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The Preparatory Commission For the International Criminal Court

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The Preparatory Commission For the International Criminal Court

Philippe Kirsch and Valerie Oosterveld

Abstract

As it becomes increasingly clear that the International Criminal Court will be set up in the near future, it is important to reflect on the work of the Preparatory Commission for the International Criminal Court. When the Rome Statute was being negotiated, it became very clear that additional documents would be necessary in order to create a fully functioning ICC. At the time, eight such documents were identified and included in Resolution F of the Final Act of the Rome Diplomatic conference. As work on these documents nears completion, States have begun to consider the practicalities of setting up the Court and the need for additional documents. A “Road Map” has been created, outlining documents that will be required to ensure that the Court is effective from an early stage. The work of the Preparatory Commission and the steps taken are absolutely critical for the smooth transition to actual operation of the Court.

ESSAYS

THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

Philippe Kirsch, Q.C. & Valerie Oosterveld***

INTRODUCTION

Since the adoption of the Rome Statute of the International Criminal Court¹ on July 17, 1998, the world has seen enormous advances in the elimination of impunity and the acceptance of international accountability: former President Milosevic is being tried by the International Criminal Tribunal for the Former Yugoslavia, a hybrid international-domestic Special Court is being established in Sierra Leone, positive steps are being taken in the creation of a tribunal to try Khmer Rouge in Cambodia, and an increasing number of countries are adopting legislation allowing them to try individuals who commit genocide, crimes against humanity, and war crimes. Added to these examples is the fact that countries are ratifying or acceding to the Rome Statute at a rapid pace, allowing us to predict that the Statute will enter into force in 2002.² As it becomes increasingly clear that the International

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, (1998), available at <http://www.un.org/law/icc/statute/rome fra.htm> [hereinafter Rome Statute].

2. The 2001 General Assembly resolution on the establishment of the International Criminal Court states in its preamble: "Taking into consideration the probability that the first meeting of the Assembly of States Parties will be held in summer or early fall 2002 . . ." *Establishment of the International Criminal Court*, U.N. Doc. A/RES/56/85 (2001) [hereinafter 2001 ICC Resolution]. The Rome Statute provides, in article 126(1), that "This Statute shall enter 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." Rome Statute, *supra* note 1.

Criminal Court ("ICC") will be set up in the near future, it is important to reflect on the work of the Preparatory Commission for the International Criminal Court.

When the Rome Statute was being negotiated, it became very clear that additional documents would be necessary in order to create a fully functioning ICC. At the time, eight such documents were identified and included in Resolution F of the Final Act of the Rome Diplomatic Conference.³ Two were completed on June 30, 2000: the Rules of Procedure and Evidence⁴ and the Elements of Crimes.⁵ Of the remaining documents listed in Resolution F, negotiations on four others have concluded, and the remaining two are expected to be finished at the April 2002 session of the Preparatory Commission.

As work on these documents nears completion, States have begun to consider the practicalities of setting up the Court and the need for additional documents. A "Road Map" has been created, outlining documents that will be required to ensure that the Court is effective from an early stage.⁶ The work of the Preparatory Commission and the steps taken to draft the documents set out in the Road Map are absolutely crucial for the smooth transition to actual operation of the Court.

1. *THE MANDATE OF THE PREPARATORY COMMISSION*

During the pre-Rome negotiations, many countries called for the drafting of additional documents to supplement the provisions of the Statute. For example, the United States proposed the elaboration of a document, referred to as the Elements of Crimes, which would set out the elements that must be proven by the Prosecutor for each individual crime.⁷ As well, Australia

3. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10* (July 17, 1998), [hereinafter Final Act], Resolution F.

4. *Report of the Preparatory Commission for the International Criminal Court, Finalized draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000) [hereinafter *Rules of Procedure and Evidence*].

5. *Report of the Preparatory Commission for the International Criminal Court, Finalized draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*].

6. *Road Map Leading to the Early Establishment of the International Criminal Court*, U.N. Doc. PCNICC/2001/L.2 (Sept. 26, 2001).

7. The issue first arose in 1996, when the delegation of the United States suggested that "elements of crime" should be included in the Statute or in an annex to the Statute.

and the Netherlands proposed that Rules of Procedure and Evidence be adopted at the same time as the Rome Statute.⁸ During the 1996-1998 Preparatory Committee phase, these suggestions were noted but attention was focused on gaining agreement on the drafting of the Statute.

The Diplomatic Conference took place in Rome, Italy over five weeks from June 15-July 17, 1998.⁹ Its task was to adopt the Statute of an International Criminal Court. The amount of work necessary to complete that task alone led many to realize that the duration of the Diplomatic Conference was too short to also allow the development of Elements of Crimes or Rules of Procedure and Evidence, or any other subsidiary instruments that would be necessary for the proper operation of the Court. Therefore, there was broad agreement at the Diplomatic Conference on the need to establish a Preparatory Commission after the Rome Statute of the International Criminal Court was adopted.

States agreed that the need for the Preparatory Commission would not be expressed in the Rome Statute itself, but rather in the Final Act of the Diplomatic Conference.¹⁰ The Final Act

ute. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, U.N. Doc. A/51/22 (1996), para. 56. The issue of elements arose again at the last Preparatory Committee session prior to the Diplomatic Conference, with the United States submitting a proposal calling for a set of binding elements to be elaborated at the Rome Conference and adopted alongside the Rome Statute. *Proposal Submitted by the United States, Elements of Offences for the International Criminal Court*, U.N. Doc. A/AC.249/1998/DP.11 (Apr. 2, 1998). The United States submitted another proposal on Elements of Crimes at the beginning of the Diplomatic Conference. *Proposal Submitted by the United States, Annex on Definitional Elements for Part Two Crimes*, U.N. Doc. A/CONF.183/C.1/L.10 (June 19, 1998). In response to a proposal by the Bureau of the Diplomatic Conference, the United States then submitted another proposal near the end of the Diplomatic Conference pressing for binding Elements. *Proposal Submitted by the United States Concerning the Bureau Proposal*, U.N. Doc. A/CONF.183/C.1/L.69 (July 14, 1998).

8. *Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working Paper Submitted by Australia and the Netherlands*, U.N. Doc. A/AC.249/L.2 (July 26, 1996).

