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The Making of the Basic Principles of the Headquarters Agreement

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Zsolt Hetesy

Abstract

The preparation of the Basic Principles of the Headquarters Agreement presents a unique challenge for the PrepCom. As explained earlier, the two-step process for the conclusion of the headquarters agreement has never been utilized before in the history of international organizations. Other factors, such as the time-pressure created by the ongoing work in a related Working Group also made the task more difficult. The Bureau of the PrepCom responded to the challenge with a unique working-method and procedure. The process, which may look somewhat cumbersome, managed to forge a heightened level of understanding among the Bureau, the host country, and the U.N. Secretariat concerning the procedure and the substance of the project. The Bureau felt comfortable with its new role, while the U.N. Secretariat, for the first time in the PrepCom process, received substantive guidelines before it set out to draft the first document. The structured interaction among the main actors provided for a natural development of the Basic Principles, which not only led to the preparation of a widely accepted first draft, but, in the humble opinion of the coordinator, will also facilitate the quick conclusion of the headquarters agreement.

THE MAKING OF THE BASIC PRINCIPLES OF THE HEADQUARTERS AGREEMENT

*Zsolt Hetesy**

INTRODUCTION

The Statute of the International Criminal Court¹ provides, in Article 3, paragraph 1, that the seat of the Court shall be established at The Hague in the Netherlands. The Statute further provides in the same article that the Court shall enter into a headquarters agreement with the “host State.”² Resolution F of the Final Act³ of the Rome Conference provides that the Preparatory Commission of the International Criminal Court, which is mandated to prepare proposals for practical arrangements for the establishment of the Court, shall prepare, *inter alia*, the draft text of “basic principles governing a headquarters agreement to be negotiated between the Court and the host country.”⁴

With the drafting of the Basic Principles of the Headquarters Agreement of the Court (“Basic Principles”), the Preparatory Commission (“PrepCom”) started a new project without precedents. Previously, if an international organization needed a headquarters agreement, it was drafted without prior guidelines. The Rome Conference opted for a two-step process when it decided that the PrepCom should prepare the Draft Basic Principles, which later will be approved by the Assembly of States Parties of the Rome Statute. Once the International Criminal Court is established and the Court and the host country enter into negotiations on the headquarters agreement, their negotia-

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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/romefra.htm> [hereinafter Rome Statute] (adopted on July 17, 1998 in Rome by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court).

2. *Id.* art. 3.

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* (1998), Resolution F.

4. *Id.*

tions will be governed by the Basic Principles.⁵ Following the conclusion of those negotiations, the draft headquarters agreement will have to be submitted to the Assembly of States Parties for review and adoption. After the Assembly approves the text, the President of the Court, on behalf of the Court, will conclude the headquarters agreement with the Government of the Netherlands, which, in turn, will have to submit it to its Parliament.

One may ask why such a two-step process was utilized. The decision stems from the unique nature of the International Criminal Court. Other international judicial organizations in The Hague, such as the International Criminal Tribunal for the Former Yugoslavia⁶ ("ICTY") and the International Court of Justice, had no legal status to conclude agreements on their own behalf. Therefore, in the case of those organizations, the United Nations Secretariat negotiated the headquarters agreements on their behalf.

By contrast, the International Criminal Court, for obvious reasons, enjoys a sovereign legal status and broad legal capacity. In order to fulfill its purposes, the Court will enjoy substantial independence from the treaty body establishing it, namely, the Assembly of States Parties. Other practical arguments were also enumerated in favor of leaving the actual negotiation of the headquarters agreement to the Court and the host Country.⁷

5. As it is also specified in the Basic Principles, the Court and the host country, in fact, will also depend on other documents, like the Rome Statute, the Agreement on the Privileges and Immunities of the Court, and the Rules of Procedure and Evidence, while developing the draft headquarters agreement.

6. 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* U.N. Doc. S/RES/1166 (1998); U.N. Doc. S/RES/1329 (2000).

