

Fordham International Law Journal

Volume 25, Issue 3

2001

Article 12

The International Criminal Court: Alive, Soon Kicking!

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Abstract

In this brief essay, I will give an overview of my insights as to what urgent practical steps need to be taken by the Preparatory Commission ("Prepcom"), the Assembly of States Parties ("ASP"), and the Host State, the Netherlands, in order to guarantee the early establishment of the Court. I assume that my readers have a high level of understanding of the Rome Statute, the Prepcom, and other related documents.

THE INTERNATIONAL CRIMINAL COURT: ALIVE, SOON KICKING!

*Harry Verweij**

INTRODUCTION

The International Criminal Court (“ICC” or “Court”) will be a reality in 2002. The sixtieth ratification is expected by mid-2002. As of December 31, 2001, forty-eight ratifications have been obtained. The steady flow of ratifications after the Rome Conference has surprised many and shocked some. I, for one, am extremely pleased with the quick pace of ratifications, both on a personal level, as one who participated with zeal in the Rome Conference, and on a professional level as an official of the Host State’s ICC Task Force. The Netherlands as Host State and the international community together face the enormous task of establishing the ICC as a credible International Criminal Court sitting at The Hague within the next eighteen months.

In this brief Essay I will give an overview of my insights as to what urgent practical steps need to be taken by the Preparatory Commission (“Prepcom”), the Assembly of States Parties (“ASP”), and the Host State, the Netherlands, in order to guarantee the early establishment of the Court. I assume that my readers have a high level of understanding of the Rome Statute,¹ the Prepcom, and other related documents.

I. SETTING UP THE ICC: A DISTINCT INSTITUTION

The International Criminal Court will be of a fundamentally different nature as compared to the existing *ad hoc* tribunals—the International Criminal Tribunal for the Former Yugoslavia² (“ICTY”) and the International Criminal Tribunal for Rwanda³

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

2. 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).

3. Statute of International Criminal Tribunal for the Prosecution of Persons Re-

("ICTR"). This fact is self-evident to an audience of lawyers. It needs to be pointed out nevertheless, because it gives a better understanding of the specific start-up problems the ICC will have to face.

The *ad hoc* tribunals are subsidiary organs of the United Nations ("U.N.") Security Council, established by a Security Council Resolution under chapter VII of the U.N. Charter. This resolution enabled the U.N. Secretariat to perform preparatory functions for the establishment and the administration of these tribunals. Immediately after the adoption of the respective resolutions, the Office of Legal Affairs, working on a clear mandate, was able to start consultations with member States and start negotiations with the respective Host States, the Netherlands and Tanzania. There were clear instructions and there could be no misunderstandings on the division of responsibilities. On top of that, being a U.N. organ, many U.N. rules (such as rules on procurement, and human resources management rules) were readily available and almost automatically applicable.

In the case of the ICC, however, things are less clear. The ICC will be a treaty body and not a U.N. organ, although all documents related to the ICC (such as, the Rome Statute, the Elements of Crimes,⁴ and the Rules of Procedure⁵) have been negotiated in the context of the U.N., that is to say in the PrepCom and in the Rome Diplomatic Conference. Moreover, the U.N. Secretariat has played a crucial role in the elaboration of the documents and the completion of the most important negotiations.

The U.N. would therefore also be in a prime position to work out the legal and practical elements of the establishment of the Court. But, alas, the ICC is as yet not supported by the full U.N. membership. That makes involvement of the U.N. administration on all levels of the preparations for the ICC difficult.

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).

4. *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).

5. *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).

Consequently, in the further setting up of this new Court there is no pre-determined and experienced entity that is in a position to take up the primary responsibilities of establishing the Court.

If as a consequence of that situation we would have to wait for the first ASP to address this issue, we would be in dire straits. Obviously there is a need to start preparatory work in advance of the sixtieth ratification, in any case well in advance of the first meeting of the ASP. The Netherlands has a need for an international and duly mandated interlocutor in order to consult and discuss issues relating to the physical and infrastructural needs of the Court. The international community, for its part, has high stakes in setting up a credible institution that can start its operations smoothly at the earliest possible date.

