

Introduction

The Preparatory Commission session, from July 26-August 13, 1999, addressed four issues. First, the working group on rules of procedure and evidence (WGRPE), under the chairmanship of Silvia Fernandez de Gurmendi of Argentina, discussed in formal and informal sessions rules relating to Parts 5 (Investigation and Prosecution), 6 (Trial) and 8 (Appeal and Review) of the Statute. A second working group on rules of procedure and evidence addressed Part 4 of the Statute (Organization and Administration of the Court) under the chairmanship of Medard R. Rwelamira of South Africa. Second, the working group on elements of crimes (WGEC), under the chairmanship of Herman von Hebel of the Netherlands, discussed in formal sessions article 8(2)(b) and (c) of the Statute, while concluding in informal sessions the discussion of grave breaches of the Geneva Conventions, which was started in the first session of the Preparatory Commission. Discussion of grave breaches as well as the discussion of other elements in the informal sessions was conducted under the chair of Prince Zeid Al-Hussein of Jordan. Third, informal consultations were carried out by Tuvaku Manongi, the Tanzanian coordinator, on the issue of aggression, who with assistance from the Canadian Chairman of the Preparatory Commission, worked out a schedule for a new working group on aggression for successive sessions. And fourth, Cristian Maquiera, the Chilean contact point, oversaw informal consultations relating to paragraph 4 of General Assembly resolution 53/105, on enhancing the effectiveness and acceptance of the Court.

I. Rules of Procedure and Evidence

The working group on rules of procedure and evidence virtually completed the initial formal discussions, held in formal sessions open to NGOs, on Part 4, the remaining rules in Part 5, Part 6 and Part 8. It was hoped initially that discussion of both Parts 5 and 6 would be completed by the end of Week 1, in order to proceed to discussion of Part 8 in Week 2, which was the last day that this working group met this session. The working group did not meet its goal of completing all three parts this session.

Part 4

The sub-working group held formal meetings, under Medard Rwelamira of South Africa as chair, discussing rules concerning serious misconduct and breach of duty, as well as less serious breach of duty by judges, the Prosecutor and the Registrar; grounds for excusing or disqualifying judges; death or resignation of judges; organization of the Court, including elections and qualifications of judges, the Prosecutor and the Registrar and the structure of divisions and Chambers of the

Court; the organization of the Offices of the Registrar and the Prosecutor; a proposed Office of Defense; and languages of the Court.

Formal working group meetings were held on Thursday, August 5, Friday, August 6, Monday, August 9 and Tuesday, August 10. The work was broken down into four clusters (see WGRPE(4)/DP.1 for more details):

- Cluster A on Rules relating to situations that may affect the functioning of the Court (i.e. misconduct of judges, the Prosecutor/Deputy Prosecutor, and Registrar/Deputy Registrar, and excuse, disqualification, death and resignation of judges)
- Cluster B on Rules relating to the organizations of the Court (i.e. on the Office of the Prosecutor, Office of the Registrar, replacement judges, divisions and chambers, plenaries, and election/qualifications/precedence of judges)
- Cluster C on defence counsel and victims and witnesses
- Cluster D on languages, texts, amendments and solemn undertakings

Informal meetings, chaired by Cate Steains of Australia, were held on Tuesday, August 10, Wednesday, August 11, and Thursday, August 12 on Cluster A (Rules relating to situations that may affect the functioning of the Court – “Serious misconduct and serious breach of duty”; “misconduct of a less serious nature”, “excuse and disqualification”; and “death and resignation”.) An informal rolling text was prepared by Australia, France, Spain, Venezuela and Colombia prior to the start of the informals, combining their various proposals. As of the end of the day on August 12, informal discussions had covered the definition of serious misconduct, serious breach of duty and misconduct of a less serious nature. In addition, discussion took place on how complaints would be dealt with (i.e. that they should be transmitted to the President of the Court, or to the First Vice-President if the complaint involves the President. Finally, discussion began on the rights of reply and defence of the person who is the subject of the complaint. Rather than issue a rolling text on August 13 regarding Cluster A, the chair of the Working Group issued a “Coordinator’s paper”, from which discussions will begin at the next session of the Preparatory Commission.

At the next session, informals on Cluster B.1, B.2, B.5 and B.6 will be coordinated by Gerard Dive of Belgium. Clusters B.3, rule 20(f) as proposed by Denmark, B.4 and D will be coordinated by Ms. Socorro Flores of Mexico.

