



# Discussion Paper on the "DRAFT RELATIONSHIP AGREEMENT BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL COURT"

(PCNICC/2000/WGICC-UN/L.1)

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The present paper offers a first evaluation to the Draft UN-ICC Relationship Agreement (RA) of 8 June 2000 drafted by the UN Secretariat which will be negotiated during the 6<sup>th</sup> PrepCom Session (27 November - 8 December 2000) The text is carefully drafted and thus represents a very useful basis for further negotiations. However, certain problems may be identified within the draft that might need further consideration.

Please note that this paper is intended as a first assessment. A more thorough study of the RA might reveal further points of concern. **Thus any criticism or comments to this paper would be highly welcome.**

As of today this paper identifies three problems with respect to the Draft-Relationship Agreement:

### **1. Art. 4 (4) RA as a means to block the ICC**

- 1 Art. 4 (4) RA last sentence, would provide a means to block the ICC by inaction of the Security Council. It reads:

"In cases where the Court has been informed by the Secretary-General that the Security Council will exercise, under paragraph 3 of article 19 of the Rome Statute, its right to submit observations, the Court *will not rule on the question of jurisdiction until it receives these observations.*" (emphasis added)

- 2 The provision is incompatible with the Statute because it could effectively block the Courts jurisdiction in through a means not provided for in the Statute.

A challenge to this conclusion could be that the draft provision covers only cases in which a situation was referred by the Security Council under Art. 13 (b) of the Rome Statute. However, once the Security Council has exercised its right to refer a situation to the Court the wording of the Statute is clear in that the only means for the Security Council to interrupt investigations or proceedings is a resolution according to art. 16 of the Rome Statute. Therefore if the Security Council does not meet the time-limits fixed by the Court (which usually could be extended upon request), the Council must be deemed to have waived or forfeit its right to submit observations.

### **2. Art. 6 (3) as a means override the Courts competence to decide on the admissibility of evidence**

- 3 Art. 6 (3) last sentence seems to impose an undue obligation on the Court to comply with a request from the UN with regard to evidence that was not provided by them. The provision reads:

"In the event that *disclosure of information or documents*, or the provision of other forms of cooperation or assistance, would, *in the opinion of the Secretary-General*, endanger the safety of current or former United Nations personnel or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations, *the Court shall* take, upon request of the United

Nations, or its programmes, funds and offices concerned, appropriate measures of protection or relief.” (emphasis added)

- 4 It is true that the Rome Statute does not (and cannot) provide for an obligation of the UN to provide evidence to the Court. Therefore, in principle, the UN may condition the provision of information to the Court upon such requirements of confidentiality as it deems necessary. Indeed such requirements are regulated in art. 5 (3) RA.

However, where the Court obtained the information from sources other than the UN the situation is different. Here it is the sole competence of the Court to decide whether or not evidence may be disclosed:

Art. 72 of the Rome Statute sets up a detailed procedure to balance the interests of a state concerning security relevant information with the interests of justice. It should be carefully noted that at the end of this procedure it is the Courts competence to decide whether the information in its possession may be disclosed or if the states interest prevails (art. 72 (7) (b)).

There is no regulation similar to art. 72 with respect to international organizations. Moreover it should be noted that even information regarding the ICRC, in principle, might be disclosed in the proceedings if it is obtained from a source other than the ICRC (cf. rule 73 (5) of the draft rules of procedure and evidence). Moreover in a recent precedent the ICTY even ordered the disclosure of documents from the SFOR, a NATO organized force in former Yugoslavia (Stevan Todorovic’s Motion For Judicial Assistance; cf. ICTY Press release: <http://www.un.org/icty/pressreal/p536-e.htm>).

This is not to say, of course, that the Court is not under an obligation to take into due consideration the interests of international organizations (or the ICRC) to prevent disclosure of security relevant information. An obligation not to disclose certain information may well arise from the sources of law applicable by the Court (e.g. a general principle of law; cf. art. 21 (1) (c) Rome Statute)

However the *competence to decide* such matters rests solely with the Court (cf. e.g. art. 69 (4) of the Rome Statute) and not with the Secretary General of the United Nations or any other authority outside the Court.

- 5 Moreover the matter should not be regulated in the RA at all. It should rather be left for the Court to decide or - if necessary - included into the rules of procedure and evidence during the first meeting of the Assembly of State Parties (in such a case a procedure similar to the one provided for in Art. 72 (7) ICC-Statute would seem to be adequate).

### **3. Art 7 RA as an impediment to future amendments of the Rome Statute**

- 6 Art. 7 could pose a problem because it might be interpreted as limiting the ability to change the relevant provisions under the amendment procedure provided in Art. 121 of the Rome Statute. The article reads:

*"[...] War crimes referred to in paragraph 2 (b) (iii) (vii) of article 8 of the Rome Statute are the following:*

(a) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(b) Making improper use of the flag or insignia and uniform of the United Nations, resulting in death or serious personal injury." (emphasis added)

- 7 If the ICC is under a treaty obligation to regard the conduct named in the RA as crimes, the State Assembly cannot - under international treaty law - change these elements (in accordance with art. 121) without the consent of the UN. The State Assembly, however, has no mandate to take decisions that might prevent amendments of the Statute.

Therefore the article should either explicitly reserve the right to amendments to the Statute or the referrals to the elements of the respective crimes should be deleted.

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