The timely adoption of the roadmap⁶ at the eighth session of the Preparatory Commission was a major step forward in this regard. The road map sets out three major fields of attention and action. The first is the preparation of documents in advance of the first meeting of the ASP, as well as the preparation for the taking of steps at an early stage of such a meeting. The second is the preparation of provisional internal rules and regulations of the Court with respect to human resources and administration, budget and finance, and finally, operational issues.

The third area of attention is the relationship with the host country. As indicated above, it seemed crucial to the host country to establish an interlocutor mechanism to manage practical issues regarding the establishment of the Court in the Netherlands. The Bureau of the Prepcom agreed, as did the plenary of the Prepcom, and established a sub-committee of the Bureau for that purpose.

These three areas of attention have one thing in common: they are identified to “jump-start” the Court.

What does this mean in practical terms? Regarding the first ASP, the necessary steps are being taken. The ICC resolution adopted by the U.N. General Assembly in December 2001⁷ explicitly mentions the convening of the first ASP by the Secretary-General at U.N. Headquarters in paragraph 9.⁸ At the request of

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

7. *Establishment of the International Criminal Court*, U.N. Doc. A/RES/56/85 (2001).

8. *Id.* para. 9.

the chairman of the Prepcorn, the U.N. will establish a trust fund for voluntary contributions. Expenses that may accrue to the U.N. as a result of the implementation of paragraph 9 as well as expenses resulting from the provision of facilities and services for that meeting of the ASP and any consequent follow-up shall be paid in advance to the U.N.⁹ I mention this paragraph of the resolution in order to give a sense of the politics involved in the discussions on the ICC. Obviously, this paragraph was designed to make absolutely sure that non-State parties to the ICC Statute do not in any possible way spend money on the ICC. Fortunately, a number of member States, including the Netherlands, have announced their intention to contribute voluntarily to that trust fund.

Activities that need to be included under the heading of the preparations of the ASP are the elaboration of a draft agenda, the establishment of the Bureau of the ASP and subsidiary bodies, recommendations concerning the secretariat of the ASP, recommendations regarding nomination and election procedures for judges and the prosecutor, etc. Effective preparation for and conduct of the ASP meetings is a condition *sine qua non* for a speedy establishment of the Court.

II. *PROVISIONAL INTERNAL RULES AND REGULATIONS OF THE ICC*

On the provisional internal rules and regulations of the Court, I offer a few remarks. First of all, it must be understood that the Prepcorn does not have a mandate to make drafts of permanent rules and regulations. The mandate of the Prepcorn is set out in Resolution F of the Final Act of the Rome Conference.¹⁰ The task that the Prepcorn has undertaken is to work out documents that could serve as a basis for the operations of the first officials of the Court. A balance needs to be struck here. On one hand the Court must be handed the tools to be operational from day one, on the other hand it should not be the intention to unnecessarily tie the hands of the Court. This is where we feel the impact of the Statute on a specific issue—

9. *Id.* para. 10.

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* (1998), Resolution F [hereinafter *Final Act*].

namely that the chief administrative officer, the Registrar, will be the last of the senior officials to be elected to his or her position.¹¹ That is an awkward situation. In a perfect world, the Registrar would have been the first selected official in order to deal with all administrative decisions in the start-up phase on a high level of responsibility. Whether this procedure was decided upon by the Rome Conference on purpose (there are certainly arguments in favor), or whether this was an oversight still puzzles me. In any case, we face some added initial hurdles due to this situation that need to be addressed in some form. I will revisit this issue further in this Essay when I speak of an advance team and the director of common services.

Regarding the provisional rules, the chairman of the Prepcom has appointed three so-called "focal points" each of whom will deal with one of the three identified categories mentioned above. They will prepare documentation for discussion on provisional rules for the Court. The main source of such documentation is the U.N. rules, including those relating to the *ad hoc* Tribunals and possibly internal rules of the International Tribunal for the Law of the Sea¹² ("ITLOS"). To some extent, lessons can be learned from the Scottish Court in the Netherlands as well. As there is no need to re-invent the wheel, the focal points should focus their attention on analyzing the rules and regulations of these institutions and adapt and annotate them, where appropriate, to meet the requirements of the Court. Their base reference materials for the assessment of the requirements are the Rome Statute, the Rules of Procedure and Evidence, and the Elements of Crimes. In December 2001, the government of the Netherlands invited representatives of the extended Bureau of the Prepcom, representatives of the Host State, the focal points, and independent experts to a meeting in the Netherlands. That meeting was designed to, *inter alia*, increase the levels of understanding of the issues mentioned in the road map with those who are at this time of the preparations most intimately involved. That meeting helped all participants with their respective assignments.

