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Financial Regulations and Rules of the Court

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Abstract

The PrepCom established a working group on financial regulations and rules, which held three sessions in November 2000, February 2001, and September 2001. While in part the models of the U.N. and draft ITLOS financial regulations could simply be followed, the PrepCom also had to tackle a number of unprecedented and difficult issues. This Essay describes how the PrepCom addressed the main novel questions.

FINANCIAL REGULATIONS AND RULES OF THE COURT

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INTRODUCTION AND MANDATE

Any international court requires substantial funding to cover necessary expenses for salaries, premises, and other needs. The two existing international criminal tribunals for the former Yugoslavia¹ and Rwanda² spent approximately U.S.\$85 million and U.S.\$78 million respectively per year, each employing more than 400 judges, prosecutors, and other staff members. The draft first year budget for the International Criminal Court (“ICC” or “Court”) provides expenses amounting to U.S.\$30.02 million and U.S.\$15.7 million respectively, depending on whether there is a referral situation or not (in other words, whether the Court has a case before it or not).³ In any event, budget requirements of the Court will not be huge but will be quite considerable. The drafters of the Rome Statute of the International Criminal Court⁴ (“Rome Statute”) were well aware of the need for appropriate financing and, above all, for an appropriate administration of the Court’s finances. Therefore, they drafted part 12 of the Statute, which deals with financing, and stipulated in article 113 that “all financial matters related to the

* Minister counselor, German government; Coordinator, Working Group on Financial Regulations and Rules of the United Nations Preparatory Commission for an International Criminal Court. The views in this Essay are expressed by the author in his personal capacity and do not necessarily reflect the views of the German government.

1. 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).

2. 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).

3. The Court’s currency will be in Euro. However, for practical purposes, the working group of the Preparatory Commission on the First Year Budget (“FYB”) works on proposals submitted by the secretariat based on U.S. dollars.

4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), *available at* http://www.un.org/law/icc/statute/99_corr/3.htm [hereinafter Rome Statute].

Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.”⁵ This provision is reflected in resolution F of the Final Act of the United Nations Diplomatic Conference on the Establishment of an International Criminal Court,⁶ adopted on July 17, 1998. Paragraph 5(e) of the resolution mandates the Preparatory Commission for the International Criminal Court (“PrepCom”) to prepare a draft text on financial regulation and rules.⁷

In order to fulfill this mandate, the PrepCom established a working group on financial regulations and rules, which held three sessions in November 2000, February 2001, and September 2001. Based on a draft document prepared by the United Nations (“U.N.”) Secretariat⁸ and various proposals from member States, the working group finalized a set of Draft Financial Regulations and Rules,⁹ a draft resolution of the PrepCom on the establishment of the Committee on budget and finance,¹⁰ and a Draft resolution of the Assembly of States Parties on relevant criteria for voluntary contributions to the International Criminal Court.¹¹ Each of the draft documents will have to be adopted by the Assembly of States Parties (“ASP”) according to rule 84 of

5. *Id.* art. 113.

6. 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., available at <http://www.un.org/law/icc/statute/finalfra.htm>.

7. *Id.* Resolution F, para. 5(e).

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

9. *Draft Financial Regulations and Rules, Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2001/WGFIRR/RT.1/REV.2 (Sept. 28, 2001) [hereinafter *Draft Financial Regulations*]. The Report of the Working Group on Financial Regulations and Rules has since been released. See *Report of the Working Group on Financial Regulations and Rules, Draft Financial Regulations*, U.N. Doc. PCNICC/2001/WGFIRR/L.1 (Oct. 2, 2001).

10. *Draft Resolution of the Preparatory Commission on the Establishment of the Committee on Budget and Finance, Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2001/WGFIRR/RT.2/REV.2 (Sept. 28, 2001). The document number has since been changed to PCNICC/2001/WGFIRR/L.2 (Oct. 2, 2001).

11. *Draft Resolution of the Assembly of States Parties on relevant criteria for voluntary contributions to the International Criminal Court, Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2001/WGFIRR/RT.3/REV.2 (Sept. 28, 2001). The document number has since been changed to PCNICC/2001/WGFIRR/L.3 (Oct. 2, 2001).

the ASP rules of procedure.¹² In all likelihood these documents will be discussed and adopted during the first two or three ASP meetings beginning in mid-2002, provided that the Statute has entered into force after the sixtieth ratification has been deposited.