Part 5

The bases for negotiations on Part 5 were several rolling texts from the February session of the Preparatory Commission. Many of these texts still proved controversial, as they set out many of the powers of the Prosecutor during the pre-trial phase and procedures for pre-trial detention.

Another sub-working group under Hakan Friman of Sweden discussed in informal meetings a rolling text concerning part 5. One of the main issues was the scope and timing of pre-trial disclosure, with many civil law jurisdictions wishing to require the defense to disclose whether it planned to raise an alibi defense and certain other defenses, as well as the names and statements of defense witnesses prior to the presentation of the prosecution's case and with many common law jurisdictions arguing that this requirement was inconsistent with the presumption of innocence.

At the end of the informal discussions, the coordinator produced a revised discussion paper that took into account the views of delegations (See PCNICC/1999/WGRPE/RT.6). Part 5 will not be discussed again until the June 2000 session of the Preparatory Commission.

Part 6

The basis for discussion of Part 6 was the "Siracusa document", entitled "A Discussion paper proposed by the Coordinator." This text was developed at an intersessional meeting, held in Siracusa, Italy, under the auspices of the International Institute of Higher Studies in Criminal Sciences, which involved around sixty government delegations and several representatives of the NGO Coalition for an International Criminal Court. The coordinator explained that there was no facility for Spanish translation at the Siracusa meeting, nor in the informals, so many Spanish-speaking delegations could only provide their input into the discussion of this Part during the formal discussions. A large number of other delegations also were not at the Siracusa meeting, so the formal discussion represented their first opportunity to comment on these rules, which many of them did at length. They also introduced many other discussion papers, as did some of the delegations that were at the Siracusa conference. Discussion proceeded in numerical order, with the most controversial rules at the beginning of the Siracusa document. This contributed to the slow pace of discussions at the beginning of Week 1.

Very little agreement was reached on many of the provisions of the Siracusa document during the formal discussions, so the coordinator did not produce any rolling text to reflect the views being expressed. This text was produced once informal discussions were completed, at the end of the Prepcom (see "Rolling texts produced as a result of discussion")

Part 8

Discussion of Part 8 commenced only 45 minutes before the working group on rules of procedure and evidence wound up formal discussions for this session. Australia and France had merged their previous proposals into two new proposals (DP.26 and 32). There was only time for very brief

discussion on the first of these proposals. Several technical amendments were proposed and the two delegations agreed to revise this text in the light of these. Informal discussions continued in Week 3 and formal debate will resume at the next session of the Preparatory Commission. See Discussion paper proposed by the Coordinator of 11 August 1999, PCNICC/1999/WGRPE/RT.7.

Other issues

Other issues which have been the subject of great discussion have included whether a witness can be compelled to testify on a confidential basis in the Court, despite the rule against self-incrimination, in exchange for an agreement by the Prosecutor not to prosecute. States have expressed concern that this could expose the witness to a risk of prosecution in a national court if the information leaked out that the witness had testified.

The proposals concerning the scope of responsibility of the Victims and Witnesses Unit adopted by the April seminar in Paris involving government and NGO experts, sponsored by the government of France, were favorably received by most delegations, although there have been differences over minor points. There was also widespread support for a proposal by the Netherlands, together with Canada, France and Germany, to establish an Office of Defense, although there has been considerable disagreement about the details. These issues were further discussed in informal sessions among the government delegations. Many of the Paris draft rules concerning participation of victims were adopted, but many delegations did not wish such participation to undermine the ability of the Prosecutor to conduct an effective prosecution and the rights of the accused to conduct a defense and not to be compelled to incriminate him or herself.

Documents

Documents pertaining to Part 4:

Proposal submitted by Australia--Draft Rules of Procedure and Evidence of the ICC,
PCNICC/1999/DP.1

Working paper submitted by France--comments on the proposal by Australia,
PCNICC/1999/DP.3

Report on the international seminar on victims' access to the ICC, PCNICC/1999/WGRPE/INF/2
Scheme of work for Part 4: PCNICC/1999/WGRPE(4)/DP.1

Proposal submitted by Canada, France, Germany and the Netherlands in connection with article
43 of the Rome Statute of the ICC concerning the Rules of Procedure and Evidence as regards
document PCNICC/1999/DP.1--Rule 38.a Defence Unit, PCNICC/1999/WGRPE(4)/DP.2