The documents that the focal points are working on will be introduced to interested members of the Prepcom in an open-

11. Rome Statute, *supra* note 1, art. 43.

12. See International Tribunal for the Law of the Sea, at <http://www.itlos.org/>.

ended intersessional expert meeting, to be held in March 2002 in The Hague. That meeting will not be a setting for a negotiating forum but will be of a more academic, seminar-type, nature. It would be impossible to subject all available voluminous sets of detailed documentation to negotiations, and it would, moreover, fall outside the scope of the mandate of the Prepcom. The intersessional meeting will require the participation of experts, in order to contribute to a thorough understanding of the issues at stake and to respond to issues raised by delegates. They will be able to exchange views. The report of this meeting would reflect the exchange of views. The report will be transmitted through a report of the Prepcom and of the ASP to the Court.

The objectives of this exercise will ultimately be to hand the first officials of the Court provisional rules, which after the review by delegates were generally deemed to be helpful managerial tools for setting up the administration of the Court. But, and this should be continuously stressed, eventually it is up to the Court itself to work out the permanent rules, under the aegis of the Presidency, the Prosecutor, and the Registrar. The ASP exercises an oversight role here, and at the end of the day needs to give final approval. The present activities undertaken by the Prepcom fit within the mandate of resolution F, which speaks of practical arrangements for the establishment and coming into operation of the Court. It is advance work, nothing more, nothing less.

This advance work of the Prepcom on staff-rules, on procurement-rules, on financial rules, and on other rules of an operational nature should be limited to certain provisions that have absolute priority over others in this phase. The Prepcom should not stretch its substantive involvement in these areas to the extreme. Moreover, the delegations to the Prepcom are not available for weeks and weeks to review each and every detail of every document that is presented to them. There is no doubt as to the priority nature of the first three subjects mentioned in this paragraph.

III. *MANAGEMENT OF EXPECTATIONS*

Amongst the priority rules under the last category—operational issues—are rules concerning the handling of evidence (“custodial function”) and rules concerning media and public

relations. Why are these so prominently important? They are important, because they relate to the “management of expectations.” The positive outcome of the Rome conference and the worldwide campaign to promote the ICC by non-governmental organizations (“NGOs”) and States, have brought about huge public interest. Public interest and attention was further raised, because of the debates in the United States on specific legislation aimed against the ICC, the work of the *ad hoc* Tribunals, the Pinochet case, the Belgian indictments, etc. The public at large all over the world, both in conflict areas and in non-conflict areas, has high expectations.

Therefore, it is important to address questions from the media and the public right from the start. It should be explained that, while the Court’s Statute may already be in force, the institution itself is in the process of being built up. I think it is fair to say that it will take approximately one year from the date of the sixtieth ratification, for the Court to be operational. That is easily explained, but not easy for some to digest, if they had hopes for immediate action by the ICC in a certain situation. Also, the Court’s procedures and jurisdiction should be explained with the help of every possible communication tool from the outset.

Another aspect of the “management of expectations” is the handling of complaints, letters, documents, and possible evidence. All these types of communications will be directed to the Court, either to the Registry or to the Office of the Prosecutor, even before the Court is operational. These documents need to be properly filed and if they concern possible evidence, be preserved in order to prevent contamination (“custodial function”). All communications must be acknowledged, and an explanation of the process needs to be attached.

IV. STEPS FOR THE EARLY ESTABLISHMENT OF THE COURT

A. *Advance-team*

I will briefly set out what other practical steps will be taken, from now to the inaugural meeting of the Court.

Once delegates to the intersessional expert meeting have had the opportunity to review and comment on the documentation prepared by the focal points, the April 2002 Prepcom may take note of its outcome. This would conclude the first phase of the practical preparations.

