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## Necessary Steps For the Creation Of the International Criminal Court

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# Necessary Steps For the Creation Of the International Criminal Court

Jennifer Schense

## **Abstract**

This Essay will examine in further detail the legal structure for the actual establishment of the Court and relevant examples, in particular the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the International Tribunal on the Law of the Sea. This Essay will also set forth some recommendations for timely action by governments, the United Nations, and other experts, to ensure that a solid foundation for the Court is constructed in a timely way.

# NECESSARY STEPS FOR THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

*Jennifer Schense\**

## INTRODUCTION

The international community will be expecting the ICC to perform and deliver from day one. It might not be expected to perform as smoothly as a world class Theatre Company to begin with, but it will need to perform nonetheless. If the foundations, administrative as well as judicial, are not in place, the result will be that the ICC will have to install everything from cables and lighting, to hiring a cast, to rehearsing the script—all while the audience is already seated, and the play has already begun.<sup>1</sup>

Due in no small part to the worldwide campaign for ratification of the Rome Statute,<sup>2</sup> the International Criminal Court (“ICC”) is now only months away from beginning its transition

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\* Jennifer Schense is the Legal Adviser of the Coalition for the International Criminal Court (“Coalition” or “CICC”). The Coalition brings together a broad-based network of over 1,000 non-governmental organizations (“NGOs”), international law experts, and other civil society groups. The multi-track approach of the Coalition involves: promoting education and awareness of the International Criminal Court (“ICC”) and the Rome Statute at the national, regional and global level; supporting the successful completion of the mandate of the Preparatory Commission and facilitating NGO involvement in the process; promoting the universal acceptance and ratification of the Rome Statute, including the adoption of comprehensive national implementing legislation following ratification; and expanding and strengthening the Coalition’s global network. The Coalition receives guidance from an informal Steering Committee, comprising Amnesty International, Asociación pro Derechos Humanos, European Law Students Association, Fédération Internationale des Ligues des Droits de l’Homme, Human Rights Watch, International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, Rights and Democracy, Union Interafricaine pour les Droits de l’Homme, Women’s Caucus for Gender Justice, and the World Federalist Movement. Current funding for the Coalition is being provided by the Ford Foundation; the John and Catherine T. MacArthur Foundation; the Open Society Institute; the European Union; the governments of Canada, Denmark, Finland, France, Germany, Liechtenstein, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom; and from individual donors and participating NGOs. The views expressed herein are those of the CICC and can therefore in no way be taken to reflect the official opinion of the funders.

1. Adama Dieng, Registrar, International Criminal Tribunal for Rwanda (“ICTR”), Address at the eighth session of the U.N. Preparatory Commission for the International Criminal Court (Oct. 1, 2001) (on file with author).

2. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9\*

from being a court on paper to being a tangible, functioning institution. The worldwide profile of the ICC grows everyday, as the media takes increasing notice of the progress towards entry into force of the Rome Statute and speculates as to the role that this Court could potentially play in addressing the world's worst crimes.

Expectations among governments and international organizations are equally high. At the conclusion of the Rome Diplomatic Conference, U.N. Secretary-General Kofi Annan described the establishment of the Court as "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."<sup>3</sup> Ambassador Philippe Kirsch of Canada, the chair of the Rome Diplomatic Conference's Committee of the Whole, described the Court as "the future of humanity in many ways."<sup>4</sup>

More recently, during the General Debate of the United Nations General Assembly in November 2001, Fernando Henrique Cardoso, President of the Federative Republic of Brazil, called the ICC "a historic victory for the cause of human rights;"<sup>5</sup> Anna Lindh, the Swedish Minister for Foreign Affairs, reiterated that "[i]t is a matter of highest priority to have the Court operational promptly," and urged those States that have not yet done so to ratify the Rome Statute;<sup>6</sup> and Goran Svilanovic, the Yugoslav Foreign Minister, professed his belief that "the International Criminal Court should start its work as soon as possible."<sup>7</sup> During the General Debate, governments also drew the link between the ICC and crimes of terrorism, which have become increasingly

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(1998), available at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute].

3. United Nations Secretary-General Kofi Annan, Statement at the ceremony held at Campidoglio (July 18, 1998) (celebrating the adoption of the Statute of the International Criminal Court, in Rome, Italy), available at <http://www.un.org/icc/index.htm> (under speeches/statements, further categorized under July 18).

4. United Nations Press Release L/ROM/23, Secretary-General says Establishment of International Criminal Court is Major Step in March Towards Universal Human Rights, Rule of Law (July 18, 1998), available at <http://www.un.org/icc/index.htm> (under Press Releases for July 18).

5. This statement was circulated on the Coalition's listserv and can be found in archives on the internet at <http://groups.yahoo.com/group/icc-info/message/1482> [hereinafter Message 1482].

