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Co-operation with the International Criminal Court (ICC) and its universality

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Herta DÄUBLER-GMELIN, Germany

Summary

The Committee on Legal Affairs and Human Rights reiterates its firm commitment to the International Criminal Court (ICC). The ICC is the first ever permanent, independent judicial institution with jurisdiction over individuals accused of genocide, crimes against humanity and war crimes. The ICC is based on complementarity, seeking to empower nation states to investigate and prosecute such crimes, assuming jurisdiction only as a last resort.

The committee reiterates its belief that the universal ratification of the Rome Statute and its effective implementation into domestic systems as well as close co-operation by states and non-states parties in providing practical and judicial assistance to the ICC are of key importance for the fight against impunity.

It welcomes the fact that since its adoption in 1998, the Rome Statute of the ICC has been ratified by 108 states across the world. Regrettably, eight Council of Europe member states (Armenia, Azerbaijan, the Czech Republic, Moldova, Monaco, Russian Federation, Turkey and Ukraine), one Council of Europe observer state (the United States) and one observer state with the Parliamentary Assembly (Israel) have not yet ratified the Rome Statute.

The committee calls on all member states and those having observer status with the Council of Europe or the Parliamentary Assembly to ratify themselves and/or actively promote universal ratification of the Rome Statute and the Agreement on Privileges and Immunities of the ICC, and to fully co-operate with the ICC in the fight against impunity for the most serious crimes of international concern.

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A. Draft resolution

1. Recalling its Resolutions 1300 (2002) and 1336 (2003), the Parliamentary Assembly reiterates its firm commitment to the International Criminal Court (ICC). The ICC is the first ever permanent, independent judicial institution with jurisdiction over individuals accused of genocide, crimes against humanity and war crimes. The ICC is based on complementarity, seeking to empower nation states to investigate and prosecute such crimes, assuming jurisdiction only as a last resort.

2. Recalling Recommendation 1408 (1999), the Assembly reiterates its belief that the universal ratification of the Rome Statute and its effective implementation into domestic systems, as well as close co-operation by states and non-states parties in providing practical and judicial assistance to the ICC, are of key importance for the fight against impunity.

3. The Assembly welcomes the fact that since its adoption in 1998, the Rome Statute of the ICC has been ratified by 108 states across the world. Regrettably, eight Council of Europe member states (Armenia, Azerbaijan, the Czech Republic, Moldova, Monaco, Russian Federation, Turkey and Ukraine), one Council of Europe observer state (the United States) and one state with observer status with the Parliamentary Assembly (Israel) have not yet ratified the Rome Statute.

4. The Assembly also recalls the importance of the Agreement on the Privileges and Immunities of the International Criminal Court, which is indispensable for the ICC's independent operation. Regrettably, to date, 14 Council of Europe member states have not ratified the Agreement, including seven countries which are states parties to the Rome Statute (Bosnia and Herzegovina, Georgia, Malta, Poland, San Marino, Spain and Switzerland).

5. The Assembly therefore urges those Council of Europe member and observer states and Parliamentary Assembly observer states which have not yet done so to:

5.1. sign and ratify without further delay the Rome Statute and the Agreement on the Privileges and Immunities of the ICC;

5.2. adopt effective national implementing legislation at the earliest opportunity and encourage third states to do so;

5.3. protect the integrity of the Rome Statute as recommended in Resolutions 1300 (2002) and 1336 (2003).

6. In addition, the Assembly recommends that Council of Europe member and observer states and the Parliamentary Assembly observer states:

6.1. fully co-operate with the ICC in the fight against impunity for the most serious crimes of international concern;

6.2. empower their judicial and law enforcement authorities in order to exercise the states' primary jurisdiction over crimes within the purview of the ICC;

6.3. make meaningful financial contributions to the ICC's Trust Fund for Victims;

6.4. incorporate in their legal orders relevant standards on victims' rights, without prejudice to existing higher standards in some Council of Europe member and observer states and Parliamentary Assembly observer states.

B. Explanatory memorandum, by Mrs Herta Däubler-Gmelin

1. Introduction

"The best chance humankind has ever had to end the 'culture of impunity' is within our grasp. We must not let it fall."[1]

1. This report stems from a motion for a resolution (Assembly Doc. 11032) tabled by Mrs Däubler-Gmelin and others on co-operation with the International Criminal Court (ICC) and its universality, dated 26 September 2006, appealing to Council of Europe member and observer states, *inter alia*, to ratify the Rome Statue and other enabling legal instruments, and urging "all states to fully co-operate with the court in the fight against impunity for the most serious crimes of international concern."[2]

2. The Rome Statute of the International Criminal Court (ICC, the court), which entered into force on 1 July 2002, is widely considered to be one of the most significant accomplishments in the development of international criminal law. It set up the first ever permanent, independent judicial institution with jurisdiction over individuals for the commission of genocide, crimes against humanity and war crimes.[3] Such optimism is reflected in the preamble of the Rome Statute of the ICC,[4] which endeavours to punish "the most serious crimes of concern to the international community as a whole", and pledges "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes." The preamble further aims to promote effective prosecution by "taking measures at the national level and by enhancing international co-operation" and stresses "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." As a result, states have been accorded an important role in the system of international criminal justice under the auspices of the ICC.

3. Since its adoption in 1998, the Rome Statute of the ICC has been ratified by 108 states from all over the world.[5] The ICC's method of creation is unprecedented in the sense that it was created by an international treaty by states themselves, ensuring "that the court broadly reflected the aspirations and objectives of the international community."[6] Unfortunately, a number of states have still not ratified the Rome Statute, with pronounced regional disparities. Africa is the most strongly represented region, while central Asia and the Middle East are still under-represented among ICC states parties (for a list of ratifications by countries and regions, please consult the websites www.icc-cpi.int and www.iccnow.org).[7] The fact that many states are not party to the Rome Statute, including eight Council of Europe member states (Armenia, Azerbaijan, the Czech Republic, Moldova, Monaco, Russian Federation, Turkey and Ukraine), one Council of Europe observer state (the United States)[8] and one observer state with the Parliamentary Assembly (Israel) underpins the need for