7. Right from the beginning of the preparatory process a number of States, including the host country, maintained that the nature of the headquarters agreement differs substantially from other documents prepared by the PrepCom, such as the Relationship Agreement between the Court and the United Nations, or the Agreement on the Privileges and Immunities of the Court. The latter agreements set forth the future rights and obligations of not only the Court, but also of the States Parties themselves. Therefore, the future States Parties, through the PrepCom, should all participate directly in shaping the content of those documents. (In fact, the "open-ended" nature of the PrepCom was particularly useful in forging consensus on the Relationship Agreement). In contrast, the headquarters agreement is a more technical document that regulates, on a bilateral basis, the presence and the activities of the Court in the Netherlands. Therefore, the host country argued that the drafting of the headquarters agreement

Therefore, the Rome Conference decided to empower the Court itself, to negotiate the headquarters agreement directly and on its own behalf with the host country. Hence, in the case of the International Criminal Court, neither the PrepCom nor the Assembly of States Parties will participate in the actual drafting of the headquarters agreement.⁸ Meanwhile, the majority of States felt that the Assembly of States Parties should give some guidance to the Court and the host country for the preparation of the draft headquarters agreement. States wanted to ensure compatibility and consistency between the headquarters agreement and the Agreement on the Privileges and Immunities of the Court. Furthermore, it was felt that the process leading to the conclusion of the headquarters agreement should be as quick as possible. With the approval of the Basic Principles of the headquarters agreement, the Assembly of States Parties could ensure that the Court and the host country have adequate guidelines with which to work. The issuance of Basic Principles could, in all probability, also minimize the danger of delays at the later stage of the process, namely, when the Assembly has to approve the headquarters agreement.

I. *THE PROCESS OF PREPARATION*

Despite the novelty of the process, there was general agreement on the above-mentioned method before the Rome Conference. In fact, States accepted the two-step approach and, thus, the need for the negotiation of the Basic Principles at the March-April 1998 session of the Preparatory Committee in New York. While differing views persisted concerning some of the other functions of the future PrepCom at the Rome Conference, the issue of Basic Principles received relatively little attention. Then, after the establishment of the PrepCom in early 1999, the question of Basic Principles was put on the back burner. The

should be left to the Court and the host country. Meanwhile, the duty to submit the text for approval to the Assembly of States Parties should be sufficient to safeguard the interest of the States Parties as a whole. The Rome Conference accepted this argument.

8. The Organization for the Prohibition of Chemical Weapons ("OPCW") is an example of another Hague-based international organization, which took a different approach. The OPCW was established by the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (August 8, 1994), which entered into force on April 29, 1997. The Preparatory Commission of the OPCW drafted the headquarters agreement.

PrepCom was racing against time in order to accomplish its most pressing task, namely, the preparation of the Draft Elements of Crimes⁹ and the Draft Rules of Procedures and Evidence¹⁰ by the deadline of June 2000. Only after the finalization of those drafts and the commencement of work on other documents, such as the Draft Agreement on the Privileges and Immunities of the Court,¹¹ could work begin on the Basic Principles. Finally, the process started during the sixth session of the PrepCom, when the Chairman of the PrepCom appointed a focal point for the agenda item on December 1, 2000.

During the winter of 2001, the representatives of the host country and the focal point discussed the future format and structure of the document, as well as questions related to its preparation and its timing. Based on bilateral consultations, interested delegations also submitted certain proposals, which were taken into consideration at the early stages.

The PrepCom, during its seventh session in March 2001, requested the U.N. Secretariat to prepare the draft text of the Basic Principles governing the headquarters agreement. The Bureau decided that the draft Basic Principles should be submitted for consideration to the eighth session of the PrepComm. The Bureau, based on the proposal of the focal point, also decided to formulate a set of guidelines¹² for the U.N. Secretariat concerning the preparation of the draft. The Bureau resorted, for the first time, to the issuance of such guidelines¹³ in order to indicate to the Secretariat its wishes with regard to the format and content of the draft and the timing and method of its preparation. The guidelines enumerated a checklist of issues to be considered while formulating the basic principles. In addition, the

9. *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).

