.org/html/ELSAprepcom9.pdf">http://www.iccnw.org/html/ELSAprepcom9.pdf</a>
ELSA Legal Research on Nomination and Election of Judges to International Courts	<a href="http://www.iccnw.org/html/ELSAprepcom9annex.pdf">http://www.iccnw.org/html/ELSAprepcom9annex.pdf</a>

#### EUROPEAN INSTITUTIONS WEB SITES

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Council of Europe ICC webpage

[http://www.coe.int/T/E/Legal\\_Affairs/Legal\\_co-operation/Transnational\\_criminal\\_justice/International\\_Criminal\\_Court/](http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Transnational_criminal_justice/International_Criminal_Court/)

Statements of the European Union

<http://europa-eu-un.org/articleslist.asp?section=14>

#### OTHER NGO'S WEB SITES

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International Criminal Court (major ICC web site of the NGO Coalition for an International Criminal Court (CICC)) <http://www.iccnw.org/>

The Rome Statute of the International Criminal Court (done at Rome, 17 July 1998; A/CONF.183/C.1/L.76 and Addendums 1 through 14) <http://www.igc.org/icc/rome/html/ratify.html>

International Criminal Court Campaign (Lawyers Committee for Human Rights (LCHR)) <http://www.lchr.org/lchr/feature/50th/main.htm>

International Justice: International Criminal Court (Human Rights Watch (HRW) Campaign to Establish an International Criminal Court/ICC campaign page) <http://www.hrw.org/worldreport99/special/icc.html>

International Criminal Court (United Nations Association of the United States of America (UNA-USA)) <http://www.unausa.org/programs/icc.htm>

Washington Working Group on the International Criminal Court (WWGICC) <http://www.wfa.org/issues/wicc/wicc.html>

Campaign for the Establishment of the International Criminal Court (Agora links) <http://www.politicalresources.net/c-criminal-court.htm>

CICC-DE (Koalition für einen internationalen Strafgerichtshof - Deutsches Komitee (CICC-DE) - Coalition for an International Criminal Court-German Committee; see also the Komitee für ein effektives Völkerstrafrecht or Committee for an Effective International Criminal Law (CoeICL)) <http://www.cicc.de/start.html>

The International Criminal Court (World Federalist Association WFA's ICC page; includes link to the WFA Campaign to End Genocide which "will work with members of the International Coalition for the International Criminal Court and with the Washington Working Group on the International Criminal Court to establish a strong and effective ICC, to support efforts to achieve the necessary ratifications and to encourage U.S. signature and ratification") <http://www.wfa.org/issues/icc.html>

Women's Caucus for Gender Justice (site contains information about the Women's Caucus and its work on the International Criminal Court (ICC) and the Optional Protocol to CEDAW; includes recent papers and publications, such as position papers distributed at the Preparatory Commissions at the ICC, reports, articles, newsletter and their recent document on the ICC for the Beijing+5 review)(Women's Caucus) <http://www.iccwomen.org/icc/index.htm>

International Criminal Court (No Peace Without Justice ICC page; NPWJ; includes PrepCom Reports/post-Rome documents) <http://www.npwj.org/iccrome/index.htm>

International Criminal Court=Corte Penal Internacional (ICC/CPI); English- and Spanish-language ICC information and links pages by Derechos and Equipo Nizkor <http://www.derechos.org/nizkor/impu/tpi/>

## **Books, Journal Articles, and Other Resources**

Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert: Unter besonderer Berücksichtigung der völkerrechtlichen Straftatbestände und der Bemühungen um einen Ständigen Internationalen Strafgerichtshof* (Baden-Baden: Nomos, 1999)(Juristische Zeitgeschichte, Abteilung I: Allgemeine Reihe, Bd.2). 502p. ISBN 3-7890-6047-X.

Rosanne van Alebeek, "From Rome to the Hague: Recent Developments on Immunity Issues in the ICC Statute", 13 *Leiden Journal of International Law* 485 (2000).

K. Ambos, "Der neue Internationale Strafgerichtshof - ein Überblick", 51 *Neue Juristische Wochenschrift* 3743-3746 (no. 51, December 16, 1998).

K. Ambos, "Establishing an International Criminal Court and International Criminal Code: Observations from an International Criminal Law Viewpoint", 7 *European Journal of International Law* 519-544 (1996).

Kai Ambos, "Les fondements juridiques de la Cour penale internationale," 10 *Revue trimestrielle des droits de l'homme* 739-772 (1999).

Kai Ambos, "General Principles of Criminal Law in the Rome Statute," 10 *Criminal Law Forum* 1-32 (1999).

Kai Ambos, "Der neue Internationale Strafgerichtshof: Funktion und vorläufige Bewertung," 2000 *Jahrbuch Menschenrechte* 122-139.

Kai Ambos, "Zur Rechtsgrundlage des Internationalen Strafgerichtshofs: Eine Analyse des Rom-Statuts", 111 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 175-211 (Heft 1, 1999).

Kai Ambos & Oscar Julian Guerrero, *El Estatuto de Roma de la Corte Penal Internacional* (Bogotá: Editor Antonio Milla, Universidad Externado de Colombia, dept. de Publicaciones, Aptdo. 034141, (00571) 3424948, 2826066 ext. 3151; fax: 2869676; 1999). 512p.

Scott W. Andreasen, "The International Criminal Court: Does the Constitution Preclude Its Ratification By the United States?", 85 *Iowa Law Review* 697 (January 2000, no. 2).

- Aref Mohamed Aref, "La Cour pénale internationale: une nouvelle perspective pour le continent africain", 1 International Law FORUM du droit international 30 (1999).
- Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court", 93 American Journal of International Law 22-43 (1999).
- J. Holmes Armstead, Jr., "The International Criminal Court: History, Development and Status", 38 Santa Clara Law Review 745-835 (Summer 1998).
- Karen Austin & Nell Stewart, "Courting Justice in Rome", 5 Human Rights Tribune 6-12 (September 1998)(includes coverage of children's rights and gender).
- Julio Barboza, "International Criminal Law", 278 Recueil des cours 9-200 (1999-2000).
- Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000)(Princeton Studies in International History and Politics). 402p. ISBN 069104922X.
- M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal* ([2nd rev. & updated ed.], Dordrecht ; Boston : M. Nijhoff, 1987). 492p.
- M. Cherif Bassiouni, *Draft Statute, International Tribunal = Projet de statut du Tribunal Pénal International = Proyecto de estatuto del Tribunal Penal Internacional* ([Pau, France] : [Toulouse?] : Association Internationale de Droit Pénal ; Érès, 1993)(Nouvelles Études Pénales ; 10)(First published in 1992 under title: Draft Statute, International Criminal Tribunal; English text called 2nd ed., Nouvelles Études Pénales ; 9). 369p.
- M. Cherif Bassiouni, "Enforcing Human Rights through International Criminal Law and through an International Criminal Tribunal," in *Human Rights: An Agenda for the Next Century* (Louis Henkin & John Lawrence Hargrove eds., Washington, D.C.: American Society of International Law, 1994)(Studies in Transnational Legal Policy, no. 26, ISSN: 1057-0551). 524p.
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