I. *MODELS AND PRECEDENCE*

The deliberations of the working group were based on the text of draft financial regulations, prepared by the U.N. Secretariat. This draft used as models both the U.N. financial regulations and the financial regulations of the International Tribunal for the Law of the Sea¹³ ("ITLOS"), as proposed by the tribunal, but not yet adopted by the Assembly of States Parties. Since the International Criminal Tribunals for the former Yugoslavia and Rwanda apply the U.N. financial regulations *per se*, they could not provide additional models or precedents. However, the experience of senior staff members of those tribunals was of tremendous value for the work of the PrepCom. During a meeting organized by the Coalition for an International Criminal Court in the spring of 2001 between PrepCom members and senior staff members of both tribunals, timely advice was given for the final round of discussions in the working group.

The draft prepared by the Secretariat consisted of fourteen regulations, providing for the preparation of the budget, the appropriations adopted by the Assembly of States Parties, the provision of funds, the establishment of funds, the various sources of income, custody and investment of funds, internal control, accounts, auditing, decisions involving expenditures, and general provisions. An annex provided for additional terms of reference governing the audit of the ICC.

II. *PROBLEMS, CHALLENGES, AND SOLUTIONS*

While in part the models of the U.N. and draft ITLOS financial regulations could simply be followed, the PrepCom also had to tackle a number of unprecedented and difficult issues. This

12. *Draft Rules of Procedure of the Assembly of States Parties, Prepared by the Secretariat*, U.N. Doc. PCNICC/2001/WGRPASP/L.1 (Dec. 20, 2000), rule 84.

13. United Nations Convention on the Law of the Sea, Meeting of States Parties, Financial Regulations of the Tribunal, SPLOS/36 (Mar. 31, 1999), available at http://www.un.org/Depts/los/meeting_states_parties/documents/SPLOS_36.htm.

Essay describes how the PrepCom addressed the main novel questions.

A. *Unforeseeable Expenses*

Probably, the most difficult issue was how to enable the Court to cope with unforeseeable expenses. Unlike other traditional tribunals, it is impossible to predict the workload of the ICC or the expenses that will be incurred. Already one or two regional conflicts erupting somewhere in the world might lead to the commission of numerous war crimes and crimes against humanity and thus entail indictments and trials at a considerable scale. This would necessitate an increase in the number of investigators, prosecutors, and other staff members, compared to other periods when a limited amount of cases may be before the Court. However, delegates at the PrepCom were not ready to give the future Court a blank check to cover all kinds of unforeseeable expenses. Without any precaution for unforeseeable expenses, on the other hand, the Court would not be able to fulfill its obligations under the Rome Statute appropriately. In other words, the PrepCom found itself between a rock and a hard place, avoiding uncontrolled spending of the Court on the one hand, and a lack of funds resulting in forced inactivity of the Court *vis-a-vis* major crimes on the other hand.

In order to address this particular problem, a triple step approach was designed: Regulation 4¹⁴ (Appropriations) provides that a separate appropriation line—one could call it a kind of reserve account—shall be adopted by the ASP together with the annual budget for the Court. If the regular budget was exhausted and if the activities of the Court were of such an urgent nature that the ASP could not be convened to approve a supplementary budget, unforeseeable expenditures would be covered under this appropriation line. Thus the Registrar will have an authorization to make payments, which would not have been possible from a regular budget without this additional appropriation line. The appropriation is at the Registrar's discretion or at the request of the Prosecutor or the Presidency of the Court. Finally, if the appropriation line for unforeseeable expenditures proves to be insufficient, the Registrar can submit a supplement-

14. *Draft Financial Regulations*, *supra* note 9, Regulation 4.

tary budget proposal to be adopted by a (if necessary extraordinary) meeting of the ASP.

This solution provides a viable compromise but fell short of the originally envisaged third step contained in a proposal submitted by France and Germany.¹⁵ This proposal, supported by a large number of delegations, sought to create a so-called contingency mechanism. The proposed regulation provided that any further funding requirements (i.e. those not to be covered by the regular budget and the additional appropriation line, but so urgent that an ASP meeting for approving a supplementary budget could not be convened in time) would be met, up to the amount decided upon by the ASP in each budget resolution, by the contingency mechanism. This mechanism would have been effected by the Registrar only if funding requirements would not have been covered by the above-mentioned appropriation line. However, the contingency mechanism would not have been pre-funded by member States, but only filled up in case of an emergency situation by additional assessed contributions. In other words, the contingency mechanism was conceived to be an empty shell to be filled up only in an emergency situation at the request of the Registrar, who would have sent out assessment letters requiring member States to pay their share of contribution. Unfortunately, this well-crafted and innovative proposal was not accepted by two member States in the PrepCom due to its internal budget procedures and therefore had to be withdrawn.