10. *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).

11. *Report of the Working Group, Draft Agreement on the Privileges and Immunities of the International Criminal Court*, U.N. Doc. PCNICC/2001/WGAPIC/L.1 (Oct. 3, 2001).

12. Letter addressed to the Director of the Codification Division, Office of Legal Affairs, United Nations (Mar. 16, 2001) (on file with author).

13. In the case of previous documents, first drafts were prepared by the Secretariat of the United Nations without prior input from the Bureau or from future coordinators. In this case, however, the Bureau felt that, due to the unprecedented nature of the document and the need for the heavy involvement of the host country, it would be advisable to take up more responsibilities at the early stages of the process.

guidelines also provided the Secretariat with sufficient flexibility to work out the details of the principles based on its own experience and with the help of direct contacts with the host country, and other relevant international organizations, such as the ICTY.

The guidelines were discussed during a meeting organized by the Ministry of Foreign Affairs of the Netherlands in The Hague on May 2, 2001. The meeting of the representatives of the various Dutch Ministries, the U.N. Secretariat, and the focal point endorsed the proposals contained in the guidelines. It was agreed that the Basic Principles should provide guidance on *all* aspects of the headquarters agreement. The suggestions on the structure of the Basic Principles also commanded wide support. Regarding the future content of the Basic Principles, the list of so-called general principles was discussed and clarified in detail. Subsequently, participants examined a sample document on specific principles, provided by the U.N. Secretariat. Suggestions were made to shorten the future Basic Principles considerably and to make them more general in nature.

On the basis of the meeting, the U.N. Secretariat prepared a first draft of the Principles in consultation with the host country. Comments were also requested from the ICTY. The above-mentioned participants met again in The Hague, on June 27, 2001, to undertake a final review of the Draft, which was then sent to Bureau members for comments. The Draft Basic Principles was revised again by the Secretariat and was issued on July 16, 2001.¹⁴

II. MAIN CHARACTERISTICS OF THE BASIC PRINCIPLES

In the Draft Basic Principles an explanatory note preceded the actual principles. This note explained the process for the negotiation of the Basic Principles and the negotiation, adoption, and conclusion of the headquarters agreement, as set forth in the relevant provisions of the Rome Statute and the Final Act.

The Basic Principles themselves were divided into two parts. The first part, the general principles, enumerates the principles that should govern the *preparation* of the headquarters agreement and those other principles, which apply generally to the headquarters agreement as a whole, or define the status of the

14. *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).

Court in general. The second part addresses, through a list of specific principles, all issues that must be addressed in the headquarters agreement.

A. *General Principles*

The general principles represent the backbone of the Basic Principles since, in many cases, they not only prescribe how to prepare the headquarters agreement, but also give guidance for the negotiating parties on how to apply the specific principles. Consensus emerged on many of the general principles very early in the process. In fact, many of them had already been articulated in the guidelines of the Bureau and they were later incorporated into the Basic Principles without much change. The general principles clarify, *inter alia*, that:

- The Court shall enjoy no less favorable treatment than any other international organization located in the host country;¹⁵
- The headquarters agreement's primary purpose is to enable the Court to fully and efficiently discharge its responsibilities and fulfill its purposes;¹⁶
- The headquarters agreement should support the independence of the Court and provide for the long-term stability of the Court;¹⁷ and
- The headquarters agreement should attempt to resolve, in an all-encompassing manner, all issues that could facilitate the functioning of the Court.¹⁸ At the same time, it should allow for the conclusion of supplementary agreements on matters that were not foreseen during the negotiations of the agreement, or are needed for the proper implementa-

15. *See id.* at II(1)(h). During the negotiations it was felt that, in particular, the experiences of the ICTY and the OPCW could be considered in developing the provisions of the headquarters agreement. The experiences of the ICTY, being an international criminal court, could be directly relevant. The experiences of the OPCW could be also relevant because, like the International Criminal Court, the OPCW, established by a separate treaty, is an entirely independent organization, not related to the United Nations.

