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FOURTH

CONSULTATION

ON

THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Council of Europe Reference texts

Council of Europe, Athens (Greece) 14-15 September 2006

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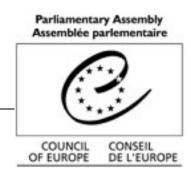


Parliamentary Assembly Resolution RES (2003) 1336 on Threats to the International Criminal Court

Parliamentary **Assembly Assemblée** parlementaire

Resolution 1336 (2003)¹

Threats to the International Criminal Court



- 1. The Parliamentary Assembly recalls its <u>Resolution 1300 (2002)</u> on the risks for the integrity of the Rome Statute of the International Criminal Court (ICC) posed by bilateral agreements granting immunity.
- 2. It welcomes the entry into operation of the ICC following the elections to its main organs the judges, the President, and the prosecutor in February and April 2003. It considers that the ICC is poised to become a truly independent and impartial arbiter of international justice and the rule of law at the international level, whose importance cannot be underestimated in the current international situation.
- 3. However, it continues to be concerned that certain Council of Europe member and Observer states have still not acceded to the Rome Statute of the ICC, or have not yet ratified it, and that the United States has even officially announced that it will not ratify.
- 4. It is also concerned that only twenty-nine countries have so far signed, and only two countries (Norway and Costa Rica) have ratified, the Protocol on Privileges and Immunities of the ICC. The Assembly recognises that despite its politically unseemly title, this protocol is of vital importance for the court to begin functioning in practice.
- 5. The Assembly further recalls the importance of the introduction of national implementing legislation, which is unfortunately belated in many countries. The implementing legislation is required to put into practice the principle of "double subsidiarity" of the ICC: firstly, the ICC, which does not have its own investigative machinery, was designed to rely heavily on the practical cooperation of the states parties. Secondly, the states parties must also make sure that their national substantive criminal law is compatible with the Rome Statute, so that they are in a position to fulfil their obligation under the Rome Statute to prosecute such crimes themselves, the ICC only coming into play when the national courts are unable or unwilling to prosecute. In this context, the Assembly welcomes the initiative announced by the Committee of Ministers in its reply to Recommendation 1581 (2002), to consider convening a third multilateral consultationin September 2003 on the implications of the ratification of the Rome Statute in the domestic legal order of member states. The Assembly intends to accept any invitation extended by the Committee of Ministers to participate in this consultation.
- 6. The Assembly regrets the renewal, as voted on 12 June 2003, of United Nations Security Council Resolution 1422 on United Nations peacekeeping, which had been adopted on 12 July 2002. This resolution had deferred, for a renewable twelve months, any prosecution by the ICC of nationals of states not parties to the statute suspected of offences committed in connection with United Nations initiated or authorised operations. The Assembly therefore commends those

¹ Assembly debate on 25 June 2003 (20th Sitting) (see <u>Doc. 9844</u>, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty).

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countries that insisted on an open debate being held in the Security Council, and on again limiting the exemption to one year.

- 7. It considers that United Nations Security Council Resolution 1422 and its renewal constitute a legally questionable and politically damaging interference with the functioning of the ICC. Its independence from the Security Council with regard to the opening of procedures against persons suspected of international crimes is one of the most important advances in the Rome Statute. Resolution 1422 is legally questionable for two reasons: firstly, it is *ultra vires*, in that the legal basis for a Security Council resolution according to Chapter VII of the United Nations Charter the existence of a present threat to international peace and security did not exist. Secondly, Resolution 1422 violates the Rome Statute of the ICC (Articles 16 and 27). The Assembly considers that Article 16 does not provide blanket immunity in unknown, future situations. It further recalls that Article 27 of that instrument expressly prohibits making distinctions on the basis of official capacity, in order to ensure that no person is above the law. The Assembly considers that this should also apply to United Nations peacekeepers, regardless of their nationality.
- 8. The Assembly regrets the ongoing campaign by the United States to convince state parties to the Rome Statute of the ICC, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states' co-operation with the ICC, in cases concerning United States citizens accused of crimes giving rise to the jurisdiction of the ICC, to prior agreement by the United States Government.
- 9. The Assembly considers that such agreements are in breach of the Rome Statute of the ICC (in particular its Articles 27, 86 and 98, paragraph 2 which allow only narrowly-defined exemptions within the framework of status of force agreements), and of Article 18 of the Vienna Convention on the Law of Treaties, according to which states must refrain from any action which would not be consistent with the object and purpose of a treaty.
- 10. The Assembly condemns the pressure exercised on a number of member states of the Council of Europe to enter into such agreements, and regrets that the contradictory demands made on them by the United States on the one side, and the European Union and the Council of Europe on the other, confronts them with a false choice between European and transatlantic solidarity. The Assembly considers that all countries should be left free to decide on their stance vis-à-vis the ICC on the basis of considerations of principle alone.
- 11. The Assembly considers that it is possible for bilateral exemption agreements to be construed narrowly, in such a way as to subject the refusal to co-operate with the ICC to strict conditions, in particular the credible assurance that persons suspected of crimes within the meaning of the Rome Statute will be prosecuted by the United States themselves, and to ensure that the scope of persons covered by the agreement is consistent with the text of Article 98, paragraph 2 of the ICC Statute.

