

**International Centre for Criminal Law Reform &  
Criminal Justice Policy (ICCLR),  
Vancouver, Canada**

**UPDATE ON THE INTERNATIONAL CRIMINAL COURT**

***Number Two***

**August 2002**

***Update on the Rome Statute of the International Criminal Court –***

Entered into force: 1st July 2002

Number of ratifications/accessions: 77

Number of signatures: 139

**Contents of this Update include:**

- Timeframes for the Establishment of the Court
- Timeframes for the Implementation of National Legislation
- Practical issues for States Parties to consider, including Financial arrangements, and
- The potential impact on all States of the United States' stance towards the ICC.

### **Update on Practical Steps to Create the Court –**

The International Criminal Court (ICC) continues to draw broad support from across the globe. On 11 April 2002, a special ceremony held at the United Nations Headquarters in New York heralded the simultaneous deposit of 10 instruments of ratification, representing every region of the world, and bringing the total number of States Parties to 66. This number was more than sufficient to bring the Rome Statute into force, effective from 1<sup>st</sup> July 2002.<sup>1</sup>

Since 11 April 2002, the total number of States Parties has now risen to 77,<sup>2</sup> and many other States have expressed their intention to ratify before the end of this year, including Jamaica, South Korea, and Tanzania. The current breakdown of States Parties per region is as follows: 32 from the European continent, 18 from the Americas, 17 from the African continent, 8 from the Asia/Pacific region, and 1 from the Arab League of States. A complete list of States Parties and regular updates can be obtained from the UN website for the ICC (<http://www.un.org/law/icc>) and the webpage of the NGO Coalition for the ICC (CICC) (<http://www.iccnw.org>).

Now that the Rome Statute has entered into force, the establishment of the Court can proceed in accordance with the relevant provisions of the Statute.

#### **The Assembly of States Parties –**

Article 112, Rome Statute provides for the establishment of an Assembly of States Parties, to oversee the work of the Court. The first meeting of the Court's Assembly of States Parties will be held at UN Headquarters in New York from Tuesday 3 September to Tuesday 10 September, 2002.

All States who are Parties to the Rome Statute are entitled to participate with full voting rights in the Assembly meetings. Those States who have signed either the Rome Statute or the *Final Act of the Rome Conference* are entitled to participate as observers at these meetings. For those few States who did not sign either the Rome Statute or the *Final Act*, the draft "Rules of Procedure for the Assembly of States Parties" now provide that such States may designate a representative to participate as an observer, upon the invitation of the President of the Assembly and with the approval of the Assembly (see rule 94, PCNICC/2001/1/Add.4).

Note also that Least Developed Countries (LDC) may receive funding from the International Institute for Human Rights Law of De Paul University, to cover the travel expenses of one delegate from each LDC interested in attending the first meeting of the Assembly of States Parties in September 2002. The Institute had previously assisted in the participation of Least Developed Countries at the Preparatory Commission's sessions.

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<sup>1</sup> The Rome Statute required 60 ratifications for it to enter into force (paragraph 1, article 126). Note that the Rome Statute only entered into force on 1<sup>st</sup> July 2002 for those 66 States who ratified or acceded to the Statute prior to 1<sup>st</sup> May 2002. For States that ratify or accede after 1<sup>st</sup> May 2002, the Rome Statute will enter into force on the first day of the month after the 60<sup>th</sup> day following the deposit by such State of its instrument of ratification/accession (paragraph 2, article 126).

<sup>2</sup> As at 9 August 2002 (the latest ratification being from Colombia on 5 August 2002).

At the first meeting of the Assembly of States Parties, in accordance with paragraph 2, article 112 of the Rome Statute, the Assembly will consider and adopt, as appropriate, the recommendations of the Preparatory Commission. The provisional agenda for this meeting is available at the webpage for the Preparatory Commission's 10<sup>th</sup> meeting: <http://www.un.org/law/icc/prepcomm/prepfra.htm>.