6. This statement was circulated on the Coalition's listserv and can be found in archives on the internet at <http://groups.yahoo.com/group/icc-info/message/1493>.

7. *Id.*

high profile in the wake of the September 11 attacks. Joschka Fischer, the German Minister for Foreign Affairs, predicted that the ICC could become "a valuable instrument in the fight against terrorism," calling on States for this reason to ratify the Rome Statute as soon as possible, and Alhaji Aliu Mahama, the Vice President of Ghana, echoed this sentiment.<sup>8</sup>

This support for the ICC has been made manifest through the ratification process. As of January 31, 2002, fifty States have ratified the Rome Statute, and another dozen ratifications are imminent. The Coalition for an ICC's ("Coalition") campaign goal of reaching sixty ratifications by July 17, 2002 is now not only realistic, but even a conservative estimate of when sixty ratifications will be achieved. It is most likely that sixty ratifications will be achieved in the spring of 2002. According to the Rome Statute, the Statute will enter into force and the Court's jurisdiction will begin to run between sixty and ninety days after the deposit of the sixtieth ratification.<sup>9</sup> The pace of ratifications has proceeded faster than any of the experts involved in the process expected that it would. It underscores the urgency of ensuring that strong measures are undertaken at the national and the international level to establish the actual Court, as quickly as possible following entry into force. The expectations of the international public will be high, and members of the public may not always make the distinction between entry into force of the Statute and the actual establishment of a functioning Court. The international public will expect the Court to be prepared to undertake its work from day one, and the Court's reputation for efficacy and fairness may suffer substantially if it cannot meet or counter those expectations.

This Essay will examine in further detail the legal structure for the actual establishment of the Court and relevant examples, in particular the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and the In-

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8. See Message 1482, *supra* note 5.

9. Rome Statute, *supra* note 2, art. 126. Article 126 indicates 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 with the Secretary-General of the United Nations." This formula will lead to a single date upon which the treaty enters into force for the first sixty States to ratify, and individual dates for each subsequent State, calculated on the basis of their specific date of deposit.

ternational Tribunal on the Law of the Sea. This Essay will also set forth some recommendations for timely action by governments, the United Nations, and other experts, to ensure that a solid foundation for the Court is constructed in a timely way.

## I. *PROVISIONS OF THE ROME STATUTE AND OTHER LEGAL INSTRUMENTS*

### A. *Assembling the Timetable*

The Rome Statute of the International Criminal Court, the Final Act of the Rome Diplomatic Conference,<sup>10</sup> and the draft Rules of Procedure and Evidence<sup>11</sup> provide the framework within which the Court will be established. In particular, these instruments set out a sequence of events, according to which the senior representatives of the Court will be elected, and the rules governing the day-to-day work of the Court may be finalized. For the most part, this sequence is not time-specific, but it is constructed in such a way that certain events must occur before others can take place.

The first step is to finish the work of the Preparatory Commission and to prepare for the first meetings of the Assembly of States Parties. The Preparatory Commission has already passed a number of milestones in progressing towards the completion of its mandate. In particular, the Preparatory Commission adopted the draft Elements of Crimes<sup>12</sup> and Rules of Procedure and Evidence before the June 30, 2000 deadline imposed by the Final Act. At its eighth session, the Preparatory Commission also adopted the draft texts of four additional instruments: the Relationship Agreement between the United Nations and the Court,<sup>13</sup> the Agreement on Privileges and Immunities of the

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10. 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].

11. *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*].

12. *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*].

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

Court,<sup>14</sup> the Financial Regulations,<sup>15</sup> and the Rules of Procedure of the Assembly of States Parties.<sup>16</sup>

The tasks from the Final Act that remain to be completed are the first year budget of the Court, the principles governing the headquarters agreement, and the definition and conditions for exercise of the Court's jurisdiction over the crime of aggression. The General Assembly has scheduled two additional sessions of the Preparatory Commission in order to facilitate its efforts to complete its work. These sessions will take place on April 8-19, and July 1-12, 2002.

In addition to the tasks explicitly listed in the Final Act, the Preparatory Commission has decided at its eighth session to take on tasks more specifically designed to prepare for the first meetings of the Assembly of States Parties and actual establishment of the Court. In particular, the Preparatory Commission's bureau has created a new working group to draft documents for the first Assembly meetings, including meeting agendas, nomination and election procedures, and preparatory documents for the creation of subsidiary bodies of the Assembly, in particular the secretariat and the bureau. In addition, the Preparatory Commission has created a new working group on financial issues to determine remuneration levels for judges and the prosecutor, as well as to address issues remaining from the financial regulations working group. The Preparatory Commission has also identified three new focal points, government delegates who will oversee the development of additional provisional internal rules, ranging from staff regulations to financial rules, from security rules to the management of evidence and archives. Finally, the Preparatory Commission designated a four-member subcommittee of the bureau to liaise between the Preparatory Commission and the host State on matters relating to the practical, physical establishment of the Court.