16. *Id.* at II(1)(d).

17. *Id.* at II(1)(e).

18. *Id.* at II(1)(i). The experience of the ICTY shows that in the headquarters agreement, all-encompassing solutions with sufficient specificity are to be sought, since filling in the gaps later, through amendments or supplementary agreements, tends to be cumbersome. Therefore the set of principles shall not prevent the negotiating parties from addressing other issues, if necessary or appropriate.

tion thereof.¹⁹

The above-mentioned general principles give considerable latitude to the negotiating parties, as far as the concrete solutions are concerned. However, they also create clear standards, against which the Assembly of State Parties will measure any, and every, provision of the headquarters agreement. Some of the elements, such as the “no less favorable treatment”²⁰ clause, are also deemed to be instrumental in lessening the need for specificity in different areas, such as the privileges and immunities of the Court, or its officials.

B. *Specific Principles*

The set of specific principles strives to enumerate and cover comprehensively all relevant issues, following a chapter-by-chapter structure,²¹ that are usually touched upon in any headquarters agreement. The specific principles also pay particular attention to the special needs arising from the unique nature of the Court. Therefore, the specific principles contain provisions on the legal status, juridical personality, and the premises of the Court; the privileges and immunities of the Court; the communication facilities and public services for the Court; and the privileges and immunities of Judges, Prosecutor, Deputy Prosecutor, Registrar, the officials of the Court, and the other persons taking part in the proceedings before the Court. The document also enumerates specific principles for the cooperation between the Court and the host country, the amendment procedure, and the procedure for the settlement of disputes.

When drafting the specific principles, some important questions had to be settled early on. First, it was emphasized that the Basic Principles themselves should be relatively short, in order to give flexibility to the Court and the host country and to avoid

19. *Id.* Not all legal and financial arrangements can be included in the headquarters agreement. Additional arrangements, which may need to be concluded, could include further agreements on the premises, property, and services to be provided, by the Netherlands and the City of The Hague (including cooperation on operational matters such as transit of people, enforcement of sentences, or pretrial detention). These agreements and supplementary understandings could also address seemingly perennial, but important issues, such as Social Security regulations for Court officials, the employment of relatives of officials, the question of interns used by the Court, etc.

20. *Id.* at II(1)(h).

21. The headquarters agreement may deviate from the grouping system used in this part of the Basic Principles.

drafting the actual headquarters agreement. The Basic Principles, therefore, does not contain detailed texts on aspects that could be properly left for the negotiating parties. Nonetheless, it was agreed that the Court and the host country do not have complete discretion, since the Assembly of States Parties will review all the details when it receives the draft headquarters agreement for adoption.

Secondly, it was decided that the Basic Principles must be comprehensive. Despite the fact that the PrepCom was negotiating a separate Draft Agreement on the Privileges and Immunities of the Court, the relevant provisions on privileges and immunities were included in the Basic Principles as well. Although this may be repetitive, experience with other headquarters agreements amply demonstrates that this approach is typical. Also, there may be privileges and immunities that only pertain to the host country or could be more specific or different in the host country. These elements, therefore, must be included in the Basic Principles and, later on, in the headquarters agreement. The decision was also supported by the desire to provide the Court and the host country with an all-encompassing document.²²

Thirdly, since the Basic Principles had to draw extensively on the elements of the Agreement on the Privileges and Immunities, the PrepCom planned to proceed with its discussions on the Basic Principles during its eighth session. It was envisaged that, by that time, the Commission could finalize the Draft Agreement on the Privileges and Immunities. Later on, completion of the Draft Agreement on the Privileges and Immunities turned out to be impossible during the seventh session; nonetheless, the work on the Basic Principles could not be delayed further. Therefore, the Draft Basic Principles had to be prepared at a time when the outcome of the negotiations in the Working Group on Privileges and Immunities was not known.