The Preparatory Commission has met 10 times since the Rome Statute was adopted in July 1998, and has recommended the adoption of numerous draft texts that are intended to supplement the Rome Statute, such as the Budget for the First Financial Year of the Court, the procedures for the establishment of a Trust Fund for Victims, and the Court's Rules of Procedure and Evidence. Many of the points highlighted in this "Update" refer to decisions that were taken by the Preparatory Commission at its most recent meetings. A complete list of Preparatory Commission draft texts and resolutions is available from the UN website for the ICC (see above).

Note that the Working Group on the Crime of Aggression was unable to reach a consensus on the issues it was required to discuss in accordance with Resolution F, *Final Act of the Rome Conference*. However, the Working Group was not subject to the same time constraints as other Working Groups, and it will be re-convened under the auspices of the Assembly of States Parties in 2003, and remain open to all interested States.<sup>3</sup>

The second meeting of the Assembly of States Parties will likely be held in February 2003, either in New York or in the Netherlands. At this meeting, States Parties will elect the ICC Prosecutor and the 18 ICC judges. Soon thereafter, the Prosecutor and the judges will be sworn in at the seat of the Court, and the election of the President of the Court will take place. After the judges are sworn in, they must elect the Registrar of the Court, in accordance with article 43. Once the Prosecutor takes office, the Deputy Prosecutors must then be elected by the Assembly of States Parties, based upon a list of candidates to be provided by the Prosecutor (paragraph 4, article 42).

Given these timeframes, realistically the ICC will only be in a position to commence investigations some time in the middle of 2003, after all these key personnel are appointed.

#### **Premises of the new ICC -**

Article 3, Rome Statute provides that the seat of the Court will be established at The Hague in the Netherlands. The Government of the Netherlands has already allocated a modern, multi-storey building in the Hague, which will serve as the temporary premises of the ICC until a permanent building has been constructed. These temporary premises are located at: Maanweg 174, 2516 AB, The Hague. The permanent ICC will be the subject of an international design competition, and will probably be completed around 2007.

From 1<sup>st</sup> July 2002, an Advance Team of experts has been working at the temporary site of the ICC in the Hague. The Advance Team consists of 8 experts in such areas as information technology, human resources, building and facilities management, and legal matters. The Team is establishing the infrastructure and institutional protocols to allow the ICC immediately to start recruiting and carrying out its important work, once its budget is adopted by the Assembly of States Parties in September. The

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<sup>3</sup> Under the Rome Statute, the Crime of Aggression will only be within the jurisdiction of the ICC after a definition and procedural mechanism are adopted by the Assembly of States Parties, at a Rome Statute Review Conference, to be held no sooner than 1<sup>st</sup> July 2009 (see paragraph 2, article 5, and articles 121 and 123).

Advance Team also is able to receive referrals and other information related to the work of the Court, and will act as custodian for such material until its term expires on 30 September 2002. The contact details of the Advance Team are as follows:

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 Press and Information Office  
 P.O. Box 19519  
 2500 CM The Hague  
 The Netherlands

Telephone (+31-70) 5158515  
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### ***Implications for States Parties and those wishing to become States Parties –***

#### **(i) Financial arrangements for the Court, and State Party contributions -**

Part 12 of the Rome Statute sets out the financial arrangements for the Court, including assessed contributions from States Parties. Since the ICC is a fully independent new institution, the arrangements for financing the Court in its first year have been the subject of much deliberation. In March 2002, a special trust fund was established, to accept contributions towards the expenses of holding the first meeting of the Assembly of States Parties. Numerous governments and individuals have contributed to this fund, which now totals around \$US 3 million.

The first financial year of the Court's operation will commence once the budget is adopted by the Assembly of States Parties in September 2002. At that time, the Court will be in immediate need of funds, and States Parties should be prepared to pay their assessed contributions as quickly as possible thereafter. A special Working Capital Fund will be created to meet any short-term liquidity problems pending receipt of all assessed contributions, and all payments made by States Parties will be credited to this fund initially.