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1. Kofi Annan, former Secretary-General of the United Nations, statement at the opening of the Preparatory Commission for the International Criminal Court, New York, 16 February 1999.
2. PACE motion for a resolution on co-operation with the International Criminal Court (ICC) and its universality, Doc. 11032, 26 September 2006, paragraph 11.*a*.
3. Coalition for the International Criminal Court (CICC) is a global network of over 2 000 NGOs promoting a fair, effective and independent International Criminal Court overview. The informal Steering Committee of the CICC is made up of a core group of NGOs, including Amnesty International, Human Rights Watch, Parliamentarians for Global Action, and a number of other well-known NGOs.
4. Rome Statute of the ICC. The Rome Statute entered into force on 1 July 2002, following the ratification of 60 states. The Rome Statute is an international treaty, and only those states which have formally ratified it are bound by its terms. Along with the Rome Statute, the Rules of Procedure and Evidence, the Elements of Crimes, and the Regulations of the Court adopted by the judges, constitute the basic legal documents of the court. See also: Otto Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, and Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge, Cambridge University Press, 2003.
5. ICC Newsletter, "Universality of the Rome Statute: the role of the ICC", Issue No. 13, February-March 2007. Of the 108 states parties, 30 are from Africa, 25 are from western Europe and other states, 23 are from Latin America and the Caribbean, 16 are from eastern Europe, and 14 are from Asia (*source*: ICC website).
6. Philippe Kirsch, "The International Criminal Court: A New and Necessary Institution Meriting Continued International Support" (2005), *Fordham International Law Journal*, Vol. 28 (2), pp. 294 and 295.
7. ICC Newsletter, *supra* note 5. See non-paper by the CICC, May 2007, dealing with the co-operation between the Council of Europe and the ICC, p. 2.
8. See in this context, PACE report, "The United States of America and international law", Doc. 11181, Committee on Legal Affairs and Human Rights, 8 February 2007, adopted by the PACE Standing Committee, in particular paragraph 3.3. For a detailed contribution on the US position, see: Robert C. Johansen, "The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity" (2006), *Human Rights*

continued efforts to promote ratification worldwide by "cultivating awareness and understanding of the court's functions"[9] and to support the ICC by encouraging the implementation of domestic legislation consistent with the Rome Statute.[10]

4. Philippe Kirsch, President of the ICC, attributes some countries' reticence towards the ICC to a lack of understanding of the court and its role.[11] He believes, "[t]he more that people understand that the court is a necessary and a credible institution, the more that support for its mission and its operation will grow."[12]

5. The fact that the Rome Statute entered into force only four years after its constitutive framework was negotiated is indicative of the intense efforts made to promote the ICC globally. Aside from the important contribution of non-governmental organisations, many international and intergovernmental organisations, including the Council of Europe, have played an active role in encouraging the universal ratification of the Rome Statute.[13] According to the Coalition for the International Criminal Court (CICC), the Council of Europe has "been among the *very first* international organisations to call for the creation of a permanent international criminal court."[14] In particular, the vast array of resolutions and recommendations of the Assembly on this matter demonstrates its interest in this institution.[15] In addition, the Assembly's Sub-Committee on Crime Problems and the Fight against Terrorism has engaged in dialogue with high-ranking officials of the ICC in April 2006.[16] The Committee on Legal Advisers on Public International Law (CAHDI) has organised four major consultations with Council of Europe member states on the implications for the latter of the ratification of the Rome Statute and has regularly advocated the implementation of the Rome Statute into national legislation.[17] The Venice Commission has examined the constitutional issues raised by the ratification of the Rome Statute.[18] In light of its demonstrated commitment to the ICC, and its relationship with those member or observer states of the Council of Europe and the observer state of the Parliamentary Assembly which have not ratified the Rome Statute to date, the Council of Europe must continue to promote its ratification and effective implementation.

6. The ICC's Assembly of States Parties (ASP)[19] has recently reiterated its plea to states parties "to proactively promote universality and full implementation", in all their contacts, political and otherwise, including through bilateral and regional relationships with nonstates parties, regional groups and regional organisations.[20] It further urges states parties to intensify their own commitment to the ICC "so as to ensure a strong, effective and efficient institution and thereby encourage other states to join."[21]

Quarterly, Vol. 28 (2), 301. See further: Amnesty International, "International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes", AI Index: IOR 40/025/2002, August 2002. See in this context: CICC, "Status of US Bilateral Immunity Agreements (BIAs)". As of 2 August 2006, the US Department of State reports that it has concluded 101 agreements; see also: CICC Factsheet, "Overview of the United States' Opposition to the International Criminal Court".

9. Kirsch, "A New and Necessary Institution", *supra* note 6, p. 307.
10. Kirsch, ibid., p. 307.
11. ICC Newsletter, *supra* note 5.
12. Kirsch, "A New and Necessary Institution", *supra* note 6, p. 307.
13. ICC Newsletter, op. cit. Other organisations include: the United Nations General Assembly, the Organisation of American States, the African Union and the European Union. As regards the European Union, see in particular: Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court, *Official Journal of the European Union*, L 150/67, 18 June 2003 and Action Plan to Follow-up on the Common Position on the International Criminal Court. See also: Amnesty International: "The need for the European Union to take more effective steps to prevent members from signing US impunity agreements", AI Index: IOR 40/030/2002, October 2002. See further, Wellington Resolution on the International Criminal Court (ICC), Multilateralism and International Co-operation, 7 December 2004.
14. CICC Non-paper, *supra* note 7, p. 1. See in this context PACE Recommendation 1189 (1992) on the establishment of an international court to judge war crimes (emphasis added).
15. PACE Resolution 1300 (2002) on risks for the integrity of the Statute of the International Criminal Court; PACE Resolution 1336 (2003) on threats to the International Criminal Court; PACE Recommendation 1408 (1999) on the International Criminal Court. In addition, human trafficking, including trafficking in women, is a crime within the jurisdiction of the ICC. In this context, see: PACE Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; PACE Recommendation 1545 (2002), on the campaign against trafficking in women; and Recommendation 1610 (2003) and its Resolution 1337 (2003) against trafficking in women.
16. PACE secretariat, synopsis of the meeting of the Sub-Committee on Criminal Problems and the Fight against Terrorism (Committee on Legal Affairs and Human Rights), in The Hague on 27 and 28 April 2006, with Mr Bartumeu Cassany (Andorra, SOC) in the chair, 10 May 2006. Meeting held in camera.
17. See CAHDI website. See further, the national progress reports resulting from the consultation process.
18. Venice Commission report on constitutional issues raised by ratification of the Rome Statute of the International Criminal Court, CDL-INF (2001) 1, 15 January 2001.
19. The Assembly of States Parties is the ICC's management oversight and legislative body. See generally: Daryl A. Mundis, "The Assembly of States Parties and the Institutional Framework of the International Criminal Court", *American Journal of International Law*, Vol. 97, No. 1 (January 2003), pp. 132-147.