Proposal submitted by Canada, France, Germany and the Netherlands in connection with article
43 of the Rome Statute of the ICC concerning the Rules of Procedure and Evidence as regards
document PCNICC/1999/DP.1--Rule 38.a Responsibilities of the Registrar related to the defence,
PCNICC/1999/SGRPE(4)/DP.2/Rev.1

Proposal submitted by Denmark concerning Part 4, Section 2, of the Rules of Procedure and
Evidence--Inclusion of a new rule 20(f): "Alternate and substitute judges",
PCNICC/1999/WGRPE(4)/DP.3

Canadian proposals to PCNICC/1999/WGRPE/INF/2 of 6 July 1999--Workshop--Protection of
Victims and Witnesses, PCNICC/1999/WGPRE(4)/DP.4

Proposal submitted by Colombia, Spain and Venezuela concerning the Rules of Procedure and
Evidence--Official and Working Languages, PCNICC/1999/WGPRE/DP.8

Proposal submitted by Colombia, Spain and Venezuela concerning the Rules of Procedure and
Evidence--Reporting judge, PCNICC/1999/WGPRE/DP.9.

Proposal submitted by Spain and Venezuela concerning the Rules of Procedure and
Evidence--Replacements, PCNICC/1999/WGPRE/DP.10

Proposal submitted by Spain and Venezuela concerning the Rules of Procedure and
Evidence--Excusing and disqualification of judges, PCNICC/1999/WGRPE/DP.11

Proposal submitted by Spain and Venezuela concerning the Rules of Procedure and
Evidence--Disciplinary measures, PCNICC/1999/WGRPE/DP.12

Proposal submitted by Colombia concerning the Rules of Procedure and Evidence--Excusing and
disqualification, PCNICC/1999/WGRPE/DP.16

Proposal submitted by Italy concerning the Rules of Procedure and Evidence--Protection of
victims and witnesses[recommendations made on Workshop 3, INF/2],
PCNICC/1999/WGPRE/DP.21

Documents pertaining to Part 5:

France on recapitulation of the general outline proposed by France,
PCNICC/1999/WGRPE/DP.5

France on conduct of investigation and proceedings, PCNICC/1999/WGRPE/DP.7/Add.1/Rev.1

Proposals by France on pre-trial phase PCNICC/1999/WGRPE/DP.8/Add.1/Rev.1 &
PCNICC/1999/WGRPE/DP.8/Add.2/Rev.1

Documents pertaining to Part 6:

Costa Rica on RPE (February text, refers to 6.6), PCNICC/1999/WGRPE/DP.3

Siracusa rolling text (coordinators proposal), PCNICC/1999/WGRPE/RT.5

France on appeal, PCNICC/1999/WGRPE/RT.6

Colombia, Spain and Venezuela on official and working languages, PCNICC/1999/WGRPE/DP.8

Spain and Venezuela on replacements, PCNICC/1999/WGRPE/DP.10

Colombia on replacements under article 74, PCNICC/1999/WGRPE/DP.14

Colombia on part 6 (various), PCNICC/1999/WGRPE/DP.15

Italy on evidence, investigation and the rights of the accused, PCNICC/1999/WGRPE/DP.18

Australia on Rules 88, 88bis, 89, 89bis, PCNICC/1999/WGRPE/DP.19

Italy on protection of victims' and witnesses' identity, PCNICC/1999/WGRPE/DP.20

Italy on protection of victims and witnesses, PCNICC/1999/WGRPE/DP.21

Croatia on Rule 6.9, PCNICC/1999/WGRPE/DP.22

Croatia on Rule 6.6, PCNICC/1999/WGRPE/DP. 23

Colombia on RT.5, PCNICC/1999/WGRPE/DP.24

Australia and France on appeal, PCNICC/1999/WGRPE/DP.26

Colombia on RT.5, PCNICC/1999/WGRPE/DP.30

France on DP.19, PCNICC/1999/WGRPE/DP. 34

Documents pertaining to jurisdiction over Article 70 & 71 Offences against the integrity of the
Court:

Italy on Rules relating to article 70, PCNICC/1999/WGRPE/DP.17

Austria on Rule 6.29, PCNICC/1999/WGRPE/DP. 25

The Netherlands on rule 6.26, PCNICC/1999/WGRPE/DP. 27

Polish proposal on rule 6.26, PCNICC/1999/WGRPE/DP. 29

The Netherlands & Poland on rule 6.26, PCNICC/1999/WGRPE/DP.31

Colombia on rule 6.26, PCNICC/1999/WGRPE/DP.36

Documents on Part 8:

France on Appeals procedure, PCNICC/1999/WGRPE/DP.6

France on revision procedure, PCNICC/1999/WGRPE/DP.13

Australia and France on appeals, PCNICC/1999/WGRPE/DP.26
Australia and France on revision, PCNICC/1999/WGRPE/DP.32
Discussion paper, PCNICC/1999/WGRPE/RT.7

Other documents:

France on compensation, PCNICC/1999/WGRPE/DP.7 &
PCNICC/1999/WGRPE/DP.7/Add.1/Rev.1
France on Provisions common to different stages of the proceedings,
PCNICC/1999/WGRPE/DP.10/Add.1

Documents with amendments as a result of discussions:

Proposed amendment to rule 6.2, PCNICC/1999/WGRPE/DP.28
Amendments to Rules 6.7, 6.17, 6.18, 6.21, 6.22, 6.23, PCNICC/1999/WGRPE/DP.33

Rolling texts produced as a result of discussion

Discussion paper on rules 6.1 to 6.9 and 6.26 to 6.42, PCNICC/1999/WGRPE/RT.5/Rev.1
Discussion paper on Rules 6.10 to 6.25, PCNICC/1999/WGRPE/RT.5/Rev.1/Add.1/Corr.1
Discussion paper on Rule 6.9, PCNICC/1999/WGRPE/RT.5/Rev.1/Add.2
Discussion paper on Rule 6.31, PCNICC/1999/WGRPE/RT.5/Rev.1/Add.3
Discussion paper on Part 5, PCNICC/1999/WGRPE/RT.6

II. Elements of Crimes

Article 9(1) of the Rome Statute states that “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8”. Article 6 of the Rome Statute contains the definition of genocide, article 7 contains the definition of crimes against humanity and article 8 the definition of war crimes. This last definition is basically divided into four parts: article 8(2)(a) covers grave breaches under the four Geneva Conventions applicable in international armed conflict, article 8(2)(b) covers other serious violations of the law and customs applicable in international armed conflict, article 8(2)(c) deals with serious violations of common Article 3 to the four Geneva Conventions and article 8(2)(e) deals with other serious violations of the laws and customs applicable in non-international armed conflict.

In the first session of the Preparatory Commission, the working group on the elements of crimes dealt with the elements of crimes for article 6 and article 8(2)(a). That session ended with rolling texts issued by the coordinator of the working group for the elements of genocide and the

elements of three grave breaches: (i) wilful killing, (ii) torture, inhuman treatment, including biological experiments and (iii) wilfully causing great suffering or serious injury to body or health.

From the start of the second session of the Preparatory Commission, the coordinator of the working group on the elements of crimes proposed that this session's work be grouped into four clusters: humanitarian/human rights provisions, Hague law provisions, conduct of hostilities provisions and weapons provisions.

Discussions began with the rest of the grave breaches ((iv) extensive destruction and appropriation of property..., (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile power, (vi) wilfully depriving a prisoner of war or other protected

person of the rights of fair and regular trial, (vii) unlawful deportation or transfer or unlawful confinement and (viii) taking of hostages) were taken up in informals.

In the first week of the second session the working group discussed in formal sessions and after that negotiated in informal sessions the elements of crimes under 8(2)(c), serious violations of common Article 3 of the Geneva Conventions and the elements of crimes under 8(2)(b), other serious violations in international armed conflict. Basic documents for the discussions are proposals for the elements by the United States, proposals for the elements by Costa Rica, Hungary and Switzerland and partly proposals made by Japan. The International Committee of the Red Cross provided important analytical background studies on which the proposals by Costa Rica, Hungary and Switzerland drew heavily.