It is still impossible to give exact figures for each State Party's assessed contribution, because more States Parties may join during 2002/2003 and the budget has yet to be adopted formally. Once the budget is adopted by the Assembly of States Parties, the United Nations Secretary General will inform each State Party of its commitments.

In the meantime, it is possible for States Parties to estimate their respective contributions, with a reasonable degree of accuracy, based on the following information. The total budget for the first financial year of the Court has been estimated at around 32 million euro (approximately \$US 25 million), and there are currently 77 States Parties. It has also been decided that the scales of assessments for State Party contributions in the first financial year will be based on the respective scales of assessments of the United Nations applicable for the period 2002-2003, with adjustments to take into account the difference in membership between the United Nations and the Assembly of States Parties.

#### **(ii) Nomination and election of ICC judges and prosecutors –**

In accordance with articles 36 and 42, Rome Statute, the Assembly of States Parties will elect the ICC judges and Prosecutor at a meeting tentatively scheduled for February 2003. Only States Parties to the Rome Statute are entitled to nominate candidates for judicial positions, and only States Parties may vote in the elections of the judges and the Prosecutors. Candidates for judicial positions must be nationals of States Parties, but the Prosecutor and Deputy Prosecutors need not be. The Rome Statute does not specify that the Prosecutor must be nominated by a State Party. But it was suggested during the last Preparatory Commission meeting that a candidate for the Prosecutor's position should be nominated with the support of several States Parties. This issue will be discussed further at the first meeting of the Assembly of States Parties.

At the final Preparatory Commission meeting, it was decided that nominations for judicial positions and for the Prosecutor will open during the first Assembly of States Parties meeting in September 2002, and will close on 30 November, 2002.

**These dates have particular implications for States intending to become Parties to the Rome Statute and wishing to nominate judges for the Court. In order to nominate and vote upon a candidate for a judicial position, a State must deposit its instrument of ratification/accession at the United Nations no later than 1<sup>st</sup> December 2002.** This will ensure that the Rome Statute has entered into force for that State in time for the February 2003 elections.

Careful selection of appropriate candidates at the national level will have a positive effect on the legitimacy of the ICC election process, and on the Court itself. Only candidates with outstanding qualifications and relevant experience will ensure that the integrity of the Court is maintained in the eyes of the world. When identifying a potential candidate to be an ICC judge, States Parties should review article 36, Rome Statute, which describes in detail the prerequisites for such candidates. Note that all candidates must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices" (paragraph 3 (a)). They may be experts in either criminal law or relevant areas of international law, such as international humanitarian law and the law of human rights (paragraph 3 (b)). In addition, States need to take into account the need to select judges with legal expertise on issues such as violence against women or children (paragraph 8 (b)). Therefore, candidates with such expertise should be put forward at the national level.

The Rome Statute also requires that "a fair representation of female and male judges" must be selected (subparagraph 8 (a)(iii), article 36). However, past experience of similar elections shows that very few States usually put forward female candidates for international judicial positions. Therefore, female candidates who are put forward are more likely to be elected to the ICC, in order to fulfil the requirements of the Rome Statute.

At the last Preparatory Commission meeting, delegates were unable to agree upon a procedure for the election of the judges, in order to ensure that all the requirements of the Rome Statute are met. In addition to the need for a fair representation of female and male judges, the Assembly of States Parties must also take into account the need for "representation of the principal legal systems of the world", and "equitable geographical representation" (subparagraphs 8 (a) (i) & (ii), article 36). In particular, there was disagreement as to whether a quota system should be imposed, to ensure that these requirements were met, or whether to leave the matter to chance. This issue is likely to be debated further at the first meeting of the Assembly of States Parties.

**(iii) Timeframes for preparation of implementing legislation by current and intending States Parties –**

Now that the Rome Statute has entered into force, there are new timeframes within which States need to prepare their implementing legislation.