B. *Currency of the Court*

Another heavily discussed issue was the currency of the Court. While the original draft submitted by the U.N. Secretariat stipulated U.S. dollars as the currency of the Court, member States mainly of the European Union, but also a number of African states supported the Euro, the future currency of the host State of the ICC (the Netherlands) and of a number of other European countries, as the Court's currency.¹⁶ The compromise was possible after, as in similar provisions for the International Atomic Energy Agency, the option to pay contributions in any

15. *Proposal submitted by France and Germany concerning the discussion paper proposed by the Coordinator (PCNICC/2001/WGFIRR/RT.4)*, U.N. Doc. PCNICC/2001/WGFIRR/DP.8 (Aug. 31, 2001).

16. *Draft Financial Regulations*, *supra* note 9, Regulations 3.2, 5.6, 11.2.

other freely convertible currency was left open. This covered the needs of at least one country, which under its national law is obliged to pay contributions to international organizations in U.S. dollars.¹⁷

C. Relationship Between the Registrar and the Prosecutor

The relationship between the Registrar and the Prosecutor was another important issue at the negotiations in the PrepCom. On the one hand, the Registrar is the person responsible for submitting the budget and for administering the funds of the Court. On the other hand, the Rome Statute clearly stipulates that "the Prosecutor shall have full authority over the management and administration of the office including the staff, facilities and other resources."¹⁸ Thus a number of delegations wanted to ensure a strong and independent role for the Prosecutor with regard to financial matters. However, others were reluctant to set up parallel responsibilities for financial matters related to the Court. In the end, the main responsibility was left with the Registrar. To accommodate those delegations favoring a strong role of the Prosecutor in financial matters, regulations 1.4 and 3.1 were included in the Draft Financial Regulations, providing that the financial regulations "shall be implemented in a manner consistent with the responsibilities of the Prosecutor and of the Registrar"¹⁹ and "that the Prosecutor and the Registrar shall cooperate, taking into account the independent exercise by the Prosecutor of his or her functions under the Statute."²⁰ Furthermore, the regulations elaborate that the proposed program budget for each financial period shall be prepared by the Registrar in consultation with the other organs of the Court (which includes the Prosecutor).

17. *Id.* Regulation 5.6. Regulation 5.6, in part, states:

Contributions and advances . . . shall be assessed and paid in the currency of the statutory headquarters of the Court. The contributions . . . may also be paid in any other currency that is freely convertible into the currency of the statutory headquarters of the Court. Any currency exchange cost will be born by the state party which decided to pay the other than the currency of the . . . Court.

Id.

18. Rome Statute, *supra* note 4, art. 42(2).

19. *Draft Financial Regulations*, *supra* note 9, Regulation 1.4.

20. *Id.* (emphasis omitted).

D. "Floors" and "Ceilings"

An attempt by some countries to introduce so-called floors (minimum lines) and ceilings (maximum lines) for the assessed contributions different from those existing in the U.N. did not prove to be successful. Therefore, member States will pay their contributions in accordance with the assessment scale adopted by the U.N. for its regular budget, adjusted in order to take into account the differences in membership between the U.N. and the Court. Countries favoring floors and ceilings had intended to have a minimum assessment of 0.1% (contrary to the U.N. minimum of 0.01%) and a ceiling of twenty-five percent (U.N.: twenty-two percent since December 2000). However, a number of smaller states were not ready to accept the proposal regarding a floor. The twenty-five percent ceiling proposed by others was considered to be too high by certain delegations. In the end, neither a floor (for which a precedent exists at ITLOS) nor a ceiling was introduced. This result was not too surprising since the extremely difficult discussions in the 5th Committee of the U.N. General Assembly on the scale of assessment for the U.N. (successfully concluded by the end of 2000) were still a fresh and deterring memory.