9. The full title of the conference was *The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*.

10. This was based on earlier precedents: the United Nations Convention on the Law of the Sea included mention of a Preparatory Commission in its Final Act, rather than in the Convention itself. The Rome Statute does refer to the Preparatory Commission in article 112, but only in the context that the Assembly of States Parties will "[c]onsider and adopt, as appropriate, recommendations of the Preparatory Commission." Rome Statute, *supra* note 1, art. 112.

stated that the purpose of the Preparatory Commission would be to develop documents and arrangements to "ensure the coming into operation of the International Criminal Court without undue delay" once the Rome Statute enters into force.¹¹ The Final Act also provided that the Preparatory Commission would be transitory in nature, ceasing to exist once the Assembly of States Parties completed its first meeting.¹²

The mandate of the Preparatory Commission is found in Resolution F of the Final Act. It provides that participation in the Preparatory Commission is open to the States that signed the Final Act, as well as States that were invited to the Diplomatic Conference.¹³ The Preparatory Commission is to prepare proposals:

for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

- (a) Rules of Procedure and Evidence;
- (b) Elements of Crimes;
- (c) A relationship agreement between the Court and the United Nations;
- (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country (the Netherlands);
- (e) Financial regulations and rules;
- (f) An agreement on the privileges and immunities of the Court;
- (g) A budget for the Court's first financial year; [and]
- (h) The rules of procedure of the Assembly of States Parties.¹⁴

In addition, the Preparatory Commission is to prepare proposals on the crime of aggression, including the definition, the Elements of Crimes, and the conditions under which the Court can exercise its jurisdiction with regard to this crime.¹⁵ These proposals are to be considered by the Assembly of States Parties at the first Review Conference, which will take place seven years

11. Final Act, *supra* note 3, Resolution F, pmb. para. 2.

12. *Id.* Resolution F, para. 8.

13. *Id.* Resolution F, para. 2. As this covers almost every State, the official and working languages of the Preparatory Commission are those of the United Nations. The Preparatory Commission meets at the United Nations Headquarters in New York.

14. *Id.* Resolution F, para. 5.

15. *Id.* Resolution F, para. 7; *see also* Rome Statute, *supra* note 1, art. 5(2).

after the Rome Statute enters into force.¹⁶

Initially, States had differing views as to the kinds of documents that should be considered by the Preparatory Commission. For example, the Draft Final Act sent to the Rome Diplomatic Conference included "staff regulations" in the list of documents to be prepared by the Preparatory Commission, a suggestion that was ultimately deleted.¹⁷ As well, States also initially disagreed on the status of the documents prepared by the Preparatory Commission. It was eventually decided that the Preparatory Commission could only make proposals to the Assembly of States Parties, since the Assembly was the only body with binding decision-making capacity.¹⁸ Therefore, it was agreed that the Preparatory Commission would submit the results of its negotiations to the Assembly of States Parties for consideration and adoption.¹⁹

Resolution F states that the draft texts of the Rules of Procedure and Evidence and the Elements of Crimes had to be finalized before June 30, 2000.²⁰ The deadline was included to ensure that negotiations on these two key documents would not be unduly prolonged. It was feared that an open-ended discussion of these two documents could delay the establishment of the Court, since some States had indicated that they would not sign or ratify before these documents were finalized. In order to meet the deadline, States agreed to give initial priority in the Preparatory Commission to the negotiation of the Rules and Elements documents.

The 1998 U.N. General Assembly resolution on the Establishment of the ICC added an element aimed at facilitating the reconciliation of divisions that existed at the end of the Rome

16. Rome Statute, *supra* note 1, art. 123.

17. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1 (1998), at 205.

18. The reference to "proposals" is found in the Final Act, *supra* note 3, Resolution F, para. 5. The Assembly's decision-making capacity is set out in the Rome Statute, *supra* note 1, art. 112.

19. Final Act, *supra* note 3, Resolution F, para. 9 ("The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.").

20. *Id.* Resolution F, para. 6. For a discussion of how this date was agreed upon, see Herman von Hebel, *The Making of the Elements of Crimes*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 7 (Roy S. Lee ed., 2001) [hereinafter *ELEMENTS*].

Conference.²¹ It called upon the Preparatory Commission to, in addition to fulfilling Resolution F, "discuss ways to enhance the effectiveness and acceptance of the Court."²² This phrasing has been included in the General Assembly resolutions every year since.²³

At the time of writing, the Preparatory Commission has held eight meetings—three in 1999, three in 2000, and two in 2001—for a total of twenty weeks.²⁴ Two more sessions are planned for 2002, one in April and one in July.²⁵

II. *PREPARATORY COMMISSION ACHIEVEMENTS TO DATE*

The past three years have seen tremendous progress within the Preparatory Commission. The Elements of Crimes and the Rules of Procedure and Evidence were adopted by consensus following one and a half years of lengthy, intense negotiations. The September-October 2001 Preparatory Commission saw the finalizing and adoption by consensus of the Relationship Agreement between the Court and the United Nations, the Rules of Procedure for the Assembly of States Parties, the Financial Regulations, and the Agreement on Privileges and Immunities of the Court. The negotiation of these documents was not easy, especially given the unprecedented nature of the ICC and therefore the issues under discussion in these documents, but the fact that all were adopted by general agreement is an indication of growing support for the International Criminal Court. Only two documents listed in Resolution F remain to be finished: the princi-

21. 120 States voted for the Rome Statute, while 7 States voted against and 21 abstained, thus indicating that while the vast majority of States accepted the Rome Statute, some divisions of opinion remained.

22. *General Assembly Resolution 53/105 on Establishment of an International Criminal Court*, U.N. Doc. A/RES/53/105 (Jan. 26, 1999), operative para. 4.

23. *General Assembly Resolutions 54/105 on Establishment of the International Criminal Court*, U.N. Doc. A/RES/54/105 (Jan. 25, 2000), operative para. 3; *55/155 on Establishment of the International Criminal Court*, U.N. Doc. A/RES/55/155 (Jan. 19, 2001), operative para. 4.; 2001 ICC Resolution, *supra* note 2, operative para. 4.

24. The 1999 meetings were held from February 16-26, July 26-August 13, and November 29-December 17. The 2000 meetings were held from March 13-31, June 12-30, and November 27-December 8. The 2001 meetings were held from February 26-March 9, and September 24-October 5.

25. The dates set for the ninth and tenth sessions of the Preparatory Commission are April 8-19, 2002, and July 1-12, 2002. 2001 ICC Resolution, *supra* note 2, operative para. 4.

ples governing the Headquarters Agreement and the budget for the first year of the Court.