Finally, due to proposals received from interested delegations, particular attention was devoted to the question of the Assembly of States Parties meetings. Despite the request for inclu-

22. The comprehensive nature of the Basic Principles does not, in itself, influence the future structure and the level of repetition in the headquarters agreement. Since the Basic Principles is silent on this issue, it will be a sensitive task for the Court and the host country to come up with the necessary balance.

sion, it was felt that the headquarters agreement of the Court, which is negotiated by the Court and the Netherlands, should not contain principles on such meetings and on the privileges and immunities of the representatives attending those meetings. It appeared inappropriate to request the Court to negotiate issues clearly unrelated to the Court. In any case, such meetings could be either in The Hague or in New York. Therefore, the headquarters agreement would not cover the issue completely. However, such a decision left the issue unregulated, except for those rules in the Agreement on the Privileges and Immunities.

III. *NEGOTIATIONS AT THE EIGHTH SESSION OF THE PREPCOM*

The Working Group on the Basic Principles of the Headquarters Agreement held two formal meetings during the eighth session of the PrepCom. As indicated above, the Draft Basic Principles contained many provisions that relied on the Agreement on the Privileges and Immunities. Since these related issues were still being discussed in the Working Group on Privileges and Immunities through the last day of the eighth session, it was difficult to discuss the Draft Basic Principles in the other Working Group. Therefore, based on the proposal of the coordinator, the Working Group decided to proceed only with the first reading of the Draft Basic Principles.

The Working Group decided not to hold a general debate on the document. This did not mean that there was no room for general comments or questions, but that the document, in general, was acceptable to the Working Group as the basis for its discussions.

The general principles received strong support and were believed to create the proper foundation for the work of the Court and the host country. Some of the comments focused on how to properly reflect the relationship between the headquarters agreement and other agreements, such as the Rome Statute and the Agreement on the Privileges and Immunities of the Court. This issue and some other drafting questions will have to be revisited during the ninth session of the PrepCom.

Questions were also raised with regard to the interim period preceding the entry into force of the headquarters agreement. It was noted that immediately after the Statute enters into force,

the Court, or some elements of it, will become operational at The Hague. Therefore, there will be an initial period, during which there will be no headquarters agreement to govern the rights and obligations of the Parties.²³ It was agreed that during such period, the relationship between the Court and the host country will be governed by the general provision contained in Article 48, paragraph 1, of the Statute. It provides that “[t]he Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.”²⁴ The headquarters agreement, in turn, should also provide for its provisional application following the conclusion of negotiations between the Court and the Government of the Netherlands, pending approval of the Agreement by the Assembly of States Parties and the Parliament of the host country.

The majority of the specific principles also enjoyed general support, while questions were raised in relation to some others. One of the challenges before the Working Group during the ninth session of the PrepCom will be finding the right balance between not being too specific, while also including all relevant principles which could assist the Court and the host country in their negotiations. It was agreed in the Working Group, that a number of the principles dealing with issues related to privileges and immunities would have to be redrafted in order to insure that the terminology and substantive issues appropriately reflect the provisions in the Agreement on Privileges and Immunities. However, delegations also noted that some specific principles on privileges and immunities should particularly address the special

23. This period may be rather long. In the case of the ICTY, which was established in May 25, 1993, the “Headquarters Agreement” was signed by the U.N. and the representatives of the host country on May 27, 1994 and only then was it submitted for final approval to the Netherlands and to the Security Council. The lapse of more than one year between the creation of the ICTY and the entry into force of its Headquarters Agreement is indicative in the case of the ICC. It is understood that entry into force of the Rome Statute could happen sometime during the first half of 2002. In contrast, real negotiations on the headquarters agreement would only start after the appointment of the Registrar of the Court, which will not happen before early 2003. It is, therefore, only hoped that the providence of the Basic Principles could enable the negotiating parties to speed up the process and to submit the headquarters agreement for approval to the meeting of the Assembly of States Parties during the fall of 2003. It has to be noted that the Court, at its initial stages, will lack both the directly applicable precedents and the readily available expertise that enabled the U.N. Secretariat and the host country to finalize the draft headquarters agreement for the ICTY in one year.