The second step is to ensure that the work of the Assembly itself goes smoothly. The first meeting of the Assembly will be faced with numerous tasks, among them election of the bureau

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

15. *Draft Financial Regulations*, U.N. Doc. PCNICC/2001/WGFIRR/L.1 (Oct. 2, 2001) [hereinafter *Draft Financial Regulations*].

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

of the Assembly; the review and adoption of the draft texts prepared by the Preparatory Commission, including the Assembly's own rules of procedure and the Court's first year budget; and establishment of subsidiary bodies such as the Committee on Budget and Finance. However, one of the most important initial tasks of the Assembly will be to prepare for and conduct the elections of the judges and the prosecutor. For many, ensuring that these elections are perceived as fair and that they result in the selection of highly qualified, impartial judges from around the world will be the first major challenge for the Assembly and for the Court. The first meeting of the Assembly will adopt nomination and election procedures and will mark the start of the process, culminating in election of the judges and the prosecutor at a separate meeting of the Assembly.<sup>17</sup>

The meeting to elect the judges will take place after a suitable period has passed for a full and transparent nomination procedure to be conducted. It is important that this procedure be fair and transparent, allowing for dialogue between governments and civil society. Given the time this may require, it could be anticipated that at least several months will pass between the first Assembly meeting and the meeting convened to elect the judges. The first two meetings of the Assembly have not yet been scheduled, but it is possible that the first will take place in early September 2002 and that the second will take place in January 2003.

The third step is to put in place the final components of the Court's senior administration. Following their election, the judges will convene in the inaugural meeting of the Court, for several purposes: to divide themselves into the Pre-Trial, Trial, and Appeals Chambers;<sup>18</sup> to elect a President and two Vice-Presidents;<sup>19</sup> and to draw up a list of candidates for the election of the Registrar.<sup>20</sup> The judges may not be able to elect the Registrar at

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17. The Assembly will elect the judges in a separate meeting, as mandated in article 36(6) of the Rome Statute. Article 36(6) states: "The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112." Rome Statute, *supra* note 2, art. 36(6). The Statute does not explicitly require the Prosecutor to be elected at a separate meeting, but the necessity of the Assembly adopting nomination and election procedures at the first meeting may make it impossible to elect the prosecutor any earlier than the second, separate meeting to elect the judges.

18. *Id.* art. 39.

19. *Id.* art. 38.

20. *Id.* art. 43.



the inaugural meeting of the Court because of the requirement that they consult in drafting the list of candidates with the Assembly of States Parties.<sup>21</sup> Therefore, another meeting of the Court may have to be convened, after the Assembly has had the opportunity to meet and to draw up recommendations relating to the candidates for Registrar.

### B. *Filling the Gap*

The Coalition has endeavored to raise awareness about the amount of time that will likely pass between the first Assembly meeting and the election of the Registrar, who will be the last senior representative of the Court to be elected, according to the system set forth in the Rome Statute. This delay could be as long as a year. However, the Registrar is described in the Rome Statute as “the principal administrative officer of the Court.”<sup>22</sup> The Registrar is responsible, *inter alia*, for establishing the victims and witnesses unit,<sup>23</sup> for developing staff regulations together with the Presidency and the Prosecutor,<sup>24</sup> for assisting with the development of the regulations of the Court,<sup>25</sup> and for maintaining trial records.<sup>26</sup> In short, the Registrar is responsible for oversight of all non-judicial systems that directly or indirectly support fulfillment of the Court’s mandate.

Most of these systems are very technical systems which are fairly straightforward to develop, but which will require substantial time to develop, and will require careful thought in their organization and execution, to ensure their mutual compatibility and overall efficiency.<sup>27</sup> They are systems that only indirectly

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21. Article 43(4) of the Rome Statute requires the judges to “tak[e] into account any recommendation by the Assembly of States Parties.” *Id.* Further, Rule 12 of the Rules of Procedure and Evidence requires the Presidency to “establish a list of candidates who satisfy the criteria laid down in article 43, paragraph 3, and . . . [to] transmit the list to the Assembly of States Parties with a request for any recommendations.” *Rules of Procedure and Evidence*, *supra* note 11, rule 12. Upon receipt of any recommendations from the Assembly, the judges must meet in plenary session as soon as possible to elect the Registrar. *Id.*

22. Rome Statute, *supra* note 2, art. 43(2).

23. *Id.* art. 43(6).

24. *Id.* art. 44(3).

25. *Id.* art. 52(2).

26. *Id.* art. 64(10).

27. The comments on non-judicial systems that follow in this Essay are based on an informal study of the systems that support the work of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

support the international criminal law mandate of the Court, so they are by their nature substantially apolitical. Governments should consider and are now actively exploring ways in which these systems could be provisionally established before the election of the Registrar. If these systems are in place, the Registrar, the Prosecutor, and the President will be free to focus on the larger policy issues that will confront the Court in its early days.