A. *Elements of Crimes*

At the beginning of the February 1999 Preparatory Commission discussion, a number of States expressed skepticism about the utility of drafting a document containing the elements of each crime. The genesis of this document arose from debates prior to the Rome Diplomatic Conference about how the crimes would be described in the Rome Statute. Some States wished to see a short list of crimes, consistent with the approach of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.²⁶ However, other States—in particular, the United States—preferred a more detailed description of the content of these crimes, arguing that more detail provided more clarity.²⁷ The United States eventually agreed that the content of the crimes could, instead of being included within the Statute or an annex, be separated into an “Elements of Crimes” document. This document would contain detailed definitions of the various elements that had to be demonstrated by the Prosecutor in order to prove the crime in question. The United States proposed that these Elements be binding on the judges.²⁸ While a majority of delegations expressed concern about imposing a kind of “checklist” upon the judges, they were prepared, in the interest of reaching agreement at the Diplomatic Conference, to negotiate Elements of Crimes at a future time, but only if the Elements document was not of a binding nature. Article 9 of the Rome Statute, which was introduced into the Rome Statute at a

26. The International Criminal Tribunal for the Former Yugoslavia was established by Security Council Resolution 827 on May 25, 1993 and the International Criminal Tribunal for Rwanda was established by Security Council Resolution 955 on November 8, 1994. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993), *amended by* U.N. Doc. S/RES/1166 (1998); U.N. Doc. S/RES/1329 (2000); Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994), *amended by* U.N. Doc. S/RES/1165 (1998); U.N. Doc. S/RES/1329 (2000).

27. See *supra* note 7 and accompanying text.

28. *Id.*

late stage of negotiations, reflects this delicate compromise. It provides that the Elements of Crimes "shall assist the Court in the interpretation and application" of the crimes in the Rome Statute.²⁹ Therefore, the Elements of Crimes will guide, but not bind, the Court, unlike the Rules of Procedure and Evidence.³⁰

By the end of the fifth session of the Preparatory Commission, in June 2000, many of the States that had originally questioned whether Elements of Crimes were necessary had accepted their usefulness. The crimes listed in the Statute are often only cursory descriptions drawn from a number of different treaties, and therefore use different language to express similar ideas. The drafting of the Elements helped to provide a logical framework, using consistent and modern terminology. For example, terms such as "declaring that no quarter will be given,"³¹ derived from the 1907 Hague Convention IV,³² are explained in plain, accessible, and understandable language. In addition, the drafting of the different elements had clarified how to apply individual criminal responsibility to crimes, such as enforced disappearance, that have been traditionally examined through the lens of State responsibility.

The drafting of the Elements of Crimes was a complex exercise. An Elements of Crimes document had never before been elaborated in international law. While some crimes had been examined and elaborated upon by the International Military Tribunals in Nuremberg and Tokyo, and by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, many more crimes had not. Even in those cases where various crimes had been discussed, the individual elements of each of the war crimes were often unclear.

Herman von Hebel of the Netherlands served as coordinator of the Working Group on Elements of Crimes.³³ He asked

29. Rome Statute, *supra* note 1, art. 9.

30. *Id.* Article 51 of the Rome Statute specifically states that the Rules of Procedure and Evidence "shall enter into force." As Herman von Hebel notes, while the Elements will not bind the Court, they will undoubtedly have persuasive force, reflecting the consensus view of the international community. von Hebel, *supra* note 20, at 8.

31. Rome Statute, *supra* note 1, art. 8(2)(b)(xii) and (e)(x).

32. Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

33. The informal negotiations for this Working Group were chaired by Prince Ra'ad Zeid Al Hussein of Jordan, and the coordinator was also assisted by others on specific issues.

States to focus on creating a framework for the elements of crimes, in order to overcome the fact that different legal traditions approach the issue in different ways. States eventually agreed that the framework would list the material elements, describing the required conduct, consequences and circumstance,³⁴ and mental elements, describing the required intent and knowledge.³⁵ They decided to structure the Elements of Crimes document to begin with a General Introduction of ten paragraphs applicable to the entire document. This General Introduction sets out, for example, the default rule for the relationship between mental elements and material elements, stating that, if no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence, or circumstance listed, the relevant mental element set out in article 30 of the Rome Statute applies.³⁶ This General Introduction is followed by an Introduction to the crimes (genocide, crimes against humanity, and war crimes), with each crime followed by the specific elements of each act. For example, under "genocide," the elements of "genocide by killing," "genocide by causing serious bodily or mental harm," and so on are set out.

States also needed to agree on the content of each crime within that framework. One difficulty faced by the Working Group was that some of the crimes listed in the Statute are described in only a few words, such as torture, inhuman treatment, and sexual slavery, because it was understood that they would be interpreted in accordance with relevant authorities. Upon closer examination, it appeared that some of the authorities appeared to conflict. For example, in relation to the war crime of torture,³⁷ there was a discussion as to whether the criteria found in the Convention Against Torture should be used. That Convention states that torture must be carried out "at the instigation of or with the consent of a public official or other person acting

34. These are objective in nature.

35. These are subjective in nature. The issue of the link between the *mens rea* requirement and the general principles of criminal law listed in the Rome Statute was discussed in more detail at an intersessional meeting held in Siracusa, Italy, from January 31-February 6, 2000. For more information on the objective and subjective elements of each crime, see Maria Kelt & Herman von Hebel, *What are Elements of Crimes?*, in *ELEMENTS*, *supra* note 20, at 13-18.

36. *Elements of Crimes*, *supra* note 5, General Introduction, para. 2.

37. Rome Statute, *supra* note 1, art. 8(2)(a)(iii) and (c)(i).

in an official capacity.”³⁸ However, many States felt that customary international law had evolved to the point where the “public official” requirement was no longer necessary. There was agreement on this issue, and the elements of torture consequently do not refer to public officials.³⁹

Agreement on certain elements proved to be quite difficult, especially for crimes against humanity. There is no convention on crimes against humanity that could be relied upon to guide the discussions, unlike the discussions on genocide and war crimes, which focused upon the Genocide Convention and the Hague and Geneva Conventions. As a result, some States were concerned that the negotiations on the Elements document might be used as a vehicle to change, in effect, certain provisions of the Rome Statute. The negotiations therefore began with many States reiterating their view that the Elements must not be used inappropriately to restrict or broaden the application of the crimes listed in the Statute. These concerns were not realized, as States worked together to protect the integrity of the Statute.

The many difficulties faced in the Elements of Crimes negotiations were successfully overcome following long hours of negotiations, and the document was adopted by consensus on June 30, 2000.⁴⁰

B. Rules of Procedure and Evidence

There was general agreement prior to and at the Diplomatic Conference that Rules of Procedure and Evidence would be required for the ICC to function properly.⁴¹ Article 51 was therefore included in the Rome Statute, providing for the adoption and amendment of the Rules. Prior to the adoption of article 51, States discussed whether they or the ICC’s judges should draft the Rules. The original draft Statute by the International

38. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), art. 1.