7. A brief examination of the court's structure and co-operation regime may contribute to eliminate the misconceptions which fuel the reticence that ultimately stands in the way of ratification by some countries, including Council of Europe member states and an observer state and a Parliamentary Assembly observer state. By way of example, the position of the United States towards the ICC, which has asserted that the ICC is over-broad in its potential exercise of jurisdiction over non-state party nationals, reflects a misunderstanding both of the Rome Statute and of existing state practice – including its own – under international law and international treaties.[22] In addition, such an overview will underscore the vital role of the ICC on a global scale and the urgent need for universal ratification. As stated by the ASP, "[u]niversality of the Rome Statute of the International Criminal Court is imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern, contribute to the prevention of such crimes, and guarantee lasting respect for and enforcement of international justice."[23] Aside from ratification, "[f]ull and effective implementation of the Rome Statute by all states parties is equally vital to the achievement of these objectives."[24] Such implementation should include enabling legal instruments, notably the Agreement on Privileges and Immunities of the ICC (APIC), which bestows certain privileges and immunities on ICC officials and staff as are necessary for the independent and effective performance of their duties.[25] To date, 14 Council of Europe member states have not ratified the APIC, including seven countries which are states parties to the Rome Statute (Bosnia and Herzegovina, Georgia, Malta, Poland, San Marino, Spain and Switzerland). Interestingly, Ukraine has ratified the APIC without being as yet party to the Rome Statute. I am pleased that the Netherlands as the ICC's host state finally ratified the agreement in August 2008.

2. Jurisdictional ambit of the International Criminal Court (ICC)

2.1. Subject matter jurisdiction (ratio materiae)

8. Article 5.1 of the Rome Statute, supplemented by an auxiliary instrument which provides a comprehensive catalogue of the elements of crimes,[26] sets out the core crimes over which the ICC has jurisdiction: genocide, crimes against humanity, war crimes, and after formulation of a definition, the crime of aggression.[27] The Rome Statute's preamble recognises these crimes as "the most serious crimes of concern to the international community as a whole."[28] The crime of aggression (and the lack of a definition thereof to date) has garnered much debate and could represent a possible reason for states not to ratify the Rome Statute.[29] It appears, however, that it is not so much the definition of the crime of aggression itself but rather the question about the court's jurisdiction over that crime, and its relationship to the UN Security Council,[30] which is creating continued challenges.[31] In particular, after the Rome Conference of 1998, the "great powers"

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20. ICC Newsletter, *supra* note 5. Draft plan of action of the Assembly of States Parties for achieving universality and full implementation of the Rome Statute of the International Criminal Court, annex to the "Report of the Bureau on Ratification and Implementation of the Rome Statute and on Participation in the Assembly of States Parties", ICC-ASP/5/26, 17 November 2006, paragraph 4 ff. (ASP draft plan of action); See also: Strategic Plan for Outreach of the International Criminal Court, ICC-ASP/5/12, 29 September 2006 and ICC's Integrated Strategy for External Relations, Public Information and Outreach.
21. ASP draft plan of action, Annex, ibid., paragraph 5.
22. Human Rights Watch, "The ICC Jurisdictional Regime; Addressing US Arguments".
23. ASP draft plan of action, Annex, *supra* note 21, paragraph 1.
24. ASP draft plan of action, Annex, ibid., paragraph 2.
25. Agreement on the Privileges and Immunities of the International Criminal Court (APIC), adopted by the Assembly of States Parties, 3-10 September 2002, Official Records ICC-ASP/1/3. The APIC came into force on 22 July 2004 for the countries having ratified it. As of 6 February 2007, 48 countries have ratified this agreement (*source*: CICC website).
26. Elements of Crimes, *supra* note 4.
27. Article 5.2 stipulates that: "The court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. …" At the 1998 Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC in Rome, a definition of aggression was not agreed upon, leading to the creation of a Special Working Group on the Crime of Aggression in 2002.
28. Preamble to the Rome Statute, *supra* note 4, paragraph 9.
29. Muhammed Aziz Shukri, "Will Aggressors Ever be Tried Before the ICC?", in: *The International Criminal Court and the Crime of Aggression*, Mauro Politi and Guiseppe Nesi (eds.), Aldershot, Ashgate, 2004, p. 41. See also: Mauro Politi, "The Debate within the Preparatory Commission for the International Criminal Court", and Mohammed M. Gomaa, "The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime" in: *The International Criminal Court and the Crime of Aggression*, op. cit.
30. The definition must set out the specific conditions under which the court shall have jurisdiction with respect to the crime of aggression as per Article 5.2. As noted by Politi, "[w]hen we speak about conditions, we intend to refer essentially to the relationships between the court and the Security Council: namely to the issue of it, and to what extent, the functions of the court with regard to the crime of aggression will depend upon the determination by the Security Council, under

(and permanent members of the Security Council) continued to voice their fears about the court becoming a politically motivated propaganda tool which could condemn even legitimate use of force in line with the UN Charter.[32]

9. Despite the continued difficulties in agreeing on a definition of the crime of aggression, the Rome Statute is in full force as regards the other crimes under its jurisdiction. Although these crimes are embedded in a variety of international conventions and international customary norms,[33] the Rome Statute is a more progressive reflection of current trends and developments in international customary law. Aside from reconsidering a number of prerequisite elements of international crimes, the Rome Statute has been groundbreaking in criminalising some acts for the very first time, as illustrated by the gender-based crime provisions. In contrast to the statutes governing the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Rome Statute deals comprehensively with gender-based crimes.[34] For the first time, various acts of genderbased violence are defined as international crimes in their own right rather than merely as offences against honour and dignity. Significantly, the Rome Statute contains the first codification of the crimes of forced prostitution and sexual slavery in the international sphere. As Bedont and Hall-Martinez point out, "[t]he Rome Statute represents a significant step in overcoming the discriminatory and inadequate treatment of sexual violence under international law."[35] The Rome Statute's progressiveness is exemplified by the notion that "[i]t is not anymore acceptable to argue that, in the absence of the express criminalisation of this conduct under domestic law, it is illegitimate to make findings as of their binding nature to a given case directly under international law."[36]

10. These advanced provisions echo the preamble's optimism and determination. They further serve as an important guide for the prosecution by national jurisdictions of crimes within the jurisdiction of the ICC. However, the fact that numerous states have either not ratified the Rome Statute or have not adequately brought their domestic legislation in line with the Rome Statute, is problematic in so far as it promulgates a dissimilar definition of crimes and, as a result, an incongruent prosecutorial standard between the ICC and national criminal jurisdictions.[37]

11. A pertinent illustration of the foregoing assertion is the crime of torture. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as requiring a purpose and a state action component ("for such purposes as obtaining … information or a confession", punishment, intimidation, coercion, "or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").[38] By contrast, the Rome Statute has done away with both elements, Article 7.2.*e* extending to acts which could be "purposeless or merely sadistic"[39] and requiring only that the victim be "in the custody or under the control of the accused."[40] Burgers and Danelius note that the UN

Article 39 of the UN charter, that a state has committed aggression. … This is indeed a problem that touches upon the institutional balance between the judiciary functions of the court and the political prerogatives of the Council under the UN charter." *The International Criminal Court and the Crime of Aggression*, op. cit. pp. 46 and 48.