The basic systems in question can be divided into two tiers to signify a distinction between systems that support the work of the entire organization, and those that may be less critical at the earliest stage as they specifically address the primary mandate of the Court. Second tier systems may therefore require the establishment of the first tier systems before they can be put into place. First tier systems can be broken down into eleven categories. These are as follows:

#### 1. First tier of systems to support the ICC

- general services, including building management, travel, transportation, and shipping;
- security against both high-tech and low-tech threats;
- procurement and logistics support, including receiving/inspection unit, property control/inventory, and supplies;
- finances/accounting and budget;
- personnel and recruiting;
- electronic data processing, including computers, communications, archives, and information security;
- communications, including phones, mail, telex, fax, internet, and videoconferencing;
- archives, records management, and library development;
- language and conference services;
- protocol, particularly with reference to early interactions with States and others, either away from or at the seat of the Court; and
- press and public affairs.

#### 2. Second tier of systems to support the ICC

The second tier of systems can be broken down more generally into two main categories, reflecting the fact that the second tier systems are more closely related to the Presidency and Chambers and to the Office of the Prosecutor. These include the establishment of investigatory or tracking teams, the creation

of a physical vault and electronic archives to support the work of the Office of the Prosecutor, and legal research and library capacities to support the work of the Presidency and Chambers. As should be clear from the lists above, many of these systems are interrelated and therefore their establishment should be addressed in a coordinated way.

## II. OTHER RELEVANT EXPERIENCES

The ICC is a unique international organization, but it is not the first international organization to be established. Many lessons may be drawn from the experiences of other organizations in their initial phases. The experiences that may be most relevant for the establishment of the ICC are those of the two *ad hoc* tribunals for the former Yugoslavia and for Rwanda<sup>28</sup> (“ICTY” and “ICTR”), and of the International Tribunal for the Law of the Sea<sup>29</sup> (“ITLOS”). These experiences are instructive but not entirely determinative because the circumstances governing the establishment of those tribunals were substantially different from those governing the establishment of the ICC. In particular, while many of the practical and logistical obstacles facing the *ad hoc* tribunals are very similar to those that will face the ICC, the methods that the States Parties to the Rome Statute employ to overcome those obstacles will have to be unique, addressing the specific circumstances that will govern the establishment of the ICC.

The first major difference between the ICC and these three tribunals is the role of the United Nations. In the case of the *ad hoc* tribunals, both were established through resolutions of the Security Council,<sup>30</sup> exercising its power under Chapter VII of the

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28. 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) [hereinafter ICTY Statute]; 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) [hereinafter ICTR Statute].

29. Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea, Dec. 10, 1982), *available at* [http://www.idos.org/start2\\_en.html](http://www.idos.org/start2_en.html).

30. *See* ICTY Statute, *supra* note 28; ICTR Statute, *supra* note 28.

U.N. Charter. As the parent organization, the United Nations took full responsibility for the actual establishment of the tribunals, addressing the many logistical and practical questions that arose in the process. In particular, the Office of Legal Affairs took the lead in establishing the two tribunals.<sup>31</sup> For example, although there were many difficulties in establishing the ICTY, in particular relating to the low level of financing committed to the endeavor, the Office of Legal Affairs did put two legal officers at the disposal of the newly elected judges and committed some additional time and resources from New York to the effort. The Tribunal for the Law of the Sea received even more support from the United Nations. The Final Act of the Third United Nations Conference on the Law of the Sea called for the creation of a Preparatory Commission at the U.N., in order to “make the necessary arrangements for the commencement of [its] functions,” as well as for the other organizations established on the basis of the Convention.<sup>32</sup> The work of the Preparatory Commission was strongly supported by the Office of Legal Affairs through its Division for Ocean Affairs, later renamed the Division for Ocean Affairs and the Law of the Sea.<sup>33</sup> The Division served first as the Secretariat for the Preparatory Commission, then as the Secretariat for the Convention and for meetings of States Parties to the Convention—a role it continues to play. As with the two *ad hoc* criminal tribunals, the United Nations played a key role in seconding personnel to the International Tribunal for the Law of the Sea. In particular, Gritakumar Chitty, the Secretary of the Preparatory Commission, was seconded to the tribunal as the Director in Charge of the Registry. The tribunal’s judges later formally elected him as the first Registrar.<sup>34</sup> Other representatives of the Office of Legal Affairs were

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31. For a more detailed description of the process to establish the International Criminal Tribunal for the former Yugoslavia, see the ICTY YEARBOOK FOR 1994, in particular the section on “Main Problems Besetting The Establishment and Functioning of the Tribunal,” on page 89.

32. Resolution 1, Final Act of the Third United Nations Conference on the Law of the Sea, *reprinted in* THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH INDEX AND FINAL ACT OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 175 (1983).