39. *Elements of Crimes*, *supra* note 5, at 19, 39 (“war crime of torture”). In that respect, the Elements of Crimes follow more closely the definition of torture as a crime against humanity in article 7(2)(e) of the Rome Statute. Rome Statute, *supra* note 1.

40. For more information on the negotiations on the Elements of Crime, see *ELEMENTS*, *supra* note 20, Part One.

41. For example, Australia and the Netherlands had proposed draft rules of procedure and evidence as far back as 1996. See *Draft Set of Rules of Procedure and Evidence For the International Criminal Court*, *supra* note 8.

Law Commission provided that the judges would draft the Rules, but they would be subsequently approved by a conference of States. Some States agreed with this approach, because they felt strongly that the Court's judges should write the Rules, as was done in the International Court of Justice, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the International Tribunal on the Law of the Sea. Other States wanted to have a clear understanding of their procedural obligations before the Court was set up, and therefore recommended that States be involved in both the drafting and the adoption of the Rules. This latter view prevailed, and States decided to retain the power to draft and adopt the Rules.⁴²

Consideration of this idea resulted in further discussions both prior to and at the Diplomatic Conference on the issue of whether the Rules should be adopted at the same time as the Statute. Some States wished to know the content of the Rules before agreeing to the Statute in Rome. Others wanted to ensure that certain proposals that were not included in the Statute were included in the Rules. Once it became clear that there was simply not enough time during the Diplomatic Conference to finalize both the Statute and the Rules of Procedure and Evidence, and in order to ensure that the content of the Rules did not become a pretext for delaying the adoption of the Statute, footnotes were included in the working documents of the Conference to record which ideas were to be later taken up in the negotiation of the Rules. In addition, in order to ensure that the Rules could not be used to affect the integrity of the Statute, States agreed that the Statute would prevail in the event of a conflict between the Statute and the Rules.⁴³

Under article 51 of the Rome Statute, the Rules of Procedure and Evidence will enter into force once they are adopted by a two-thirds majority of the Assembly of States Parties. Amendments to the Rules may be proposed by any State Party, an absolute majority of judges, or the Prosecutor. Amendments also require a two-thirds majority.⁴⁴

Negotiations on the Rules at the Preparatory Commission

42. Thus, article 51(1) states, "The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties." Rome Statute, *supra* note 1.

43. Rome Statute, *supra* note 1, art. 51(5).

44. *Id.* paras. (1)-(2).

were lengthy, meeting often (including in the evenings) during the first five sessions and considering almost every aspect of the Rome Statute. While the Statute itself contains an elaborate set of provisions of a procedural nature, there were many areas that States felt required further elaboration. Some Parts of the Statute, being themselves very detailed, called for a relatively short set of rules, such as Part 9 on International Cooperation and Judicial Assistance. In other cases, however, the rules needed to be quite detailed, as they supplement brief Statute provisions, such as Part 10 on Enforcement.

While less political than the Elements of Crimes, the development of the Rules of Procedure and Evidence represented a significant challenge, for various reasons. The best understood is probably the need, already encountered in Rome, to reconcile national criminal systems with different concepts and practices. Whenever the provisions of the Statute remained at the general level, it fell to the negotiators at the Preparatory Commission to try to bridge the gaps, or oppositions, between systems. This proved particularly difficult with respect to such issues as investigation and prosecution of crimes, the pre-trial regime, disclosure of evidence, and fundamental notions of justice, fair trial, and rights of the accused. In addition to differences between legal systems, the Rules also gave rise on occasion to significant divisions between different regions and cultures, notably in the case of privileged communications and information, evidence for sexual offenses, and incrimination of family members.

The Working Group on Rules of Procedure and Evidence was coordinated by Silvia Fernández de Gurmendi of Argentina, who had also coordinated negotiations of procedural issues at the Diplomatic Conference. Other coordinators were assigned to specific parts of the Statute: John Holmes of Canada (Part 2), Medard Rwelamira of South Africa (Part 4), Rolf Fife of Norway (Part 7), and Phakiso Mochochoko of Lesotho (Parts 9 and 10).⁴⁵

Negotiations on the Rules of Procedure and Evidence were divided into four general areas. The first was Part 4 of the Statute, on the composition and administration of the Court. Discussions on that Part resulted in rules on the functions of the

45. The coordinators were themselves assisted by a number of persons who chaired informal consultations.

Victims and Witnesses Unit,⁴⁶ the removal from office and disqualification of judges and officials of the Court,⁴⁷ the appointment of defense counsel,⁴⁸ and the working languages of the Court.⁴⁹ The second set of discussions focused on Parts 5, 6, and 8 of the Statute, on investigation and prosecution, trial proceedings, and appeals. This involved such issues as pre-trial detention, collection and presentation of evidence, privileges, and the procedure for an appeal.⁵⁰ The third area related to Parts 7, 9, and 10 of the Statute, on penalties, cooperation of States with the Court, and enforcement of judgments, including the sensitive issue of conditions of imprisonment.⁵¹ The fourth area for discussion under the Rules is related to Part 2, on jurisdiction and admissibility, and applicable law, which regulates the interaction between the Court and national systems.⁵² Some cross-cutting issues were encountered by all groups, notably the extent to which victims are involved in the Court process.⁵³

C. *Relationship Agreement Between the Court and the United Nations*

Cristian Maquieira of Chile coordinated the Working Group on the Relationship Agreement between the Court and the U.N., which met during the sixth, seventh, and eighth sessions of the Preparatory Commission. The Relationship Agree-

46. *Rules of Procedure and Evidence*, *supra* note 4, rules 16-19.

47. *Id.* rules 23-32.

48. *Id.* rule 22.

49. *Id.* rule 41. For a detailed description of negotiation of the Rules relating to Part 4, see Medard Rwelamira, *Composition and Administration of the Court*, in *ELEMENTS*, *supra* note 20, at 259-320.

50. Donald Piragoff, *Evidence*, in *ELEMENTS*, *supra* note 20, at 349-402; Helen Brady, *Disclosure of Evidence*, in *ELEMENTS*, *supra* note 20, at 403-24; Hakan Friman, *Investigation and Prosecution*, in *ELEMENTS*, *supra* note 20, at 493-538; Peter Lewis, *Trial Procedure*, in *ELEMENTS* *supra* note 20, at 539-53; Helen Brady, *Appeal*, in *ELEMENTS* *supra* note 20, at 575-96; Gilbert Bitti & Silvia A. Fernández de Gurmendi, *Revision of Conviction or Sentence*, in *ELEMENTS*, *supra* note 20, at 575-603.