Note that there are two key aspects of the Rome Statute that may require States Parties to adopt domestic implementing legislation:

- (a) The “complementary” jurisdiction of the ICC (articles 1 & 17); and
- (b) The obligation on States Parties to cooperate with the ICC in its investigations and prosecutions (article 86).

*(a) The “complementary” jurisdiction of the ICC*

The ICC will be “complementary” to national jurisdictions, only commencing its own proceedings where no State authority is willing and able to carry out a genuine prosecution of the same case (article 17). Most States would prefer to avoid the embarrassment of being found “unwilling or unable” to take their share of responsibility for prosecuting international crimes that fall within their jurisdiction, especially if their nationals are accused of such crimes. Therefore, many States are currently adopting legislation to ensure that their own authorities may prosecute the crimes within the jurisdiction of the ICC – genocide, crimes against humanity, and war crimes. This is not an obligation under the Rome Statute, however many States have pre-existing obligations under various international humanitarian law treaties to investigate and prosecute many of these crimes. By proscribing the crimes within the Rome Statute and other international humanitarian law treaties, these States are demonstrating that they are completely committed to ending the culture of impunity for these crimes.

With the entry into force of the Rome Statute, there is a new urgency for current States Parties to introduce these crimes into their national laws. Note that for current States Parties, the ICC has jurisdiction over any crimes committed from 1<sup>st</sup> July 2002. Even if the ICC is not in a position currently to investigate such crimes, because it is still being set up, in future it may decide to investigate and prosecute any crime committed on the territory of a State Party, or committed by a national of a State Party, from 1<sup>st</sup> July 2002. Therefore, current States Parties need to ensure that their criminal laws are in place as soon as possible, and preferably back-dated to 1<sup>st</sup> July 2002. However, many jurisdictions have a prohibition against retrospective enactment of criminal laws, so the law must recognise that the act in question was a crime in accordance with international and domestic law, as at 1<sup>st</sup> July 2002.

For non-States Parties intending to ratify in the future, the complementary jurisdiction of the ICC will apply to crimes committed on their territory or by their nationals approximately 2 months after deposit of the instrument of ratification/accession, once the Rome Statute has entered into force for that State (see paragraph 2, article 126). Therefore, criminal laws need to be enacted and enter into force within approximately 2 months of ratification/accession.

*(b) The obligation to cooperate*

Once the ICC has determined that it has the jurisdiction to investigate and prosecute a case, it will rely on national authorities in order to carry out many of the investigative tasks. Article 88, Rome Statute requires all States Parties to ensure that there are procedures available under their national law for all of the forms of cooperation set out under the Statute. The main areas of cooperation are: arrest and surrender of suspects (article 89), collection and preservation of evidence (including evidence of the proceeds of crimes) and protection of victims and witnesses (article 93). States Parties are also required to protect the privileges and immunities of Court personnel (article 48), and to introduce legislation proscribing offences against the administration of justice of the ICC, where committed by their nationals or on their territory (article 70). Thus, governments all over the world are rapidly preparing implementing legislation to empower their authorities in this regard, to ensure the effectiveness and efficiency of the ICC.

The recent entry into force of the Rome Statute is providing an incentive to accelerate the process of adopting such legislation. The actual means of cooperation will probably not be required until April or May next year. However, in order to cooperate with the ICC, some jurisdictions may have to recognise explicitly that the authority of the ICC to request assistance started on 1<sup>st</sup> July 2002, or whenever the treaty entered into force for that State. Otherwise, the request from the ICC for judicial assistance may be related to a crime that was allegedly committed before the national implementing legislation entered into force, which may cause technical problems in some jurisdictions.