24. Rome Statute, *supra* note 1, art. 48(1).

relationship between the Court and the host country. This is a matter that delegations will have an opportunity to consider during the next session of the PrepCom.

Due to the general agreement on the nature of the exercise before the Working Group, the endorsement of the underlying principles, and the general support for the majority of the provisions contained in the Draft Basic Principles, the Working Group was able to complete the first reading of the text in record time.

IV. *STEPS TAKEN AFTER THE EIGHTH SESSION OF THE PREPCOM*

In accordance with the decisions taken during the eighth session of the PrepCom, the coordinator, with the help of the U.N. Secretariat, prepared a revised text of the Basic Principles.

As a major change, the explanatory note in Chapter I detailing the process for the negotiation of the Basic Principles and the negotiation, adoption, and conclusion of the headquarters agreement was removed. It has been replaced with a short Preamble to the actual text of the Basic Principles. Some changes have been effected in Chapter II, containing the general principles, in order to include as many comments as possible. In Chapter III—the specific principles—provisions concerning the privileges and immunities of the Judges, Prosecutor, Deputy Prosecutor, Registrar, the officials of the Court, and the other persons had to be restructured and reworded, due to the changes made in the Agreement on the Privileges and Immunities. The set of provisions on visa-related issues was enhanced and separated from the privileges and immunities. Based on discussions with the host country, provisions related to communication facilities and public services for the Court have been enhanced to reflect better the special relationship between the Court and the host country. The Draft does not contain, however, any provision on matters related to the Assembly of States Parties meetings. It is the view of the Secretariat and the coordinator, that the Assembly of States Parties, if necessary, should conclude a separate agreement on this issue with the Netherlands. However, it is expected that some States will not share this view at the PrepCom.

V. *FUTURE STEPS*

The redrafted document, which takes the format of a discussion paper proposed by the coordinator,²⁵ was distributed in February 2002. The Working Group will start its consideration of the discussion paper at the April 2002 session of the PrepCom. As it is currently planned, the Working Group will hold five meetings during the first week of the PrepCom in order to carry out the second reading of the draft.

Based on the above-mentioned changes in the discussion paper and the large number of provisions, which enjoyed general acceptance during the first reading, the Bureau expects that the Working Group will be able to concentrate primarily on the redrafted provisions. If that expectation proves to be justified, the Working Group should be in the position to finalize its work on the Basic Principles at the ninth session of the PrepCom.

CONCLUSION

The preparation of the Basic Principles of the Headquarters Agreement presents a unique challenge for the PrepCom. As explained earlier, the two-step process for the conclusion of the headquarters agreement has never been utilized before in the history of international organizations. Other factors, such as the time-pressure created by the ongoing work in a related Working Group also made the task more difficult.

The Bureau of the PrepCom responded to the challenge with a unique working-method and procedure. The process, which may look somewhat cumbersome, managed to forge a heightened level of understanding among the Bureau, the host country, and the U.N. Secretariat concerning the procedure and the substance of the project. The Bureau felt comfortable with its new role, while the U.N. Secretariat, for the first time in the PrepCom process, received substantive guidelines before it set out to draft the first document.

The structured interaction among the main actors provided for a natural development of the Basic Principles, which not only

25. *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, Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2002/WGHQA/RT.1 (Jan. 7, 2002).

led to the preparation of a widely accepted first draft, but, in the humble opinion of the coordinator, will also facilitate the quick conclusion of the headquarters agreement.