31. Press conference, by the Chairman of the Working Group on Crime of Aggression, New York, 31 January 2007.

32. *The International Criminal Court and the Crime of Aggression*, *supra* note 30, at p. 45.

33. Kirsch, "A New and Necessary Institution", *supra* note 6, at p. 295. Kirsch notes that "these categories of crimes are accepted to be part of customary international law. However, with the exception of genocide, there was no single, comprehensive treaty defining these offences in full. … The resultant Statute is a more extensive codification of the customary international law crimes than that provided by any previous international criminal tribunal."

34. Article 7 (setting out the elements of crimes against humanity) enumerates a broad range of gender-specific crimes, including in Article 7.*g* "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity."

35. Barbara Bedont and Katherine Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", (1996) 6, *The Brown Journal of World Affairs*, 65 at p. 72.

36. Flavia Lattanzi, "The International Criminal Court and National Jurisdictions", Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues*, *Negotiations, Results*, The Hague, Kluwer Law International, 1999, at p. 187.

37. See in this context, Human Rights Watch, "Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute" (2001), Vol. 13, No. 4(G). See also: Amnesty International, "International Criminal Court: The failure of states to enact effective implementing legislation", AI Index: IOR 40/019/2004, September 2004. The report documents frequent problems encountered in the draft legislation prepared by national jurisdictions.

38. UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 46, UN GAOR, 30th Session, Supp. No. 51, at p. 197, 23 UN Doc. A/39/51, I.L.M. 1027 (1948), as modified, 24 I.L.M. 535 (1985). *Punishment*, The Hague, Kluwer Academic Publishers, 1998.

39. Human Rights Watch, "Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute" (2001), Vol. 13, No. 4(G) at p. 28.

40. Rome Statute, Article 7.2.*e*.

convention was primarily motivated by the need to capture state sponsored violence against its citizens, which had increased during the 20th century.[41] A growing realisation on the part of the international community that torture is in the meantime commonly engaged in by belligerents during internal and international armed conflicts has influenced the definition of the Rome Statute. The Rome Statute's comprehensive understanding of torture therefore more adequately captures the nature of the crime in that it "better reflects the how and by whom torture is committed."[42]

12. Where a country is either not party to the Rome Statute or has not implemented the Rome Statute and its subsidiary instruments into its domestic legislation, a suspect tried before a national court is in less jeopardy than before the ICC for the same act because the national definition of torture is restricted by the purpose for which it is committed and the status of the perpetrator. This shows that ratification must be followed by proper implementation of the Rome Statute in national law. Although a small number of ICC states parties have aligned their domestic laws with the Rome Statute, the majority of states parties have made little if any progress in this matter.[43] As stressed by President Kirsch, "[i]n order for the principle of complementarity to work, national jurisdictions need to adopt domestic legislation prohibiting crimes within the jurisdiction of the court."[44]

2.2. Temporal jurisdiction (ratione temporis)

13. Contrary to its ad hoc predecessors, the ICTY and ICTR, which are both temporally and geographically constrained, the ICC's reach is broader because it is permanent, the crimes over which it has jurisdiction are not confined to a particular region, and its jurisdiction is prospective rather than retrospective.[45] The court's jurisdictional ambit is limited to events from 1 July 2002 onwards, the date of its entry into force. However, where a country becomes state party after such date, the ICC only has jurisdiction for that state from the date of ratification, unless the country accepts jurisdiction of the court for the period prior thereto (Rome Statute, Article 11.2), but in no case before 1 July 2002.[46] Under Article 12.3 of the Rome Statute, ICC jurisdiction extends to non-states parties, which have accepted the jurisdiction.

2.3. Triggering mechanisms

14. There are three principle ways in which a case may be brought before the ICC (Rome Statute, Article 13).

15. Firstly, states parties may refer a situation to the court (Rome Statute, Article 14). Two cases currently before the ICC, relating to crimes committed on the territory of northern Uganda and the Democratic Republic of Congo, were initiated in this manner.[47] Most recently, an investigation was launched in the Central African Republic following a referral by the government of that state.

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41. J. Herman and H. Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, The Hague, Kluwer Academic Publishers, 1998.
42. Human Rights Watch, "Making the ICC Work", *supra* note 39 at pp. 17 and 28.
43. CICC non-paper, *supra* note 7, at p. 3.
44. Kirsch, "A New and Necessary Institution", *supra* note 6, at p. 300. See also the CICC website for concrete guidance to implementing legislation, as well as examples of certain countries implementing legislation. See also: Amnesty International, "The International Criminal Court: Summary Checklist for Effective Implementation", AI Index: IOR 40/15/00, 1 August 2000, and Amnesty International, "International Criminal Court: Guidelines for Effective Implementation of the Rome Statute – Introduction", AI Index: IOR 40/013/2004, 1 September 2004.
45. For an interesting comparison between ad hoc tribunals and the ICC, see: Kirsch, "A New and Necessary Institution", *supra* note 6.
46. ICC website.
47. Democratic Republic of Congo: ICC press release, "Prosecutor receives referral of the situation in the Democratic Republic of Congo, ICC-OTP20040419-50-En, 19 April 2004. ICC press release, "The Office of the Prosecutor of the International Criminal Court opens its first investigation", ICC-OTP-20040623-59-En, 23 June 2004. Uganda: ICC press release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", ICC-20040129-44-En, 29 January 2004, ICC press release, "Prosecutor of the International Criminal Court opens an investigation into northern Uganda", ICC-OTP-20040729-65-En, 29 July 2004. The situation in the Central African Republic (CAR) has also been referred to the court by the CAR Government, and on 22 May 2007 the Prosecutor of the ICC announced his decision to launch an investigation. Central African Republic": ICC press release, "Prosecutor Opens Investigation in the Central African Republic, ICC-OTP-PR-20070522-220_EN, 22 May 2007. "ICC Background information, Situation in the Central African Republic", 22 May 2007.