33. For more information about the Division’s work, see <http://www.un.org/Depts/los/index.htm>.

34. ITLOS, Press Release, Election of Mr. Gritakumar Chitty as the first Registrar of the International Tribunal for the Law of the Sea (Oct. 23, 1996), *available at* [http://www.un.org/Depts/los/itlos\\_new/press\\_releases/ITLOS\\_3.htm](http://www.un.org/Depts/los/itlos_new/press_releases/ITLOS_3.htm).

continually involved in the practical process of establishing the tribunal.

By contrast, the ICC will likely not be able to rely upon seconded staff from the United Nations. This is true in part because the U.N. currently operates under a zero growth budget, and so cannot likely afford to spare personnel to assist the ICC. More significantly, given the current position of the U.S. government *vis-à-vis* the ICC, it is likely that the U.S. delegation would oppose the secondment of U.N. staff to the ICC. What this means is that the ICC and the States Parties to the Rome Statute that support establishment of the Court will have to rely completely on their own resources to ensure that the ICC is established in a timely and expert manner.

The second major difference between the ICC and the *ad hoc* criminal tribunals is that the ICC will require a great deal more flexibility than is necessary in the operations of the *ad hoc* tribunals. The ICC is endowed with the jurisdiction to address cases that arise anywhere in the world, whereas the *ad hoc* tribunals are only authorized to address crimes committed in the former Yugoslavia and in Rwanda. In addition, the ICC has unlimited prospective temporal jurisdiction, following entry into force of the Rome Statute. The ICTR only has jurisdiction over “a period beginning on 1 January 1994 and ending on 31 December 1994”<sup>35</sup> and the ICTY has jurisdiction beginning on January 1, 1991.<sup>36</sup> The expanded responsibilities of the ICC will affect almost every aspect of the Court’s operations, requiring a tremendous capacity for both flexibility and scalability.<sup>37</sup> This is impor-

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35. ICTR Statute, *supra* note 28, art. 7.

36. ICTY Statute, *supra* note 28, art. 8. While the jurisdiction of the ICTY is prospective from January 1991, the annual report of the ICTY for 2001 indicates that the goal of the tribunal is to finish its mission by 2008. *Report 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*, A/56/352 (Sept. 17, 2001).

37. In his statement to a plenary session of the Preparatory Commission on the International Criminal Court, ICTY Registrar Hans Holthuis emphasized these same two points. Specifically, he pointed out to government delegates

the imperative need for *flexibility* to be an inherent cornerstone of the organization you are setting up. In engine terms: a motor which can be maintained cost effectively while awaiting to be used, when the need arises (often unexpectedly) to carry cargo and climb uphill roads. I raise this need again because, in my view, its importance cannot be over-stressed. In this connection, I should perhaps slightly refine the notion of ‘flexibility’ as I used it previously with the word ‘scalability,’ to indicate that the flexibility required should en-

tant so as to ensure that the Court can meet the challenges it faces without wasting precious resources.

To cite one prominent example, this need for flexibility and scalability will be essential when it comes to the interpretation and translation services of the ICC. The ICC has six official languages and two working languages.<sup>38</sup> Occasionally, one of the other four official languages may be used as a working language.<sup>39</sup> In addition, the Court may authorize use of an additional language as a working language should any party to a proceeding or a State allowed to intervene request it and should the Court find its use adequately justified.<sup>40</sup> What this means is that the Court will need to be able to work in at least six languages, in various combinations, on a regular basis, and may need, at short notice, to be able to work in very localized or regional languages, for which expert interpretation and translation services are harder to secure. Therefore, the Court will need to be able to maintain a permanent capacity to work in the six official languages and the two primary working languages in particular, while developing procedures that will quickly facilitate the temporary addition of other language experts, where specific cases require them. This implies that the Court will need to have staff regulations and related legal instruments that allow for the expedited hiring of short-term experts, so as to ensure that these ex-

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able the Court to scale its operations upwards and downwards as dictated by circumstances. Such 'scalability' has financial, administrative and procedural aspects. Over many years, the United Nations has developed means and methods for creating such a capacity for scalability, to which we at the ICTY have added some means and methods specifically geared towards the operation of a Court. Our Tribunal, for instance, makes extensive use of flexible recruitment arrangements, amongst which the utilization of so-called General Temporary Assistance funds to recruit quickly on a short-term basis. 'Scalability' should also find a way into recruitment and procurement procedures, management structures, and, on an even more tangible level, the types of assets which are purchased.

ICTY Press Release, Statement by Mr. Hans Holthuis, Registrar of the ICTY, to the Plenary of the Preparatory Commission of the International Criminal Court (ICC) during its eighth Session (Oct. 2, 2001).

38. The official languages of the ICC are the U.N.'s official languages: Arabic, Chinese, English, French, Russian, and Spanish. The working languages are English and French. See Rome Statute, *supra* note 2, art. 50.