The second phase starts (and may slightly overlap with the first phase) as soon as a small number of experts have been identified to start setting up administrative procedures on basis of the documentation provided by the Prepcom. This is a fairly unique phenomenon. As far as I know, the international community has never hired experts, without statutory or treaty provisions, to perform advance work for an international entity. Yet, there is no other option if the ICC is to be a success.

In my view, the Prepcom has a clear mandate also to be involved in the structuring of such advance operations. That includes very practical measures like establishing an advance-team of experts that will prepare the ground for the arrival of the first officials of the ICC. They will not make far-reaching policy decisions; that needs to be preserved for the future senior officials of the Court. They will, however, put systems in place on the basis of their instructions from the bureau of the Prepcom and of the reviewed provisional rules that will enable the Court to start day-to-day work from day one. These systems may vary from hiring and firing to banking, from contracts to information technology issues, and from archives and library to internal security. As said, these systems should not touch upon policy matters, as for example, operating procedures of the office of the Prosecutor or practice directions of the Presidency.

What form must this advance team have?

In January 2002, the sub-committee for Host State issues of the Bureau of the Prepcom met bilaterally with the Host State in order to assess the options for the establishment of such a team. There was a clear understanding among the participants of this meeting that there is an urgent need for an advance team, and it will be established. The Host State will assist in every possible way. The preferred form of the advance team is that of hiring a relatively small group of experts for a certain time period (approximately five months) and opening the possibility for this group to engage on an *ad hoc* consultancy basis with further experts to assist them, when appropriate, on issues of a very specific detailed nature. This needs to be decided on, once ongoing work is being assessed regularly. The advance team will work on the instructions of the bureau. The advance team members need to ensure that the work is done in a comprehensive manner.

B. *Functions*

To start with, there is a need to engage a coordinator on a full time basis. He will be called the "court manager." He or she will oversee and coordinate the activities. The court manager will also, on the instructions of the Chairman of the PrepCom, be the spokesman of the team. That functionary needs to have wide experience with and insights in (international) court structures and systems.

Further experts that need to be engaged are a chief administrative officer, a legal officer, an electronic data and telecommunications expert, a public information officer, and a security expert. The administrator will, on the basis of the proposed provisional rules lay out a structure of administrative procedures on personnel procurement (e.g. recruitment, pensions schemes) that the Court may decide to use from the outset. The legal officer will ensure adequate knowledge of the Statute in the team, as well as performing the "custodial function." The officer should make sure that the advance team responds to communications sent to it or to the—not yet operational—Court, and that the procedures of the Statute and the coming into operation of the Court are duly explained. Furthermore, all documentation received should be stored, secured, filed, and archived with the utmost care in order to hand it uncontaminated to the Court for its consideration, after establishment. The public information officer will, on the instructions of the court manager, work on documentation for the public, a web-site, and deal with other information matters of a more routine nature. The electronic data and telecommunications expert will be responsible for the setting up of state of the art computer and telecommunication systems that are in line with the requirements of the Court, such as separate and properly secured systems for the separate pillars of the Court. Last, but not least, is the security expert. Representing the interests of the Court, he or she should ensure that the future internal security systems are aligned to the outside (periphery) security aspects that the Host State will set up.

This outline of the functions is very general and rough and will be refined by the Subcommittee. It is envisaged that these experts will start working in May 2002 for approximately five months until the first ASP meets, probably in September 2002, unless the ASP decides otherwise.

C. *Financing of the Advance Team*

The financing of this team is also still a matter of deliberations. Who should pick up the bill?

Dutch foreign minister, Jozias van Aartsen, in his intervention before the Prepcom in September 2001,¹³ stated that he feels a special, but by no means exclusive, responsibility for the Court. That means in this context that he is willing to go a long way in facilitating preparatory work for the Court, but there is a limit. The Netherlands is prepared to pre-finance such work and will not shy away from further involvement, but responsibilities need to be shared. It is important to also keep in mind that the division of responsibilities between the Prepcom, the advance team, and the Host State is clearly defined. In line with the view that the Prepcom manages and supervises the work of the advance team, it seems to me that the financing is certainly not a (sole) Host State responsibility. The international community does have a prime responsibility here, but has, as long as the ASP has not met, neither a legal responsibility to pay, nor the actual cash available. Further options are now being explored by the Subcommittee and the Host State.