By the end of the second session, the coordinator of the working group released rolling texts on all of article 8(2)(a)(grave breaches of the Geneva Conventions), on article 8(2)(b)(xxii)(crimes of sexual violence), on article 8(2)(b)(xiii-xvi) and (xxvi); on article 8(2)(b)(x) and (xxi), on article 8(2)(b)(i-iii)(relating to the conduct of hostilities), on article 8(2)(b)(vi), (vii), (xi) and (xii)(Hague law), and on article 8(2)(c)(article 3 common to the Geneva Conventions). The group reached "general agreement" on 37 of the 48 war crimes, although notably the weapons provisions, the provisions on collateral damage, and the provisions addressing transfer of civilian populations of the Statute have not yet been addressed in the rolling texts. These provisions, as well as those concerning other violations during internal armed conflict, including the thresholds for internal armed conflict, are to be discussed at the December session of the Preparatory Commission.

Documents

ICRC study, PCNICC/1999/INF.1
Coordinator's paper, PCNICC/1999/L.3/Rev.1
US paper on terminology, PCNICC/1999/DP.4 (USA withdrew this paper in light of the compromise US-Swiss proposal)
US paper on war crimes, PCNICC/1999/DP.4/Add.2 (also withdrawn)
compromise US-Swiss proposal on Article 8(2)(a)(iv) to (viii)(No PCNICC number)
Costa Rican, Hungarian and Swiss paper on article 8(2)(b)(viii), (x), (xiii), (xiv), (xv), (xvi), (xxi), (xxii), (xxvi), PCNICC/1999/WGEC/DP.8
Spanish paper on article 8(2)(b), PCNICC/1999/WGEC/DP.9
Costa Rican, Hungarian and Swiss paper on article 8(2)(c), PCNICC/1999/WGEC/DP.10
Costa Rican, Hungarian and Swiss paper on article 8(2)(e)(v), (vi), (vii), (viii), (xi), (xii), PCNICC/1999/WGEC/DP.11
Japanese paper on Article 8(2)(b)(i) to (xvi), PCNICC/1999/WGEC/DP.12

Belgian paper on Article 8(2)(c)(iv), PCNICC/1999/WGEC/DP.13
Belgian paper on enforced sterilization, PCNICC/1999/WGEC/DP.14
Discussion paper proposed by the Coordinator: Article 8(2)(a), PCNICC/1999/WGEC/RT.4 (RT=rolling text)
Discussion paper proposed by the Coordinator: Article 8(2)(c), PCNICC/1999/WGEC/RT.5/Rev.1
Discussion paper proposed by the Coordinator: Article 8(2)(b)(xxii), PCNICC/1999/WGEC/RT.6
Discussion paper proposed by the Coordinator: Article 8(2)(b)(xiii)-(xvi) and (xxvi), PCNICC/1999/WGEC/RT.7
Discussion paper proposed by the Coordinator: Article 8(2)(b)(x) and (xxi), PCNICC/1999/WGEC/RT.8
Discussion paper proposed by the Coordinator: Article 8(2)(b)(i)-(iii), PCNICC/1999/WGEC/RT.9
Discussion paper proposed by the Coordinator: Article 8(2)(b)(vi), (vii), (xi) and (xii)

III. Aggression

On August 9, the Canadian Chairman of the Preparatory Commission presented the Bureau's proposal for a working group on the crime of aggression, which the delegates to the Preparatory Commission accepted without debate. First, the working group will be established at the outset of the next session of the Preparatory Commission. Second, at the next and following sessions of the Preparatory Commission, the plenary that is traditionally held on Monday mornings will be maintained but will be significantly shorter and essentially limited to brief reports by the

coordinators. Third, each of the Monday morning plenary meetings will be followed by a meeting by the working group on the crime of aggression until the end of the morning. Fourth, informal consultations will be conducted at other times on the crime of aggression as possible and appropriate, it being understood that this will be without prejudice to the work on subjects that must be completed by June 30, 2000.

IV. Paragraph 4 of General Assembly Resolution 53/105

A particularly notable element of the session was the constructive engagement of the United States delegation in drafting the rules and elements. There was speculation whether this signaled a possible shift in Washington's opposition to the Court. In addition to participating in the formal and informal meetings of the Preparatory Commission, the American delegation also held (according to its head, Ambassador David Scheffer) some forty-five bilateral meetings with other national representatives. According to those who met with the American delegation, it is still not

clear what accommodation the United States wants in exchange for support for the ICC. But the message back to Washington is that there will be no reopening of the negotiations on the Rome Statute. As one delegate put it, "time is on our side. With each additional signature and ratification, it will become more difficult for the Americans to find delegations willing to accommodate their requests." That appears to be the view of the informal grouping of more than sixty "Like-Minded" states which continue to play a key role in the push to create the ICC.