39. The Rules of Procedure and Evidence dictate when one of the other four official languages may be used. *Rules of Procedure and Evidence*, *supra* note 11, rule 41. See also Rome Statute, *supra* note 2, art. 50(2).

40. Rome Statute, *supra* note 2, art. 50(3).

perts can be brought in immediately when they are needed, but are not retained for longer than necessary. The successful development of such regulations will have an impact on the proper allocation of the Court's financial resources, and there will therefore likely have to be parallel provisions in the financial regulations and rules.<sup>41</sup> In general, well-organized finance, procurement, and inventory systems that allow the Court's expenses to be clearly tracked and audited will enhance the Court's credibility, an especially important element in the Court's relations with States Parties and other contributors to its budget.

An efficient interpretation and translation unit would also benefit tremendously from a strong information management system. The integrated use of modern software and hardware technology makes it increasingly possible for computers to handle the bulk of rough translations, freeing up expert translators to identify and focus on the documents that are most important for more thorough, professional translation. If such systems are to be truly effective though, they must fit into an overall system for information management, including information flowing into the Court, in particular evidence; the documentation of court proceedings; and information flowing out of the Court, in response to specific and general demands for information. Establishment of comprehensive and well-integrated information systems will require careful thought in their planning and execution and should be taken up as soon as is feasible.

It should be clear from examining the Court's interpretation and translation needs that flexibility in the judicial work of the Court (and in quasi-judicial work like translation and interpretation) will only really be possible if all of the non-judicial systems that constitute the foundation of the Court are also con-

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41. At the most recent Preparatory Commission session (September 24-October 5, 2001), the Working Group on the Financial Rules and Regulations completed the draft financial regulations. *Draft Financial Regulations*, *supra* note 15. The financial regulations do include some provisions for appropriations for unforeseeable expenditures. However, the coordinator of the Working Group proposed further provisions, which were not accepted by the Preparatory Commission. *Draft Financial Regulations and Rules, Discussion Paper Proposed by the Coordinator*, U.N. Doc. PCNICC/2001/WGFIRR/RT.4 (Aug. 22, 2001); *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). This subject may be addressed again at the April 2002 session of the Preparatory Commission, in the context of the new Working Group on Financial Issues.

structed to be flexible and well integrated. If these foundation systems are well built, their strength will have a tremendous ripple effect throughout the ICC system. If they are not, the Court will be limited in terms of what it can achieve and the judicial work of the Court will directly suffer. For example, if the interpretation and translation unit of the Court cannot keep up with the flood of information arriving at the Court for lack of individual translators or the necessary software and hardware technology, valuable pieces of evidence could be lost to the Office of the Prosecutor because they are not recognized for what they are. The same could be said for the information management system as a whole. Without a proper system in place from the start, the Court could experience a backlog of millions of pages of documentation, rendering these documents essentially invisible to the system. In addition, if the information management system is not well developed, the Office of the Prosecutor could experience difficulty meeting its obligations to disclose relevant documents to the defense. This could provide grounds for the defense to challenge the prosecution in court. Finally, well-integrated and carefully planned information management systems will be much more capable of resisting invasion and subversion by hackers, who could attack the integrity of documentation or who could use sensitive information about witnesses, victims, and other aspects of cases to cause physical or other harm or to otherwise undermine the work of the Court. These few examples only highlight the fact that the ambitions of the international community for the ICC, that it contribute to greater international stability, peace, and security, will rest on the successful daily functioning of the Court's most basic, non-judicial functions.

The third major difference relates to how cases will come to the ICC.<sup>42</sup> With the two *ad hoc* tribunals, the Prosecutor enjoys a tremendous amount of control over her own docket. This is be-

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42. The International Tribunal for the Law of the Sea is less relevant here because it addresses disputes between States. States act essentially as prosecutors, putting together their own cases and bringing all evidence and documentation with them to the Tribunal. Therefore, while cases may come in without much warning, the Tribunal does not bear responsibility for investigating and prosecuting cases, and so will not require the same degree of flexibility as the ICC will. For more information on the settlement of disputes within the law of the sea regime, see [http://www.un.org/Depts/los/settlement\\_of\\_disputes/settlement\\_of\\_disputes.htm](http://www.un.org/Depts/los/settlement_of_disputes/settlement_of_disputes.htm).



cause both the ICTR and the ICTY Statutes provide the Prosecutor with primacy over national courts with respect to cases that could come under the *ad hoc* tribunals' jurisdiction.<sup>43</sup> The Prosecutor alone may determine which cases deserve the attention and resources of her office, and may choose when to address them. By contrast, the ICC's jurisdiction may be triggered three ways. The Prosecutor may act *proprio motu* to initiate an investigation and a prosecution, as with the ICTY and the ICTR. In addition, though, the Security Council may refer a case to the ICC, as may a State Party to the Rome Statute or a State that has accepted the ICC's jurisdiction on an *ad hoc* basis, in order to refer a specific situation.<sup>44</sup> These three different triggers signal a greater degree of unpredictability for the ICC in terms of its docket. This will be particularly true at the start of the ICC's existence, when a pattern for referrals has not yet been clearly established.