51. Rolf Einar Fife, *Penalties*, in *ELEMENTS*, *supra* note 20, at 555-74; Frederik Harhoff & Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, in *ELEMENTS*, *supra* note 20, at 637-72; Kimberly Prost, *Enforcement*, in *ELEMENTS*, *supra* note 20, at 673-702.

52. John T. Holmes, *Jurisdiction and Admissibility*, in *ELEMENTS*, *supra* note 20, at 321-48.

53. Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in *ELEMENTS*, *supra* note 20, at 427-34; Helen Brady, *Protective and Special Measures for Victims and Witnesses*, in *ELEMENTS*, *supra* note 20, at 434-56; Gilbert Bitti & Hakan Friman, *Participation of Victims in the Proceedings*, in *ELEMENTS*, *supra* note 20, at 456-74; Peter Lewis & Hakan Friman, *Reparations to Victims*, in *ELEMENTS*, *supra* note 20, at 474-91.

ment is to govern the interaction between the U.N. and the Court. It therefore contains articles on issues such as exchange of information between the U.N. and the Court,⁵⁴ the use of U.N. conference facilities and services,⁵⁵ use of the U.N. *laissez-passer*,⁵⁶ testimony of U.N. officials before the Court,⁵⁷ and cooperation between the U.N. and the Prosecutor.⁵⁸

One of most contentious articles under discussion related to U.N. privileges and immunities. The draft Relationship Agreement prepared by the U.N. Secretariat stated that if the Court exercises its jurisdiction over a person who enjoys privileges and immunities in connection with his or her work for the United Nations pursuant to the U.N. Charter, the Convention on Privileges and Immunities of the United Nations or other agreements concluded by the U.N., "the United Nations undertakes to cooperate with the Court in such a case and, if necessary, will waive the privileges and immunities of the person or persons concerned"⁵⁹ Delegates raised questions as to the scope of the reference to "other agreements," whether the waiver of the U.N. privileges and immunities should be closer to automatic, the compatibility of this article with article 27 of the Rome Statute (on irrelevance of official capacity), and the status of U.N. representatives who are victims or witnesses.

Several delegations argued that the U.N. representatives could not have any privileges and immunities with respect to the crimes within the jurisdiction of the Court. Others argued that privileges and immunities might still attach, despite the crimes the person is alleged to have committed, regarding offenses against the administration of justice (as opposed to genocide, crimes against humanity, war crimes, or aggression). Ultimately, the article was reworded to state that if there are such privileges and immunities attaching to individuals accused of committing crimes within the jurisdiction of the Court, then the U.N. "undertakes to cooperate fully with the Court and to take all neces-

54. *Draft Relationship Agreement Between the United Nations and the International Criminal Court*, U.N. Doc. PCNICC/2001/WGICC-UN/L.1 (Oct. 4, 2001), art. 5.

55. *Id.* art. 10.

56. *Id.* art. 12.

57. *Id.* art. 16.

58. *Id.* art. 18.

59. *Draft Relationship Agreement Between the United Nations and the International Criminal Court, Prepared by the Secretariat*, U.N. Doc. PCNICC/2000/WGICC-UN/L.1 (Aug. 9, 2000), art. 8.

sary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities.”⁶⁰ This compromise was accepted by consensus.⁶¹

Other issues discussed within the Working Group included a proposal that called upon the U.N. Secretary-General to

keep the Court informed of information the U.N. may receive from any State regarding its exercise of national criminal jurisdiction over any accused for the purpose of assisting the Court to determine the admissibility of a relevant case pursuant to any motion or challenge brought under article 19 of the Statute.⁶²

Many delegations were concerned that this proposal would lead to a delay in the determination of admissibility, and it was not ultimately included in the text.

Another issue debated by delegates was how closely the administrative and personnel management structures of the ICC should follow those of the U.N. Some delegations voiced the concern that the ICC will need to develop structures that best suit the Court. Therefore, the final text of the Relationship Agreement on this issue allows the Court and the U.N. to consult on administrative and personnel management matters, but the Court is not obliged to adhere to the standards and procedures of the U.N.⁶³

60. *Draft Relationship Agreement Between the United Nations and the International Criminal Court*, *supra* note 54, art. 19.

61. Austria, Belgium, Chile, Portugal, South Africa, and Switzerland accepted this text, though they would have preferred the inclusion of an explicit reference to article 27 of the Rome Statute, as they were of the view that no privileges and immunities could exist with respect to genocide, crimes against humanity, war crimes, and aggression. They therefore made a statement at the final Working Group and plenary meetings of the eighth session, stating that, in their view, article 19 of the Relationship Agreement must be interpreted without prejudice to article 27 of the Rome Statute, in the sense that immunities cannot be waived when they do not exist.

62. *Proposal Submitted by the United States of America, Comments on Document PCNICC/2000/WGICC-UN/L.1*, U.N. Doc. PCNICC/2000/WGICC-UN/DP.12 (Dec. 9, 2000).

63. *Draft Relationship Agreement Between the United Nations and the International Criminal Court*, *supra* note 54, art. 8. The Agreement states that the “United Nations and the Court agree to consult and cooperate as far as practicable regarding personnel standards, methods and arrangements.” The Agreement goes on to state that:

[The] United Nations and the Court shall consult, from time to time, concerning the most efficient use of facilities, staff and services with a view to avoiding the establishment and operation of overlapping facilities and services. They may also consult to explore the possibility of establishing common facilities or services in specific areas, provided that there are cost savings.

D. Financial Rules and Regulations

Georg Witschel of Germany was appointed to coordinate the Working Group on the Financial Rules and Regulations. Given the extreme complexity of the issues that needed to be considered and the time available for negotiations, this Working Group decided to focus on completing the Financial Regulations, leaving the Financial Rules for consideration by the Assembly of States Parties. The Working Group met in the sixth, seventh, and eighth sessions of the Preparatory Commission.

The original draft Financial Regulations were prepared by the U.N. Secretariat and were drawn largely from the Financial Regulations of the International Tribunal for the Law of the Sea.⁶⁴ Two main issues that arose in the negotiations on the Financial Regulations were the Committee on Budget and Finance and the currency of the Court. Delegates debated the role of the Committee on Budget and Finance, which was originally proposed as a body within the Court charged with the task of preparing the Court's budget. At the urging of a number of delegations, it instead became a Committee of the Assembly of States Parties.⁶⁵ The Committee on Budget and Finance will be elected by the Assembly of States Parties and will be its main point of financial contact with the Court, with responsibilities roughly analogous to those of the U.N.'s Advisory Committee on Administrative and Budgetary Questions.