16. Secondly, the prosecutor may initiate an investigation *proprio motu* subject to authorisation by ICC judges (Rome Statute, Article 15). In both of the foregoing scenarios, jurisdiction is limited to 1. nationals of a state party; 2. crimes taking place on the territory of a state party or 3. nationals or crimes taking place on the territory of a non-state party which accepts the jurisdiction of the court. In this case, ICC jurisdiction extends to non-states parties with respect to the crime in question, and that state "shall co-operate without any delay or exception" (Rome Statute, Article 12.3).[48]

17. Thirdly, a case can be referred to the ICC by the UN Security Council, acting under Chapter VII of the UN Charter, irrespective of nationality or territoriality considerations. The situation in Darfur, Sudan, a non-state party, which is currently before the ICC, was referred to it by the UN Security Council in March 2005.[49]

18. Inevitably, the nature of the referral has a significant impact on the subsequent co-operation by the state in question with the ICC in the investigation and prosecution of crimes. The short ICC experience has already demonstrated this aptly. As a result, the ICC's Chief Prosecutor, Luis Moreno Ocampo, has encouraged voluntary referrals by states as a way to achieve enhanced co-operation. He notes:

> *"While my authority as the Prosecutor to initiate investigations by the proprio motu power is a critical aspect of the Office's independence, I have adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the court. This policy resulted in referrals for what would become the court's first two situations: northern Uganda and the DRC. The method of inviting investigations by voluntary referral has increased the likelihood of important co-operation and on-the-ground support to carry out the investigation and prosecution."*[50]

19. In addition, the ability to co-operate with the ICC pro vides affected states and their civil societies with an important opportunity to send a strong message to the victims of the most serious international crimes about their commitment to ending impunity and achieving justice in the region.

2.4. Gravity of crimes

20. Although it is clear that all crimes within the jurisdiction of the ICC are very grave, the Rome Statute conceptualises "gravity" as an additional admissibility criteria to justify further action by the court (Article 17.*d*). The Chief Prosecutor, Luis Moreno Ocampo, has recently stated that in making a determination of gravity, the Office of the Prosecutor is guided by the following factors, *inter alia*: the scale of the crimes, the nature of the crimes, the manner of commission of the crimes, and the impact of the crimes.[51]

2.5. The principle of complementarity

21. Contrary to the ICTY and ICTR, which have primacy over national courts, the ICC's jurisdiction is complementary to national jurisdictions. The principle of complementarity (set out in the preamble and Articles 1 and 17) is the result of a "delicate balance" between state sovereignty and international justice, backed by the conviction that national criminal systems are in a better position to effectively prosecute international crimes.[52] Although an exact definition of the notion of "complementarity" is not proffered in the statute, Michael Newton points out that "the plain text of Article 1 compels the conclusion that the International Criminal Court is intended to *supplement* the foundation of domestic punishment of international violations, rather than *supplant* domestic enforcement of international norms."[53] The preamble's message is clear in "recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." At the heart of the principle of complementarity is a state's "unwillingness" or "inability" to prosecute international crimes, set out in Article 17.2 and 17.3 of the Rome Statute.

22. "Unwillingness" is ascertained "having regard to the principles of due process recognised in international law" where: 1. national courts hold proceedings with the "purpose of shielding the person concerned from criminal responsibility"; 2. a delay in bringing proceedings is "inconsistent with an intent to

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48. Côte d'Ivoire is an example.
49. Darfur, Sudan: UN press release, "Secretary-General welcomes adoption of Security Council resolution referring situation in Darfur, Sudan, to International Criminal Court Prosecutor", SG/SM/9797 AFR/1132, 31 March 2005; ICC press release, "The Prosecutor of the ICC opens investigation in Darfur", ICC-OTP-0606-104-En, 6 June 2005.
50. Jurist Forum, "Instrument of Justice: The ICC Prosecutor Reflects", 24 January 2007 (emphasis added).
51. Ibid.
52. John T. Holmes, "The Principle of Complementarity" in: Roy S. Lee, (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues*, *Negotiations, Results*, The Hague, Kluwer International, 1999, 41 at p. 74.
53. Michael A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court" (2000), 167, *Military Law Review,* 20, at p. 26 (emphasis added).

bring the person concerned to justice"; or 3. proceedings are not carried out in an independent or impartial manner.[54] A determination of "unwillingness" is easily made in a situation where bad faith is employed by the national judicial authority in order to circumvent ICC jurisdiction, such as where a trial is stage-managed in order to shield a suspect, or where prosecution is refused altogether.[55] Greater complexities present themselves in situations where efforts are genuine but insufficient, where a conviction is followed by a pardon, or where a more or less effective investigation leads to a decision not to prosecute.

23. "Inability" in turn is defined as "a total or substantial collapse or unavailability of its national judicial system," which occurs when "the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out the proceedings."[56]

24. It is worth noting that the negative phrasing of Article 17, referring to "inadmissibility",[57] suggests that the drafters' intention was clearly to bestow a subsidiary or secondary position on the court *vis-à-vis* national criminal jurisdictions. The result is that the ICC's jurisdictional scheme is confined by Article 17, allowing the court to assume jurisdiction only in limited situations.[58] The fact that states merely need to demonstrate their willingness and ability to investigate an international crime within the jurisdiction of the ICC in order to avoid the ICC's jurisdiction should silence any fears – especially of states which have a functioning judiciary and a genuine will to bring perpetrators of international crimes to justice – that the court could assume jurisdiction against the will of the state concerned.

3. Key features of the ICC's co-operation regime

25. Co-operation represents a fundamental building block upon which the entire ICC system rests, as set out in Part 9 ("International Co-operation and Judicial Assistance") of the Rome Statute. Article 86 of the Rome Statute explicitly recalls states parties' general obligation to "co-operate fully with the court in its investigation and prosecution of crimes within the jurisdiction of the court." Under Article 87.1.*a*, the ICC "shall have the authority to make requests to states parties for co-operation". Under Article 87.5.*a*, the ICC may also "invite any state not party to this Statute to provide assistance under this part on the basis of an ad hoc arrangement, an agreement with such state or any other appropriate basis." Such co-operation concerns a variety of issues, such as assistance in gathering evidence, in executing arrest warrants (that is, in locating, arresting and transferring suspects), identifying and protecting witnesses,[59] enforcing sentences of convicted persons, and so on. For instance, in two of the cases presently before the court, northern Uganda and Darfur, where arrest warrants have been issued, it is of vital importance that states assist the ICC in apprehending and transferring the suspects to the court in The Hague.[60] Such co-operation is particularly crucial in light of the fact that the ICC, much like the ICTY and ICTR, does not have its own police force or any other enforcement mechanism commonly at the disposal of national courts.[61]

26. To enlist such co-operation, the ICC has been actively engaging in external communication,[62] general outreach,[63] and outreach relating to specific cases,[64] taking into account factors such as the context of operations, target groups (general population, media, NGOs, victims, government/opposition, traditional and religious leaders, etc.), phases of the juridical process, messages, communication tools, etc. Although the