D. *ASP and Director of Common Services*

The next phase starts with the first meeting of the ASP. The preparatory work will continue, but the ASP will provide guidance and supervision from then on. The first ASP is the moment of transition between the Prepcom and the ASP. Resolution F of the Final Act states that the Prepcom ceases its activities at the conclusion of the first meeting of the ASP.¹⁴ The ASP may wish to appoint other officials and give specific instructions for the continuation of preparatory work.

The discussions on the proposals in the First Year Budget¹⁵ ("FYB") will be crucial in this regard. The revised draft FYB¹⁶

13. *Statement by the Minister for 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).

14. Final Act, *supra* note 10, resolution F, para. 6.

15. *Draft Budget for the first financial year of the Court, Prepared by the Secretariat*, U.N. Doc. PCNICC/2001/WGFYB/L.1 (Aug. 8, 2001). A thoroughly revised version is due out by March 2002.

16. *Proceedings of the Preparatory Commission at its eighth session, Addendum, Annex II, Priority Guidelines for the preparation of a revised draft first-year budget for the International*

offers some creative possibilities. In the context of this Essay, I will only highlight one. To fully maximize efficiency and economy, the coordinator for this subject, Mr. Rolf Fife, suggests establishing a Common Services Division ("CSD"). It is envisaged as a common branch from which the judiciary and the Prosecutor can draw administrative services, which are a common requirement for both. For the purposes of the first budget year of the ICC, it is anticipated that this division would include general administrators and individuals with experience in the setting up of Courts. In the absence of the Registrar (whose election may only be expected six months later), a director of common services would be uniquely positioned to take over from the court manager in the advance team. The director would also take over from the Bureau's sub-committee functions as the interlocutor for the Host State. I fully concur with Mr. Fife and endorse his approach in the draft FYB.

E. *Host State*

The government of the Netherlands in the meantime will also continue with Host State responsibilities. The focus of attention will slowly move from New York to The Hague; from the more abstract discussions to discussions about actually establishing and housing the ICC. A Task Force within the Dutch Foreign Ministry has in the meantime been set up. It is in full swing and will expand as its responsibilities grow. The buildings sites for the temporary and permanent facilities have been identified; the availability of appropriate housing from day one is thus ensured. National assessments as to the needs of the Court in relation to the Dutch bid are being undertaken in close consultation with the Prepcom bureau. The Task Force can draw on a lot of experience within many circles of the Dutch administration. After all, we have been a staunch supporter and a proud and experienced Host State to important legal institutions, such as the International Court of Justice, the ICTY, and the Scottish Court, as well as the Permanent Court of Arbitration and the Iran-U.S. Claims Tribunal. The Netherlands will make that experience work for the ICC.

F. Timeline

To sum up, the following rough time-line with respect to the practical preparations seems valid:

March 2002	Open-ended intersessional meeting at The Hague;
April 2002	Prepcom meeting in New York;
April-July 2002	Start work of advance team; Sixtieth ratification deposited;
July 2002	Prepcom meeting in New York;
Summer 2002	Statute enters into force;
September 2002	First Assembly of State Parties in New York (adoption first year budget);
September/Fall 2002	Director of Common Services in office at The Hague;
Fall 2002	U.N. General Assembly; Continuation of preparatory work; Nominations for judges and prosecutor sent in;
January 2003	Second Assembly of State Parties (elections for judges and prosecutor);
February 2003	Inaugural Meeting at The Hague; Presidency elected; Registrar elected.

FINAL REMARKS

The number of ratifications is growing rapidly. There is no time to spare. The point of no return has been crossed. All actors are on track. The burden to smoothly establish a credible International Criminal Court in a timely manner rests on the shoulders of a relatively small group of States parties, conscious of their responsibilities. Important international actors have for various reasons decided to stay out; some for the time being, some possibly indefinitely. For that reason the ratifying States need to overcome one or two extra hurdles, but they can and they will. It will be proven to the world that the ICC will be established soon and that it will perform as it is required to: credibly, impartially, effectively, and in accordance with the Rome

Statute. It will be a kicking and strong universal institution, fully alive, ready to uphold the basic principles at heart and to fight impunity; worthy to be supported by all nations that defend the very essence of human life and dignity, and that believe in the rule of law and in the rights of victims of the most egregious universal crimes.