The currency of the Court also underwent long discussions, with some arguing for use of the Euro and some for the U.S. dollar. Those calling for the use of the Euro argued that the seat of the Court will be in The Hague and therefore will be operating in an environment using the Euro for transactions. They pointed out that most of the ICC's expenses will likely be linked to salary costs, and these will be incurred in The Hague. Those arguing for use of the U.S. dollar were concerned that the Euro might fluctuate more than the U.S. dollar, which could have a significant impact on a country's financial exposure for yearly assessments. Some also indicated that internal laws and regula-

Id. art. 9.

64. *Draft Financial Regulations of the International Criminal Court, Prepared by the Secretariat*, U.N. Doc. PCNICC/2000/WGFIRR/L.1 (July 13, 2000).

65. *Draft Financial Regulations*, U.N. Doc. PCNICC/2001/WGFIRR/L.1 (Oct. 2, 2001), regulation 1.2.

tions require them to make all foreign payments in U.S. dollars. Ultimately, it was agreed that the “currency of the statutory headquarters of the Court” (which, as of January 1, 2002, is the Euro) would be the official currency, and each State may pay its assessed contribution in the currency of its choice as long as it absorbs any exchange costs.⁶⁶ A paper by Mr. Witschel is included in this volume, providing further details.

At the conclusion of the eighth session, the Financial Regulations were adopted, as were two draft resolutions. The first draft resolution was on the criteria for accepting voluntary contributions, and the second was on the establishment of the Committee on Budget and Finance.⁶⁷

E. *Rules of Procedure of the Assembly of States Parties*

The Working Group on the Rules of Procedure on the Assembly of States Parties, coordinated by Saeid Mirzaee-Yengejeh of the Islamic Republic of Iran, met during the seventh and eighth sessions of the Preparatory Commission. The Working Group was tasked with completing the rules governing the work of the Assembly of States Parties, including rules governing how often the Assembly must meet,⁶⁸ the issues to be discussed by the Assembly at each session,⁶⁹ the creation of a Bureau of the Assembly,⁷⁰ the powers of the President of the Assembly,⁷¹ and the participation of officials of the Court and the Secretary-General of the U.N.⁷²

One important issue considered by the Working Group was who would have access to the meetings and documents of the Assembly, and who could address the Assembly. It was decided that meetings of the Assembly of States Parties would be held in public, unless the Assembly decides that exceptional circum-

66. *Id.* regulation 5.7.

67. *Draft Resolution of the Assembly of States Parties on Relevant Criteria for Voluntary Contributions to the International Criminal Court*, U.N. Doc. PCNICC/2001/WGFIRR/L.3 (Oct. 2, 2001); *Draft Resolution of the Assembly of States Parties on the Establishment of the Committee on Budget and Finance*, U.N. Doc. PCNICC/2001/WGFIRR/L.2 (Oct. 2, 2001).

68. *Draft Rules of Procedure of the Assembly of States Parties*, U.N. Doc. PCNICC/2001/WGRPASP/RT.1/Rev.1 (Oct. 1, 2001), rule 4.

69. *Id.* rules 10-13.

70. *Id.* rule 29.

71. *Id.* rule 30.

72. *Id.* rules 34-35.

stances require that the meetings be held in private.⁷³ States that have signed the Rome Statute or the Final Act can sit as Observer States in the Assembly of States Parties.⁷⁴ States that are not States Parties and not Observer States can be invited to be present during the work of the Assembly.⁷⁵ Intergovernmental organizations may also participate as observers in the deliberations of the Assembly.⁷⁶ Non-governmental organizations may also attend meetings of the Assembly, receive copies of official documents, and make statements, subject to rule 88*bis*. Mr. Mirzaee-Yengejeh provides more details on the Working Group's negotiations in his paper in this volume.

F. *Agreement on Privileges and Immunities*

The Working Group on the Agreement on Privileges and Immunities of the Court, coordinated by Phakiso Mochochoko of Lesotho, met during the sixth, seventh, and eighth sessions of the Preparatory Commission. The main challenge facing delegates was to create a system that would provide appropriate protection to the Court and those who must appear before it, without unduly expanding either the scope or nature of privileges and immunities to those who must benefit from them. The privileges and immunities that attach to a wide range of persons were considered, such as the judges, Prosecutor, Deputy Prosecutor(s), Registrar, Deputy Registrar, staff of the Office of the Prosecutor and Registry, personnel recruited locally, defense counsel and the legal representatives of victims, persons assisting defense counsel, witnesses, victims, experts, and other persons required to be present at the seat of the Court.⁷⁷ The fact that different people require different privileges and immunities due to the nature of their work raised exceedingly complex issues. Many difficult, and often unprecedented, issues arose in these negotiations, necessitating long hours (including many eve-

73. *Id.* rule 41. Note that meetings of subsidiary bodies open to all States Parties will be held in public, unless the body concerned decides otherwise, and meetings of the Bureau and subsidiary bodies with limited membership will be held in private, unless the body concerned decides otherwise. *Id.* rule 41(2)-(3).

74. *Id.* rules 1, 23.

75. *Id.* rule 88*ter*.

76. *Id.*

77. *Draft Agreement on the Privileges and Immunities of the International Criminal Court*, U.N. Doc. PCNICC/2001/WGAPIC/L.1 (Oct. 3, 2001); *see also* Rome Statute, *supra* note 1, art. 48.

nings) of discussions to reach consensus. Mr. Mochochoko's paper in this volume provides a thorough description of the issues considered in these negotiations.

III. DOCUMENTS STILL UNDER DISCUSSION

A. *Aggression*

Under Resolution F, the Preparatory Commission "shall prepare proposals for a provision on aggression, including the definition and the Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime."⁷⁸ The Rome Statute provides that the Court will exercise jurisdiction over the crime of aggression once a provision is adopted by the Review Conference, seven years following entry-into-force.⁷⁹

Tuvaku Manongi of the United Republic of Tanzania was appointed as coordinator for the definition of the crime of aggression in the first session of the Preparatory Commission. He was asked to speak to delegates and determine a way forward for negotiations on this crime. He did this during the first two sessions, during which a number of delegations expressed the view that the details of aggression must be discussed in a Working Group, despite the need to concentrate on the Rules and Elements until June 30, 2000. These delegations were concerned that if aggression was not formally recognized as an important subject early on, its consideration might be postponed indefinitely. Therefore, a Working Group was formed and Mr. Manongi was appointed as coordinator. He oversaw discussions on aggression from the third through the sixth sessions. Once Mr. Manongi indicated he could no longer serve as coordinator, Silvia Fernández de Gurmendi of Argentina was appointed in his place.