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54. Rome Statute, *supra* note 4, Article 17.2.
55. Rome Statute, Brian Concannon Jr., "Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti" (2000), 32, *Columbia Human Rights Law Review,* 201 at p. 235.
56. Rome Statute, *supra* note 4, Article 17.3.
57. Article 17 (Issues of Admissibility) stipulates: "Having regard to paragraph 10 of the preamble and Article 1, the court shall determine that a case is inadmissible where: …".
58. Rome Statute, *supra* note 4, Article 1. See also: William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press, 2001, at p. 67.
59. Aside from its progressive elements of crime, discussed earlier, the ICC has created an elaborate system of witness rights, including protection and reparation. As noted by the CICC, "[f]or the first time in the history of international criminal jurisdictions, the rights of victims find their expression in the context of individual criminal responsibility. In many respects, the fact that there is now little disagreement on these particular issues demonstrates how far the debate has come. Ultimately, states that co-operate with the court will further affirm victims' rights in their national legal orders."
60. In this context, see: Kristina Miskowiak, *The International Criminal Court: Consent, Complementarity and Co-operation*, DJØF Publishing, Copenhagen, 2000.
61. Interview with Philippe Kirsch, *International Review of the Red Cross*, Vol. 88, No. 861, March 2006, p. 10.
62. The ICC website refers to external relations as "constructive dialogue between the court and states parties, non-states parties, international organisations, NGOs and other key partners with the aim of building and maintaining support and co-operation facilitating the court's ability to fulfil its statutory mandate."

primary responsibility lies with the court to engage in active outreach activities[65] the court does not have the financial or human resources to act alone. States, national and international organisations as well as non-governmental organisations are often wellplaced to assist in this task.

27. The following plea by President Kirsch sums up the above:

> *"… the court cannot accomplish its mission on its own. The support of states, intergovernmental and nongovernmental organisations (NGOs), and the international community at large, is necessary for its success. As the court's personal and territorial jurisdiction is limited …, universal ratification of its Statute is necessary for the court to achieve a truly global reach in the fight against impunity. Ratification, however, is only the initial step towards the court reaching its full potential. States parties and non-states parties alike can contribute to a strong and effective court in many ways. The investigation and prosecution of specific cases will not only require the co-operation of the states where the atrocities occurred, but will also call upon the resources of all states which can contribute to the court's operations. The ICC relies upon the practical assistance of states in relation to different stages of its proceedings, from the arrest of suspects to the enforcement of the sentences of the convicted."*[66]

4. Arguments advanced by Council of Europe member states which have not yet ratified the Rome Statute

28. At its meeting on 26 June 2007, the committee considered and approved a questionnaire, which was subsequently sent, on 16 July 2007, to the chairpersons of national delegations of the eight Council of Europe member states (Armenia, Azerbaijan, the Czech Republic, Moldova, Monaco, Russian Federation, Turkey and Ukraine) and to the relevant authorities of two Council of Europe observer states (Japan and the USA) and of one Parliamentary Assembly observer state (Israel) which had/have not yet ratified the Rome Statute. The purpose of the questionnaire was to obtain information from these states about their precise reasons for not ratifying the Rome Statute and/or implementing legislation so as to be able to address and correct any misconceptions about the ICC that may persist.

29. The questionnaire comprised the following questions:

> *1. What are your country's reasons for not ratifying the Rome Statute of the International Criminal Court?*
>
> *If there are several reasons, please list them in order of importance, if any, and in as detailed a manner as possible.*
>
> *2. Does your country intend to ratify the Rome Statute in the near future?*
>
> *If so, please indicate the approximate timeframe foreseen.*
>
> *a. Are there specific constitutional issues raised by the ratification of the Rome Statute?*
>
> *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification.*
>
> *b. Has your country made any formal steps towards implementing the Rome Statute into national law?*

30. Of the 11 questionnaires sent out, replies were received from the following Council of Europe member states: Armenia, Azerbaijan, the Czech Republic, Monaco and Ukraine, as well as two Council of Europe observer states: Japan and the United States of America.[67]

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63. The ICC website defines outreach as "a process of establishing sustainable, two-way communication between the court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC. It aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials."

64. Strategic Plan for Outreach of the International Criminal Court, *supra* note 20, at pp. 10 and 18. Such outreach will depend on the issuance of the arrest warrant(s).

65. The Public Information and Documentation Section (PIDS) of the Registry develops and implements the court's outreach programme, in co-ordination with other sections and divisions of the registry and other organs of the court. The PIDS' Outreach Unit is staffed by outreach officers, who, *inter alia*, oversee the work of the field offices, which are equally staffed with outreach officers, and whose presence in the field is vital to carrying out outreach activities on the ground. For more information, see Organigramme. The External Communications Group (ECG) is responsible for general coordination of the ICC's external communications activities, namely external relations, public information and outreach.

66. Kirsch, "A New and Necessary Institution", *supra* note 6, p. 306 (emphasis added).

67. For further details, please see the appendix to this document.

31. I note with satisfaction that Japan has in the meantime ratified the Rome Statute, on 17 July 2007, a symbolic step which will hopefully help persuade other Asian countries to ratify it in the near future. Replies are still outstanding from three Council of Europe member states, namely: Moldova, Russia, Turkey and one Parliamentary Assembly observer state: Israel. Of the replies received, Armenia, Ukraine and the Czech Republic have indicated their intention to ratify the Rome Statute in the near future, although, due to constitutional issues the former two states have not provided any timeframe yet. The Czech Republic has indicated its intention to ratify by the end of 2008. Although no reply was received from the Turkish authorities, there is some indication that Turkey intends to ratify the Rome Statute in the future, although there is no sign as to when that may be. Turkey's main hesitation appears to lie in the absence of a definition of terrorism, which it hopes will be made an urgent priority during the Review Conference of 2010. Two Council of Europe member states, namely Azerbaijan and Monaco, as well as one Council of Europe observer state, the United States, have indicated that they have no intention of ratifying the Rome Statute in the near future.[68] In the case of Azerbaijan, this has been justified by the absence of a definition of the crime of aggression and the lack of retroactive effect of the Rome Statute prior to July 2002. In the case of Monaco, the reluctance to ratify is based on constitutional issues as well as the belief that Monaco, as a country which respects human rights, is not likely to be involved in crimes which belong to the jurisdiction of the ICC. The United States, in turn, has reiterated that while it does not intend to become a party to the Rome Statute, it has sought to adopt a practical approach toward other ICC states parties in advancing the shared goal of promoting international criminal justice. It acknowledges, however, that in some instances, such as in the case of the crimes being committed in Darfur, the ICC may have a role to play.

