

Key Outcomes of the Eighth Preparatory Commission

Comments by Maria Fariello, Center for Development of International Law, at the UNCA Press Briefing, October 5, 2001

Of the seven Working Groups which met during the Eighth Preparatory Commission for the International Criminal Court (ICC), four concluded agreements: the Rules of Procedure for the Assembly of States Party; the Agreement on Privileges and Immunities of the Court; the Working Group on the ICC-UN Relationship Agreement and the Working Group on Final Rules and Regulations.

Rules of Procedure for the Assembly of States Party (ASP)

The Concerns on this agreement regarded the access to ASP and the election of the Judges and high officials.

The Rules provide for observer access to the Assembly, including subsidiary bodies of general composition. Subsidiary bodies not of general composition can allow for observers if they so decided.

However, States who have not signed either the Rome Statute or the Final Act will not be allowed to observe unless their participation is proposed by the president of the ASP and approved by the Assembly.

Unfortunately, the working Group on the ASP missed the opportunity to increase the transparency of the Court by not addressing questions relating to the election of the judges and leaving the issue entirely to back room negotiations.

Working Group on the Agreement on Privileges and Immunities of the Court (APIC)

This document is important for the practical functions of the court. It provides the Court with the legal standing necessary in international and domestic law, allowing it to set up its seat in the Netherlands and to establish other offices as needed. Furthermore, it provides the coverage for its personnel to operate on a par with other international organizations.

Working Group on the ICC-UN relationship agreement

The question of gravest concern on this issue was whether a waiver for the privileges and immunities enjoyed by the UN's personnel would be required for the ICC to exercise jurisdiction over such persons. This is because the requirement of a waiver could imply immunity.

In the end, the ICC-UN Agreement states that the UN is required to cooperate fully with the Court should the ICC seek to exercise jurisdiction. The result is thus an automatic waiver, which is the same as the acknowledgment that no waiver exists. This was further strengthened by a statement of six delegations led by Portugal to request that the Working Group further record that they interpret this article not to prejudice article 27 of the Rome Statute which affirms the irrelevance of official capacity for the ICC to exercise its jurisdiction.

Final Rules and Regulations

This Working Group completed its work during this PrepCom meeting but referred two outstanding issues to other bodies. These issues are:

- q the important questions regarding the Trust Fund for Victims (article 79 of the Rome Statute); and
- q the issue of a contingency mechanism for unforeseen expenses

The first will be taken up by the Working Group on the First Year budget (see below) while the later will be referred to the ASP.

The difficult questions of the Trust Fund for Victims include, who will manage the fund, how can contributions be made, and how will the beneficiaries be identified.

Three Working Group remain open and will continue discussions at the next PrepCom: The Working Group on the First Year Budget; General Principles for the Headquarters Agreement and the Working Group on the Crime of Aggression.

Working Group on the First Year Budget

The Working Group completed its first reading of the draft. The rapid pace of ratification and the need for flexibility, caused the pace of the discussions to pick up significantly, and this was particularly evident in this Working Group.

This group will also address the open questions regarding the Trust Fund for Victims.

The original proposal put forward by the Secretariat was of two budgets, one of approximately \$15 million the other of \$30 million. However these were for either a situation of no referrals (and therefore a court operating with minimal staff) and the other was for a scenario where there was a case load of six cases before the Court. The next draft will provide for much greater flexibility and an incremental approach.

General Principles for the Headquarters Agreement

The first reading of the draft Agreement was concluded. Many of the issues were pending the conclusion of the Agreement on the Privileges and Immunities of the Court. The significance of this agreement is that it is establishing the guidelines within a multilateral context while the actual Headquarters agreement will be negotiated between the Court and the Netherlands.

Issues covered by these guidelines, include the premises, security and privileges and immunities.

The Working Group on the Crime of Aggression

This Working Group made significant progress by narrowing its focus. The two main issues are:

- * The conditions for the exercise of jurisdiction; and
- * The definition of aggression.

The first, more politically sensitive question, which includes the issue of the Security Council's role, remains open to discussion. The latter question has been narrowed into two issues, of individual responsibility verses State responsibility.