This set-up has serious implications for the process by which the ICC will be established because the Court's jurisdiction will become theoretically active upon entry into force of the Rome Statute. Anytime after entry into force, a State may attempt to refer a case to the ICC. Given the high number of conflicts that are taking place around the globe and the seriousness of crimes that are committed on a regular basis, and given the strong support for the ICC that these conflicts and crimes have engendered among States, many States may wish to make use of the ICC at the earliest possible moment, even before the Court is fully established. Of course, there will be a natural gap between entry into force and full functioning of the Court, as described in Part I of this Essay. However, the credibility of the Court will suffer if the first impression of States and others is that the Court is not capable of engaging with them in a constructive way. Therefore, the nascent ICC must be prepared at least to respond in a credible way to these requests for assistance as soon as they are received, and to address them in a more thorough, substantive way, as soon as possible after that. In general, it is important to ensure a steady flow of updates about the process of establishing the Court so that expectations during this crucial period are realistic and based on accurate information.

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43. ICTR Statute, *supra* note 28, art. 8(2); ICTY Statute, *supra* note 28, art. 9(2).

44. Rome Statute, *supra* note 2, arts. 12, 13.

Ensuring the capacity of the Court to engage with States and others is also essential in order to ensure that potentially valuable information submitted to the Court in its early days is not lost. Again, given the high expectations for the Court, NGOs, governments, and others may decide to send information and potential evidence to the Court soon after entry into force. These incoming materials must be properly received, documented, and secured, so that should they be used at a later point in a court case, their validity cannot be challenged. If the chain of custody is not established and maintained, the defense may be able to successfully challenge otherwise good evidence as tainted.

These are only a few of the many lessons that can be gleaned from the experiences of the ICTY, ICTR, and the ITLOS. The States Parties to the Rome Statute engaged in the process of establishing the Court should endeavor to consistently involve the experts from these tribunals, to ensure that their best practices constructively influence ongoing work on the ICC.

### III. *PREPARATORY COMMISSION STRUCTURES FOR ESTABLISHMENT OF THE COURT*

The bureau of the Preparatory Commission has recognized the challenge that lies ahead of States in establishing this new institution. Following the seventh session of the Preparatory Commission, the bureau began to consider new areas of work that would have to be undertaken to prepare for establishment of the Court. The result was the development of the road map, adopted by the Preparatory Commission at the conclusion of its eighth session.<sup>45</sup> The road map sets forth three new areas of work: two new working groups, three focal points, and a subcommittee. These three areas are intended to address the more practical aspects of establishment of the Court; until now, the Preparatory Commission has focused strictly on the development of legal instruments to guide the work of the Court. The two new working groups, like the other working groups, will focus more specifically on the promulgation of instruments subsidiary to and derivative of the Rome Statute, although with a relatively practical slant. Among these instruments are the guide-

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

lines governing the victims' trust fund, nominations and elections procedures, and agendas for the first meetings of the Assembly of States Parties.<sup>46</sup>

The work of the focal points also combines these legal and practical elements. While the provisional rules for which they are responsible are clearly linked to the Rome Statute and to the legal work of the Court, they are directly essential to the proper functioning of the foundational, non-judicial systems of the Court.<sup>47</sup> These include three categories of provisional rules: rules relating to human resources and administration, relating to finances and the budget; and relating to operational issues.<sup>48</sup> The road map indicates that it would be useful to follow the past practice of inter-sessional open-ended experts meetings in order to facilitate the work of the Commission in this regard. An inter-sessional meeting to address the work of all of the focal points has been tentatively scheduled for March 2002. The intended outcome is for the focal points to develop the provisional internal rules through a process of drafting and consultation with government and other experts, and to present these rules for inclusion in the final report of the Preparatory Commission to the Assembly of States Parties. The Assembly will not adopt these rules, but will simply pass them on to the senior elected officials of the Court for review and finalization.

The work of the focal points is an important addition to the tasks of the Preparatory Commission. The provisional internal rules they develop will be of tremendous value to the senior elected officials of the Court, who will be able to begin their

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46. The areas of work of the new working groups were elaborated by Ambassador Philippe Kirsch, the chair of the Preparatory Commission, at the end of the final plenary of the eighth session. The unofficial transcript of that plenary session is part of the Coalition's records. A summary of the new working groups is also part of the Summary of the Proceedings of the Preparatory Commission at its eighth session. *Proceedings of the Preparatory Commission at its Eighth Session*, U.N. Doc. PCNICC/2001/L.3/Rev.1 (Oct. 11, 2001).