32. While I must respect the decision of individual states not to ratify the Rome Statute, however regrettable, I do not find the reasons put forward to justify this decision convincing. A careful analysis of the various replies reveals certain misconceptions about the ICC, which I have sought to elucidate in a more general manner throughout this memorandum and which require no additional comment here.

33. But the replies by Azerbaijan and Monaco give rise to additional comments. In the case of Azerbaijan, the fact that the Rome Statute has no retroactive effect prior to July 2002 has, in my view, no bearing on the authority of the court as regards those grave international crimes which do fall into its ambit. I am not convinced by Azerbaijan's argument saying effectively that they refuse to join the ICC because it wishes the ICC to have additional competences, going back further into the past and covering an additional crime. By not joining, Azerbaijan sends the contrary message – that it does not support the ICC at all. Monaco argues that since it respects human rights, no crimes coming within the jurisdiction of the ICC would ever be committed on its territory. With all due respect, I disagree with this position for two reasons. Firstly, the very fact that a state's government recognises and complies with universal human rights standards should be an argument in favour of ratification not against, the ICC symbolising a global commitment to uphold universal human rights standards and to eradicate impunity for international crimes on a global scale. A country's ratification not only demonstrates its own commitment to human rights, but sends an important message about the crucial need to fight impunity to those countries on whose territory the commission of crimes within the ICC's jurisdiction is perhaps more likely to take place. Secondly, given that the ICC has jurisdiction over individuals ("natural persons") under the terms of Article 25 of the Rome Statute, the fact that the government complies with international human rights standards does not exclude the possibility that individual state or non-state actors commit such crimes. In fact, three of the four situations currently pending before the ICC to date have been referred to it by the respective governments themselves, involving crimes allegedly committed on their territories, *inter alia*, by non-state actors.[69]

5. Conclusion and recommendations: the Council of Europe's role

34. Over the last sixty years, the world has witnessed the creation of a variety of ad hoc international tribunals in order to prosecute the gravest international crimes. The ICC, the first ever permanent judicial institution, which its president, Mr Kirsch, calls "a humanitarian imperative",[70] has an arduous task. With a broad geographical and temporal reach, and a progressive understanding of international crimes, it is built on an intricate system of complementarity which seeks to empower national states to investigate and prosecute

68. Replies on file with the secretariat of the Committee on Legal Affairs and Human Rights.

69. Uganda: ICC press release, "President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC", 29 January 2004. Democratic Republic of Congo: ICC press release, "Prosecutor receives referral of the situation in the Democratic Republic of Congo", 19 April 2004. Central African Republic: ICC press release, "Prosecutor receives referral concerning Central African Republic", 7 January 2005.

70. Kirsch, "A New and Necessary Institution", op. cit., p. 305.

such crimes, assuming jurisdiction only as a last resort. Complementarity requires not only universality of the Rome Statute, but also its effective implementation into domestic systems as well as continued close co-operation by states and non-states parties in providing practical and judicial assistance to it.

35. The Council of Europe, with important contributions from such bodies as the Parliamentary Assembly, the CAHDI and the Venice Commission, is uniquely placed vis-à-vis its own member states to assist in the ICC's universal ratification campaign.

36. As eight Council of Europe member states, one Council of Europe observer state and one Parliamentary Assembly observer state have not ratified the Rome Statute to date, and numerous member states have not yet enacted effective implementing legislation, the Council of Europe must continue its efforts to promote universal ratification. This could be achieved by providing political support and technical assistance to states wishing to ratify the Rome Statute.[71]

37. While other issues have been raised in this report (for example the lack of national implementing legislation in countries which are already states parties to the Rome Statute, or the still outstanding definition of the crime of aggression), the immediate focus is universal ratification. A thorough examination of the other issues may need to be taken up in a separate report.

38. The Committee on Legal Affairs and Human Rights therefore recommends to the Assembly to urge those Council of Europe member and observer states and the Parliamentary Assembly observer states which have not yet done so to:

– sign and ratify without further delay the Rome Statute and the Agreement on the Privileges and Immunities of the ICC;

– adopt effective national implementing legislation at the earliest opportunity and encourage third states to do so;

– protect the integrity of the Rome Statute as recommended in Resolutions 1300 (2002) and 1336 (2003).[72]

39. In addition, the committee proposes that the Assembly recommends that Council of Europe member and observer states and the Parliamentary Assembly observer states:

– fully co-operate with the ICC in the fight against impunity for the most serious crimes of international concern;

– empower their judicial and law enforcement authorities in order to exercise the states' primary jurisdiction over crimes within the purview of the ICC;

– make meaningful financial contributions to the ICC's Trust Fund for Victims;

– incorporate in their legal orders relevant standards on victims' rights, without prejudice to existing higher standards in some Council of Europe member and observer states and Parliamentary Assembly observer states.

Reporting committee: Committee on Legal Affairs and Human Rights.

Reference to committee: Doc. 11032 and Reference No. 3280 of 6 October 2006.

Draft resolution unanimously adopted by the committee on 9 September 2008.

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro **Marcenaro**, Mrs Nino **Nakashidzé**, (Vice-Chairpersons), Mr Francis **Agius**, Mr José Luis Arnaut, Mrs Meritxell **Batet Lamaña**, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna Benaki, Mr Erol Aslan Cebeci, Mrs Ingrida Circene (alternate: Mr Boriss **Cilevičs**), Mrs Alma Čolo, Mr Joe Costello (alternate: Mr Terry **Leyden**), Mrs Lydie Err, Mr Valeriy **Fedorov**, Mrs Mirjana **Ferić-Vac**, Mr Aniello Formisano (alternate: Mr Andrea **Manzella**), Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr József Gedei, Mrs Svetlana Goryacheva (alternate: Mr Arsen **Fadzaev**), Mrs Carina Hägg, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel **Hunault**, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Želijko Ivanji, Mrs Iglica **Ivanova**, Mrs Kateřina Jacques, Mr Karol Karski, Mr András Kelemen, Mrs Kateřina **Konečná**, Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych (alternate:

71. ICC Newsletter, *supra* note 5.
72. See PACE Resolutions 1300 (2002) and 1336 (2003), *supra* note 15.

Mr Ivan **Popescu**), Mrs Darja Lavtižar-Bebler, Mrs Sabine LeutheusserSchnarrenberger, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr Alejandro Muñoz Alonso (alternate: Mr Miguel **Barceló-Pérez**), Mr Felix **Müri**, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mr Anastassios Papaligouras (alternate: Mr Theodoros **Pangalos**), Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr John Prescott (alternate: Mrs Ann **Clwyd**), Mr Valeriy **Pysarenko**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul Rowen, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Ellert Schram, Mr Christoph Strässer, Lord John Tomlinson, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem **Türköne**, Mr Vasile Ioan Dănuţ **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Klaas **de Vries**, Mr Dimitry **Vyatkin**, Mrs Renate **Wohlwend**, Mr Jordi **Xuclà i Costa**, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Łukasz **Zbonikowski**.