**(iii) The potential impact of the position of the USA towards the Court, for current and intending States Parties -**

Recently there has been a great deal of publicity surrounding the negative position of the United States towards the ICC. The main concern of the US appears to be a perception that the ICC could be used to pursue politically-motivated prosecutions against US personnel providing military and peacekeeping assistance around the world. However, all of the US's NATO allies and most of the other States involved in international peacekeeping have concluded that the Rome Statute contains enough procedural checks and balances, to ensure that the ICC will not be involved in any politically-motivated prosecutions against their nationals. Where a State is concerned about a particular ICC investigation or prosecution, there are numerous avenues of appeal under the Rome Statute. Thus, the final decision to conduct a controversial ICC prosecution rests with the 5 judges who will comprise the Appeals Chamber, not with the ICC Prosecutor or any other organ of the Court (see articles 15, 17, 19, 39 and 83, Rome Statute). Since all ICC judges must be nationals of States Parties, and since all current States Parties are committed to the rule of law, the majority of the 5 judges of the Appeals Chamber will only represent legal systems that are based upon the rule of law, and thus are highly unlikely to base their decisions upon political considerations.

While President Clinton signed the Rome Statute on behalf of the United States on 31 December 2000, the Bush administration has concluded that it would not be in America's interests to ratify the Rome Statute, and in fact it is pursuing a policy which many view as undermining the Rome Statute.<sup>4</sup> Some of

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<sup>4</sup> Note that on 6 May 2002, the United States of America lodged a declaration with the UN Secretary-General, stating that it has no intention of ratifying the Rome Statute, and therefore believes it has no legal obligations arising from its signature on 31 December 2000. Under the *Vienna Convention on the Law of Treaties 1969*, once a State has signed a

the United States' decisions and actions have the potential to affect both current and intending States Parties to the Rome Statute.

*Implications for States receiving military and other assistance from the US -*

On 2 August 2002, President Bush signed into law the "American Servicemembers' Protection Act", contained in PL 107-206. Of most interest to foreign governments is section 2007, which prohibits United States military assistance to States Parties to the Rome Statute. Most of America's major allies are exempted from this provision, and the President retains the right to waive this provision with respect to a particular country if it is important to the national interest of the United States (paragraph a). However, many smaller States may be affected by this provision. In addition, the United States will be restricting its contributions to UN peacekeeping missions, wherever its troops may be exposed to the jurisdiction of the ICC (section 2005).<sup>5</sup>

At the same time, the United States is openly pursuing a policy of trying to negotiate bilateral agreements with all States, which would prevent those States from surrendering to the ICC any United States citizens, or anyone else involved in a US military or peacekeeping operation, including non-US civilian contractors. These agreements have been nicknamed "article 98" agreements, in reference to a provision in the Rome Statute upon which the United States is claiming to rely.

However, there are serious questions about the legality of these agreements in relation to the Rome Statute. Any State that has been approached by the US about one of these agreements needs to be aware of these concerns. To date, only 2 countries have agreed to enter such agreements with the United States – Israel and Romania. At the time of writing, Romania is receiving criticism from the European Union for having concluded such an agreement without waiting for the EU to finalise a common policy on these agreements, which will also influence those States hoping to accede to the European Union, including Romania.

Most ICC experts have suggested that entering such agreements is in violation of the treaty obligations of States Parties to the Rome Statute, and of the obligations of signatory States to the Rome Statute not to defeat the object and purpose of the Statute. The text of the "article 98" agreement which the US is proposing also goes far beyond the scope of article 98 of the Rome Statute, because article 98 is only meant to apply to persons who were subject to Status of Forces (SFOR) agreements at the time that the ICC offence was allegedly committed. The US is trying to extend article 98 to apply to all US personnel who were subject to any SFOR agreement at any time since 1<sup>st</sup> July 2002, as well as to anyone who has had a connection to a US military or peacekeeping operation, including nationals of States Parties to the Rome Statute. In addition, the US is trying to re-write extradition law, by removing the right of a State that has extradited a person to a particular State, to decide if the person should be re-extradited to another State. If a State concludes an "article 98" agreement with the US, that State would probably have to re-write all of its existing extradition treaties, in order to meet the requirements of the "article 98" agreement.