Discussions on aggression have continued to reflect well-known difficulties related to this crime. The first difficulty relates to the definition of the crime. Some States prefer a general definition, some prefer a general definition supplemented by a list of acts that might be considered aggression, and others prefer a detailed definition (which may or may not have a list of acts

78. Final Act, *supra* note 3, Resolution F, para. 7.

79. Rome Statute, *supra* note 1, art. 5(2).

attached). Part of the debate revolves around whether the definition should be based on the 1974 General Assembly Resolution 3314(XXIX). The second issue relates to the conditions under which the Court would exercise jurisdiction, specifically what the role of the Security Council should be in relation to the exercise of the Court's jurisdiction, and what happens if the Council fails or otherwise declines to act. The main debate here is whether the role of the Security Council in determining an act of aggression is exclusive, or if the use of the term "primary responsibility" in the U.N. Charter indicates that the General Assembly can assume secondary responsibility in cases where the Security Council fails to determine whether or not an act of aggression has taken place.⁸⁰

A number of proposals have been put forward on the definition and conditions for exercise of jurisdiction.⁸¹ The coordinator issued a consolidated paper, collating these proposals, as well as a paper outlining the main issues under discussion.⁸² The discussions of the seventh and eighth sessions were largely focused on an analysis of proposals put forward by the delegations of Bosnia and Herzegovina, Romania, and New Zealand.⁸³

Despite the fact that States are dealing with very difficult issues that have been under discussion within the United Nations system for over fifty years, the negotiations have become quite focused and legalistic, and have attracted a growing number of interested States.⁸⁴ Certain principles have been widely accepted, namely that the crime must be committed by political or

80. Article 24(1) of the United Nations Charter states: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." U.N. CHARTER art. 24(1), para. 1.

81. See the list of documents contained in Annex I to the *Proceedings of the Preparatory Commission*, U.N. Doc. PCNICC/2001/L.3/Rev.1 (Oct. 11, 2001) at its eighth session from September 24 through October 5, 2001.

82. *Discussion paper proposed by the Coordinator, Consolidated Text of Proposals on the Crime of Aggression and Discussion paper proposed by the Coordinator, Preliminary List of Possible Issues Relating to the Crime of Aggression*, in *Proceedings of the Preparatory Commission*, *supra* note 81, Annex III (each were originally released during the third and fourth sessions of the Preparatory Commission respectively).

83. *Proposal Submitted by Bosnia and Herzegovina, New Zealand and Romania, Definition of the Crime of Aggression*, U.N. Doc. PCNICC/2001/WGCA/DP.2 (Aug. 27, 2001); *Conditions for Exercise of Jurisdiction Over the Crime of Aggression*, U.N. Doc. PCNICC/2001/WGCA/DP.2/Add.1 (Aug. 27, 2001).

84. 2001 ICC Resolution, *supra* note 2, operative para. 3.

military leaders of a State, planning, preparation, or ordering of aggression should be criminalized only when an act of aggression has taken place, and a determination of an act of aggression is necessary before the ICC can consider whether a crime of aggression has taken place.⁸⁵

The negotiations on the crime of aggression will not be completed prior to the first meeting of the Assembly of States Parties. Therefore, the issue has arisen as to how the negotiations will continue once the Preparatory Commission ends. This will be discussed at the ninth Preparatory Commission. Ms. Fernández de Gurmendi elaborates on the negotiations on the crime of aggression in her paper in this volume.

B. *First Year Budget and Principles for a Headquarters Agreement*

Since the various documents listed in Resolution F were negotiated in stages, it was necessary to provide avenues through which States could relay concerns or opinions on certain documents not currently under discussion. The Working Groups on the budget for the first year of the Court and the principles governing the Headquarters Agreement met for the first time during the eighth session of the Preparatory Commission. Two focal points were therefore appointed, to speak to States about these documents prior to the eighth session. This was a continuation of a practice introduced at the first session of the Preparatory Commission.⁸⁶ Saeid Mirzaee-Yengejeh of the Islamic Republic of Iran was designated as the contact point on the budget for the first year of the Court, and Zsolt Hetesy of Hungary as

85. The first two are listed in the *Consolidated Text of Proposals on the Crime of Aggression*, *supra* note 82, Explanatory Note A(ii). The last was reflected in delegates' statements in the Working Group on the Crime of Aggression during the seventh and eighth sessions.

86. At the first session of the Preparatory Commission, Tuvaku Manongi of the United Republic of Tanzania was appointed to serve as coordinator for the definition of the crime of aggression; Hiroshi Kawamura of Japan was appointed as the contact point in respect of the draft texts on financial regulations and rules, a budget for the first financial year, and the rules of procedure of the Assembly of States Parties; and Cristian Maquieira of Chile was appointed as the contact point for the draft texts of a relationship agreement between the Court and the United Nations, basic principles governing a headquarters agreement to be negotiated between the Court and the host country, a draft agreement on privileges and immunities of the Court, and the request contained in paragraph 4 of General Assembly Resolution 53/105. *Proceedings of the Preparatory Commission at its First Session (Feb. 16–26, 1999)*, U.N. Doc. PCNICC/1999/L.3/Rev.1 (Mar. 2, 1999), para. 14.

the contact point on the principles governing the headquarters agreement and other general issues.

The Working Group on the first year budget, coordinated by Rolf Fife of Norway, examined the document prepared by the U.N. Secretariat.⁸⁷ This document presented two scenarios: a budget equaling approximately U.S.\$15 million assuming that no cases were referred to the ICC in its first year, and a budget equaling approximately U.S.\$30 million assuming that cases were referred to the ICC. At the conclusion of the eighth session, the Working Group presented a series of guidelines for the preparation of a revised draft budget.⁸⁸ A new document prepared by the Secretariat in accordance with these guidelines will be considered at the ninth session.

The Working Group on the principles governing the Headquarters Agreement was coordinated by Zsolt Hetesy of Hungary. This Working Group considered a draft set of general principles, as the actual agreement will be negotiated between the Court and the host country.⁸⁹ Discussions on these general principles will continue in the ninth session of the Preparatory Commission.

IV. DOCUMENTS STILL REQUIRED

As the pace of ratifications and accessions quickened in 2001, States and non-governmental organizations turned their thoughts to the fact that documents other than those listed in Resolution F were required for the creation of the ICC. In the seventh session of the Preparatory Commission, the Bureau⁹⁰ agreed to prepare an outline of the documents and activities necessary, including their sequencing, to ensure the most efficient establishment of the Court and the smooth operation of the Assembly of States Parties. In the eighth session, the "Road map leading to the early establishment of the International

87. *Draft Budget for the First Financial Year of the Court, Prepared by the Secretariat*, U.N. Doc. PCNICC/2001/WGFYB/L.1 (Aug. 8, 2001).