NB: The names of the members present at the meeting are printed in bold.

The draft resolution will be discussed at a later sitting.

Appendix – Table of country replies to the questionnaire

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Council of Europe member states				
Armenia 21.03.08	Please see answer to question N. 3.	Armenia signed the Statute of the ICC on 1 October 1999. It is not possible to indicate an approximate date for ratification, as the amendments to the constitution adopted in November 2005 do not eliminate all the necessary discrepancies. However, the Constitutional Court considers that such an amendment to the Constitution of Armenia is possible, and will allow the RS to be considered as complementary to the national system.	**Yes**. Ruling 502 of the Constitutional Court of 13 August 2004 identified the following areas of conflict between the RS and the national constitution, adopted in 1995: 1. Articles 91 and 92 of the constitution are in conflict with the Rome Statute's principle of complementarity (preamble and Article 1) as they establish Armenian courts' primacy in accordance with the constitution and national laws. According to Article 92, the courts of general jurisdiction, including criminal jurisdiction, shall be the courts of first instance, the appellate courts and the court of cassation. In addition, Chapter 6 of the constitution, which includes provisions on the judiciary, does not contain any provision which creates an opportunity to complement, through an international treaty, the system of judicial bodies exercising criminal jurisdiction. 2. Right to ask for pardon or amnesty under Armenian Constitution conflicts with Article 105 of RS, which stipulates that a prison sentence shall be binding on states parties, which shall in no case modify it. Accordingly, the President of the Republic cannot realise his right to grant a pardon and the National Assembly its right to declare an amnesty in regard to these persons. 3. Conflict between RS and national constitution as regards protection of human rights and freedoms. Article 4 of the constitution cannot make restrictions on human rights, which are not provided for in the constitution, and which will create less favourable protection for persons under the constitution *[reply does not back this argument with concrete examples]*.	

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Azerbaijan 11.10.07	1. Absence of definition of crime of aggression. 2. Lack of retroactive effect of RS prior to July 2002.	**No.**	**Yes.** RS is in contradiction with the Constitution of the Republic of Azerbaijan (CRA) on two principal grounds: 1. Article 53.2 of CRA stipulates that under no circumstances shall citizens of Azerbaijan be expelled or transferred to a foreign state. RA claims that this article is in conflict with Article 4.2 of RS, which grants the ICC jurisdiction in the territories of all member states. 2. CRA grants heads of state and members of parliament immunity, while the RS does not.	**No.** Nevertheless it should be noted that the crimes listed in the second part of the RS are echeed in Chapter 16 (Crimes against peace and humanity) and Chapter 17 (War crimes) of Part VII of the Criminal Code of the Republic of Azerbaijan.

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Czech Republic (13.03.08)	The main arguments against ratification are of a **legal nature**. Opponents argue that the Rome Statute, to some extent, contradicts the constitution and the Declaration of Basic Rights and Freedoms, which forms part of the Czech constitutional order – ratification is conditional on amendments. In particular, alleged contradiction with the following rules: – that the state is forbidden to extradite its own citizens; – that the President of the Republic has the right to grant pardon and amnesty; – the rule of immunity of President of the Republic, MPs and constitutional judges. Other reasons are of a **political nature** (namely, fear of the abuse of ICC, foreign policy reasons – especially relations with the USA).	**Yes,** ratification should be realised by the end of 2008.	**Yes**, see above answer to question N. 1.	**Not yet**, as ratification must take place first.
Moldova **– No reply**				

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Monaco (20.09.07)	1. Would signify modification of constitution, which is not desired at present. 2. Underscores that Monaco respects human rights and is not likely to enter into ICC's jurisdictional ambit.	**No.**	**Yes.** Article 3 of Monaco's Constitution sets out that the executive power is vested with the Prince and that he enjoys immunity.	**No.**
Russian Federation **– No reply**				
Turkey **– No reply**				
Ukraine (05.10.07)	– In July 2001, the Constitutional Court of Ukraine held that the RS does not comply with the Constitution of Ukraine. – Complications related to the intricate procedures of submitting amendments to the Constitution of Ukraine.	**Yes,** ratification of the RS complies with Ukraine's aspirations as part of European integration and is stipulated in the Action Plan for 2005-07. However, given the complicated process of submitting amendments to the constitution, this may take time. In 2006, the Ministry of Justice and the Ministry of Foreign Affairs submitted for the consideration of the Cabinet of Ministers the draft law on amendments to the Constitution of Ukraine, in light of the earlier decision of the Constitutional Court.	**Yes.** The Constitutional Court of Ukraine based its finding on the fact that the Constitution of Ukraine does not foresee a complementary relationship between it and the ICC. All other provisions of the RS were recognised as complying with the constitution.	**Yes.** Ukraine declares its indisputable support for the ICC and takes practical steps in implementing it. Presently, there is work being carried out to ratify the RS and all necessary draft laws have been prepared. While Ukraine has not yet ratified the Rome Statute, it has ratified other key instruments relating to the work of the ICC, such as the Agreement on Privileges and Immunities, which came into force on 28 February 2007.
Council of Europe observer states:				

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Japan (17.08.07)		On 17 July, the instrument of accession to the Rome Statute of the International Criminal Court was deposited by Mr Kenzo Oshima, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of Japan to the United Nations, with the UN Secretary-General. **Japan to officially become a state party to the statute on 1 October 2007.**		
United States of America (10.04.08)	The US shares with parties to the Rome Statute a strong belief in the importance of accountability for genocide, war crimes, and crimes against humanity. The US position about the ICC is well known, and it does not intend to become party. It acknowledges, however, that in some cases, such as the situation of Darfur, there may be an appropriate role for the ICC. The US respects the rights of other states to choose to become parties to the RS, and it asks that they similarly respect the US decision not to become a party. It has sought to adopt a practical approach towards working with RS parties to advance the shared goal of promoting international criminal justice and urges RS parties to join it in its efforts.	**No.**		

Country name and date reply received	Reasons for not ratifying the Rome Statute (RS) *If several reasons, listed in order of importance*	Does your country intend to ratify RS in near future? *If so, timeframe foreseen*	Are there specific constitutional issues raised by the ratification of the RS? *If so, please explain in detail and indicate which formal steps your country envisages taking prior to ratification*	Has your country made any formal steps towards implementing the RS into national law?
Parliamentary Assembly observer state:				
Israel **– No reply**				