E. *Other Issues*

The working group of the PrepCom was also entrusted with a number of other issues. One was to establish procedures for the Committee on Budget and Finance, a committee of the ASP responsible for the technical examination of any documents submitted to the Assembly containing financial or budgetary implications. Since all the delegations were quite aware that the ASP, with its large membership, would be unable to deal with the technical details of budget proposals and other financial matters, the draft resolution proposed by the coordinator on the establishment of the Committee on Budget and Finance was approved after a relatively short discussion.²¹ The Committee on Budget and Finance will be composed of twelve members, all of them experts of recognized standing and experience in financial matters, and shall carry out their duties for three calendar years.

21. *Draft Resolution of the Preparatory Commission on the Establishment of the Committee on Budget and Finance, Discussion Paper Proposed by the Coordinator, supra* note 10.

Another matter related to the financial regulations, but not part of them, was the establishment of criteria for voluntary contributions to the ICC. A considerable number of delegations at the PrepCom were concerned that major donors of voluntary contributions might affect the independence of the Court. Therefore, the coordinator submitted a draft resolution "on relevant criteria for voluntary contributions to the International Criminal Court"²² stipulating that donors making voluntary contributions have to declare their intention not to affect the independence of the Court. Furthermore the Registrar has to assure him or herself that offered contributions will not affect the independence of the Court and will fulfill any criteria the ASP may establish at a later stage.

With regard to financial rules, the PrepCom decided not to elaborate them but to leave this task to the Court itself. The rules will elaborate in detail the regulations and put flesh to their bones. Since the time budget of the PrepCom is extremely limited, delegates were convinced that financial rules for the relatively moderate budget of the ICC would not be a matter of priority to be addressed by the PrepCom.

Another unresolved issue related to the financial regulations, but not part of it, was the adoption of criteria relating to the establishment of the fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.²³ This proposal stipulated not only several rules for voluntary contributions but also, and above all, that the Committee on Budget and Finance should direct the fund in accordance with criteria to be adopted by the ASP. Furthermore, it provided that the Registrar should be responsible for the day-to-day administration of the fund. This proposal did not meet consensus. Questions with regard to both the day-to-day administration by the Registrar and the oversight by the Committee on Budget and Finance could not be resolved. Therefore the coordinator proposed a shorter draft resolution,²⁴ which was briefly discussed in the last PrepCom meeting. This draft resolution provided that

22. *Draft Resolution of the Assembly of States Parties on relevant criteria for voluntary contributions to the International Criminal Court, Discussion Paper Proposed by the Coordinator, supra* note 11.

23. *Id.*

24. *Draft Resolution of the Assembly of States Parties on the Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such*

the victims fund should be funded by voluntary contributions, money and property collected through fines and forfeiture, resources collected through awards for reparations and “such resources as the Assembly of States Parties may decide to allocate to the fund.”²⁵ An annex to this draft resolution provided for the management of the fund and the criteria for the acceptance of voluntary contributions. Due to lack of time the draft resolution was discussed but not finalized. A number of questions referred to the scope of beneficiaries (the draft resolution speaks of “families of such victims”). It is unclear exactly what the term family means, since it could refer to dependents, heirs, or immediate family. Furthermore, some delegations tried to narrow the meaning of “such resources” by adding “other than assessed contributions.” Since the problems with the administration and oversight of the fund remained unresolved, the working group recommended that the PrepCom should further discuss the question of the victim’s fund in an appropriate framework in the context of the work of the PrepCom.

CONCLUSION

In sum, the working group on financial regulations did a good job in a very limited period of time. In only three sessions a state of the art set of financial regulations has been finalized. The regulations are flexible enough to allow for unforeseeable events and expenditures on the one hand and a solid management of resources on the other (even if a further step to tackle the problem was unsuccessful). The establishment of a Committee on Budget and Finance is another important step to provide for the necessary amount of control without trying to micromanage the administration of financial matters carried out by the Registrar. The relationship between the Registrar as the main person responsible for financial matters, and the Prosecutor has been dealt with in a sufficient and flexible way. The only major shortcoming of the working group’s achievements is the fact that the work on the draft resolution on a victims fund could not be concluded due to the lack of time.

Victims, Discussion Paper Proposed by the Coordinator, U.N. Doc. PCNICC/2001/WGFIRR/RT.5 (Sept. 24, 2001).

25. *Id.* para. 2(d).