47. In order to fulfill the requirements of the road map in Part II(B), the chair of the Preparatory Commission appointed three focal points to coordinate the preparation of initial draft texts of essential provisional internal rules. Phakiso Mochochoko (Lesotho) was appointed to oversee development of draft rules in the human resources and administration area, Christian Much (Germany) was appointed to oversee development of draft rules in the area of budgetary and finance area, and Sivu Maqungo (South Africa) was appointed to oversee development of draft rules in the operational issues area. *Id.*

48. *Road Map*, *supra* note 45, Part II(B).

work on the basis of well-researched and developed drafts. These rules, in particular the staff regulations, financial and procurement rules, security rules, and media and outreach rules, will be absolutely essential for the early and consistent functioning of the Court. While the Registrar, Prosecutor, and President may wish to modify these rules, these drafts will buy them the time to immediately undertake their primary tasks without having to focus exclusively on preparation of these critical documents.

However, a distinction should be made between what could be described as rules and systems. The focal points will develop provisional internal rules, but their work will not address the creation of the technical, non-judicial systems that will form the foundation of the Court. Therefore, there remains the need to ensure that these systems are in place prior to the election of the senior officials of the Court. In addition, as the rules and systems are developed on parallel tracks, it is important to make sure that these two processes are coordinated. The rules must create and maintain a sustainable interface between the Court staff and the technical systems that support their work, allowing staff to make the most efficient use of the technical systems in place.

The development of well-integrated systems also has implications for the budget for the Court's first financial period. It is essential that the first budget incorporate not only the necessary funds but also the encompassing vision of how the systems should be established, so as to create the foundation for the most efficient and effective Court.

#### IV. *HOST STATE STRUCTURES FOR ESTABLISHMENT OF THE COURT*

The host State, the Netherlands, has also taken a number of concrete steps to fulfill its responsibilities to the Court. At the final plenary of the Preparatory Commission's eighth session, the Foreign Minister of the Netherlands, Jozias van Aartsen, highlighted some of these steps.<sup>49</sup> In particular, the host State

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49. *Statement by the Minister of Foreign Affairs of the Kingdom of the Netherlands, Jozias J. van Aartsen, presented during the eighth session of the Preparatory Commission on 25 September 2001*, U.N. Doc. PCNICC/2001/INF/3 (Sept. 27, 2001) [hereinafter *Statement by the Minister of Foreign Affairs*]. This statement is available on the Coalition's website at

has assembled a national task force of approximately ten members to plan for the Court. The host State has also secured temporary premises to host the Court while permanent facilities are under development. It is anticipated that the permanent facilities will be completed by 2007. The host State has also pledged to spend more than thirty three million Euro on the temporary premises, including approximately 10 million on the interior layout and design. Finally, the host State has pledged to contribute financially to the initial meetings of the Assembly of States Parties and its Bureau, and to fully finance the inaugural meeting of the Court.

In addition to highlighting steps taken by the host State, the Foreign Minister reiterated what he saw as shared responsibility for ensuring the successful establishment of the Court. He indicated that the Netherlands takes its responsibilities seriously but that there are limits to what the host State can do on its own; he underscored the need for input from the chair of the Preparatory Commission and the bureau, ratifying States, NGOs, and other experts. The Preparatory Commission responded to the host State's requests for an interlocutor by establishing through the road map a subcommittee of the bureau.<sup>50</sup> The subcommittee is intended to help the host State address questions related to the development of the interim premises and the infrastructure that the Court will need.<sup>51</sup> The subcommittee met once in December 2001 and again in January 2002 with the host State to initiate these discussions. It is to be hoped that the subcommittee will be able to provide the framework to draw in the necessary technical experts—from the ICTY, ICTR, the ITLOS, and elsewhere—who can commit the time, resources, and strategic thinking to help the host State conceptualize how the ICC should be physically established and to implement those plans.

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<http://www.iccnw.org>, and on the website of the Netherlands Ministry of Foreign Affairs at <http://www.minbuza.nl/english>.

50. In order to fulfill the requirements of the road map in Part III, the chair appointed a four member subcommittee, to serve as an interlocutor mechanism between the Preparatory Commission and the host country. This subcommittee will be chaired by Silvia Fernandez de Gurmendi (Argentina), and also includes Andras Vámos-Goldman (Canada), Zsolt Hetesy (Hungary), and Patricio Ruedas (Spain).

51. *Road map*, *supra* note 45, Part III.

*CONCLUSION*

The Coalition has been encouraged to see recent developments on all fronts, promoting early establishment of the Court. However, these are only the first few steps. All supporters of the Court will have to continue to work together, in the most coordinated manner possible, if we are to create a foundation for the Court that will endure. The road ahead may pose tremendous and unprecedented challenges, but it is one worth traveling, for as Minister van Aartsen concluded in his statement to the Preparatory Commission, "It is the road to justice that we are helping to pave."<sup>52</sup>

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52. *Statement by the Minister of Foreign Affairs, supra* note 49.