88. Appendix, *Priority Guidelines for the Preparation of a Revised Draft First Year Budget for the International Criminal Court*, in *Proceedings of the Preparatory Commission at its eighth session*, U.N. Doc. PCNICC/2001/L.3/Rev.1/Add.1 (Oct. 11, 2001).

89. *Basic Principles Governing an Agreement to be Negotiated Between the International Criminal Court and the Kingdom of the Netherlands Regarding the Headquarters of the Court*, U.N. Doc. PCNICC/2001/WGHQA/L.1 (July 16, 2001).

90. The Bureau of the Preparatory Commission consists of the Chairman, three Vice-Chairmen, and one Rapporteur.

Criminal Court" was adopted in the final plenary.⁹¹ Zsolt Hetesy explains the road map in his paper in this volume.

At the last Preparatory Commission, two new Working Groups were announced based on the issues identified in the road map. These Working Groups will meet for the first time in the ninth session. The first Working Group will consider documents that are required for the Assembly of States Parties, including matters such as a draft agenda for the first session of the Assembly, preparations for the establishment of the Bureau and subsidiary bodies of the Assembly (for example, the Committee on Budget and Finance), and recommendations regarding nomination and election procedures for judges and the Prosecutor. This Working Group will be coordinated by Saeid Mirzaee-Yengejeh of the Islamic Republic of Iran. The second Working Group will be coordinated by Rolf Fife of Norway and will deal with remaining financial issues, such as the victims' trust fund and the remuneration of judges, the Prosecutor, and the Registrar.

In order to address other issues raised in the road map, three focal points were also appointed to coordinate the preparation of initial draft texts of essential provisional rules. Phakiso Mochochoko of Lesotho will oversee the development of draft rules in the area of human resources and administration. These draft rules will include: provisional staff regulations, including the drawing up of job descriptions, hiring, classification, promotion, and dismissal rules; provisional rules determining remuneration and benefits, including social security, pension systems, and health insurance; a provisional code of conduct for all staff as well as defense counsel; and provisional rules governing the assignment, remuneration, and benefits for defense counsel, including a directive on legal aid. Christian Much of Germany will assist with development of draft rules on budgetary and financial issues, such as provisional financial rules and provisional procurement rules. Sivu Maqungo of South Africa will manage the drawing up of draft rules for operational issues. This includes the creation of provisional security rules for the courtroom, detention unit, information and field offices, and operations. In addition, he will consider such issues as provisional rules for in-

91. *Road Map Leading to the Early Establishment of the International Criminal Court*, *supra* note 6.

vestigation protocols and archival systems, provisional media and outreach rules, and provisional rules on victims and witnesses, logistics, allowances, support services, security arrangements, participation, and reparations. The road map indicated that, given the rapid pace of ratifications, it would be useful to follow the past practice of holding intersessional open-ended experts meetings on these topics.

During the eighth session, the Minister of Foreign Affairs of the Netherlands addressed the plenary of the Preparatory Commission. He outlined the steps the Netherlands, as host country for the ICC, had taken to date to prepare for the establishment of the Court. He announced that the Netherlands' ICC task force was composed of ten officials from various government ministries and agencies; headed by a senior official with the status of Director-General. The government has identified both the temporary and permanent sites of the ICC, the former across from the International Criminal Tribunal for the Former Yugoslavia and the latter on the site of former army barracks in a prime location.

The government, in cooperation with the municipal authorities of The Hague, is preparing an international architectural competition for the design of the permanent ICC buildings, the construction of which should be completed in 2007. Foreign Minister van Aarsten indicated that the Netherlands was willing to contribute financially to the initial meetings of the Assembly of States Parties. He concluded by noting that the Netherlands takes its responsibility as host country very seriously and will work closely with the Preparatory Commission to ensure the timely establishment of the Court.⁹²

The road map document anticipated the need for the Netherlands' ICC task force to communicate frequently with the Preparatory Commission over the coming months. It therefore suggested the creation of an interlocutor mechanism between the Preparatory Commission and the host country. A four member sub-committee of the Bureau was appointed to fulfill the role, chaired by Silvia Fernández de Gurmendi of Argentina, and including Andras Vamos-Goldman of Canada, Zsolt Hetesy

92. *Statement by the Minister for Foreign Affairs of the Kingdom of the Netherlands, Jozias J. van Aarsten, Presented During the Eighth Session of the Preparatory Commission on 25 September 2001*, U.N. Doc. PCNICC/2001/INF/3 (Sept. 27, 2001).

of Hungary, and Patricio Ruedas of Spain. The interaction between the sub-committee of the Bureau and the Netherlands' ICC task force will be very important over the coming months. The ICC task force will be arranging practical issues such as the refurbishment of the temporary space identified for the Court to meet the Court's needs for the first several years of its existence. The task force will discuss the needs of the temporary, as well as permanent, Court with the sub-committee, to ensure that proper security and other measures are addressed. In addition to the physical needs of the Court, the ICC task force and the sub-committee will also discuss the infrastructure required for the smooth establishment of the Court.⁹³ The sub-committee will report to the Bureau, which will keep the Preparatory Commission informed of the developments regarding host country issues.

CONCLUSION

Setting up an international criminal court is extremely complex. It is not enough to adopt a Statute providing the general parameters of such a court. The international community must also decide on procedural, financial, and legal issues that arise from the creation of a new entity, as well as implement these agreements. To this end, the Preparatory Commission has made excellent progress to date. Six of the eight documents set out in Resolution F have been completed and adopted by consensus. The remaining two are likely to be completed at the next Commission, from April 8-19, 2002. That Commission will also focus upon the first meetings of the Assembly of States Parties, in order to prepare as much as possible for the transition from the Commission to the Assembly.

The ICC will soon be established. ICC supporters—States and non-governmental organizations alike—will be focusing their energies over the coming months on ensuring a smooth transformation from a Court on paper to a Court in reality. The next Preparatory Commission will play a key role in this process, as will open-ended intersessional meetings. Though it is not technically the mandate of the Preparatory Commission, the work of the Commission to date has contributed to growing support for the ICC: the elaboration of documents listed in Resolu-

93. *Road Map Leading to the Early Establishment of the International Criminal Court*, *supra* note 6, para. 12.

tion F has increased understanding of the parameters of the ICC, and the adoption by consensus has ensured widespread acceptance of not only the documents but of the Court itself. This process will continue as the work of the Preparatory Commission intensifies as the establishment of the ICC draws near.