**This issue will be discussed amongst all States Parties at the first meeting of the Assembly of States Parties in September 2002, in order to clarify the legal position of these agreements in**

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treaty, it is obliged to refrain from acts which would defeat the object and purpose of the treaty, until the State makes its intention clear not to become a party to the treaty (article 18, 1155 UNTS; 8 ILM 679 (1969); in force 1980).

<sup>5</sup> An excellent section-by-section summary of this Act is available via the website of the NGO Coalition for the ICC (see reference above).

**relation to the Rome Statute. It is highly recommended that all States who support the integrity of the Rome Statute do not conclude “article 98” agreements with the US, until the Assembly of States Parties for the ICC is able to establish a common position on the legality of these agreements.**

*Implications for all States Parties to the Rome Statute*

The United States was also instrumental in negotiating Security Council Resolution 1422 of 12 July 2002, which purportedly relies upon the Council’s powers under Chapter VII of the Charter of the United Nations. Operative paragraph 1 of this Resolution effectively grants 12 months’ immunity to nationals of non-States Parties to the Rome Statute who have been involved in a “United Nations established or authorized operation” at any time since 1<sup>st</sup> July 2002, and who have committed crimes within the jurisdiction of the ICC, in relation to that operation (paragraph 1, S/Res/1422). This situation could arise where the national of a non-State Party allegedly commits an ICC crime relating to a “United Nations established or authorized operation” on the territory of a State Party (see paragraph 2 (a), article 12, Rome Statute). The Security Council Resolution further provides that this immunity from prosecution by the ICC may be renewed by the Security Council for a further 12 months on 1<sup>st</sup> July next year, and “for further 12-month periods for as long as may be necessary” (paragraph 2).

States Parties to the Rome Statute should note that paragraph 3 of Resolution 1422 requires all Member States of the United Nations to “take no action inconsistent with paragraph 1 and with their international obligations”. This wording was the result of intense negotiations, and is deliberately ambiguous. At first glance, it seems that States Parties must not cooperate with the ICC in respect of any investigations or prosecutions of nationals of non-States Parties who have committed crimes relating to their involvement in a “United Nations established or authorized operation” at any time since 1<sup>st</sup> July 2002. This would also be consistent with article 103, Charter of the United Nations, which provides that an obligation to cooperate with the Security Council, when the latter body is acting under Chapter VII of the UN Charter, prevails over any obligations under other international agreements, such as the Rome Statute. However, Security Council Resolution 1422 explicitly provides that States are allowed to act consistently with their “international obligations”, which would appear to include their obligations under the Rome Statute. Note that article 90, Rome Statute addresses the obligations of States Parties where they receive competing requests for the surrender or extradition of the same person, and where one of the requests is from the ICC. In general terms, the request from the ICC should be given priority in most cases.

Many notable jurists and several governments – most notably Canada, Brazil, New Zealand and South Africa – have suggested that Security Council Resolution 1422 goes beyond the authority of the Security Council, and therefore is unlawful. The issue may be taken up in the International Court of Justice, if a sufficient number of members of the United Nations General Assembly requests an advisory opinion (see article 65, UN Charter). The ICC may also decide to review the legality of the Resolution as it relates to the jurisdiction of the Court (see paragraph 1, article 119, Rome Statute).

**The first meeting of the Assembly of States Parties will also be discussing this issue in more detail, in order for ICC States Parties to arrive at a common position on the correct interpretation of the ambiguous wording of Resolution 1422.**

**All States Parties to the Rome Statute should endeavour to send a representative to the meetings of the Assembly of States Parties, so that the Assembly can take into account the views of all its**

**members, when taking these important decisions. All other interested States should also make every effort to be represented during these discussions.**

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*This document was prepared by Joanne Lee, LLM, Research Associate for ICCLR. Please do not hesitate to contact ICCLR if you would like more information on any of these topics. If you require more details on what is required for implementation of the Rome Statute, please refer to the documents on ICCLR's website, especially the "Manual for the Ratification and Implementation of the Rome Statute". Our website address is <http://www.icclr.ubc.ca>. If you have trouble downloading any of our documents, please let us know and we will send you a copy.*