12. The Assembly therefore:

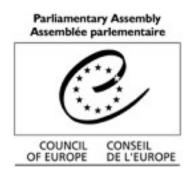
- i. as regards the signature, ratification and implementation process
 - a. renews its appeal to Council of Europe member and Observer states, where appropriate, to accede to and ratify the Rome Statute of the ICC;
 - b. appeals to those Council of Europe member and Observer states (other than Norway, which has taken all the necessary steps) which have not yet done so to sign and/or ratify the Protocol on Privileges and Immunities of the ICC;
 - c. appeals to those Council of Europe member and Observer states that have not yet done so to adopt the necessary national implementing legislation at the earliest opportunity;

- ii. as regards United Nations Security Council Resolutions 1422 (2002) and 1487 (2003)
 - a. regrets the renewal for another year of United Nations Security Council Resolution 1422, which requests that the ICC refrain from prosecuting crimes under international law committed in connection with peacekeeping and other operations authorised by the Security Council, voted by the Security Council on 12 June 2003 (Resolution 1487);
 - b. regrets that all Security Council members that are members of the Council of Europe did not maintain a united, unequivocal stance in favour of the integrity of the ICC:
 - c. thanks the member and Observer states of the Council of Europe, in particular Canada and Switzerland, that insisted on an open debate in the Security Council on this issue, voiced their principled stance and made clear that they did not consider that Resolution 1422 should be automatically renewed;
 - d. opposes any further renewal of the exemption of peacekeeping missions from the jurisdiction of the ICC, and invites the member and Observer states of the Council of Europe that are members of the United Nations Security Council, especially those having a permanent seat, to take all the necessary steps in good time before the question of renewal reoccurs in 2004 to prevent any further renewal of this exemption;
 - e. encourages the ICC, if a situation arises in which Resolution 1422 or its possible successor may become relevant, to assess independently the legal validity of and, as the case may be, the precise interpretation that shall be given to, any request addressed to the ICC under the said resolution;
- iii. as regards bilateral immunity agreements
 - a. supports those member and Observer states of the Council of Europe that have resisted entering into bilateral immunity agreements in their continued adherence to their principles, and commends in particular those countries that are candidates for accession to the European Union for their solidarity with the vast majority of European countries in supporting the ICC;
 - b. encourages those member and Observerstates that have already signed such agreements (Azerbaijan, Israel and Romania) not to ratify them;
 - c. invites those member and Observer states that have ratified such agreements (Albania, Bosnia-Herzegovina and Georgia) to apply them, as the case may be, in the manner that is most consistent with their legal obligations as states parties to the Rome Statute.

Text adopted by the Assembly on 25 June 2003 (20th Sitting).

Parliamentary Assembly Resolution RES 1300 (2002) Risks for the integrity of the Statute of the International Criminal Court

Parliamentary **Assembly Assemblée** parlementaire



Resolution 1300 (2002)¹

Risks for the integrity of the Statute of the International Criminal Court

- 1. The Parliamentary Assembly recalls its Recommendation <u>1408</u> (1999) on the International Criminal Court adopted on 26 May 1999.
- 2. The Assembly warmly welcomes the entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court (ICC), which represents a decisive step towards achieving justice and ending impunity for the most serious crimes known to mankind war crimes, crimes against humanity and genocide.
- 3. The ICC Statute has so far been signed by 139 countries and ratified by 81 countries. The Assembly notes with satisfaction that 42 Council of Europe member states have signed it and 33 have ratified it.
- 4. The Assembly welcomes the outcome of the Assembly of States Parties to the Rome Statute of the International Criminal Court held from 3 to 10 September 2002 in New York, which laid the foundations of the effective establishment of the court.
- 5. The Assembly considers that universal adherence to the ICC Statute is of crucial importance in order to enable the court to become a truly efficient international instrument to prevent impunity and to ensure equal justice for all.
- 6. Democratic states must be the most ardent supporters of the court, which represents the expression of their commitment to promote the universal values of human rights, international humanitarian law and the rule of law.
- 7. The court is, and must remain, a supreme body of international justice and must not be subject to political pressures or be used for political purposes. The Assembly underlines the importance of the safeguards incorporated in the ICC treaty in this respect.
- 8. The Assembly regrets that some states have not yet acceded to the ICC Statute or have declared that they do not intend to become party to it. The Assembly is of the opinion that such attitudes may weaken the integrity of the statute of the court as well as respect for international law in general.

¹ Assembly debate on 25 September 2002 (29th Sitting) (see Doc. <u>9567</u>, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty).

- 9. Moreover, the Assembly is greatly concerned by the efforts of some states to undermine the integrity of the ICC treaty and especially to conclude bilateral agreements aimed at exempting their officials, military personnel and nationals from the jurisdiction of the court (exemption agreements).
- 10. The Assembly considers that these exemption agreements are not admissible under the international law governing treaties, in particular the Vienna Conventions on the Law of Treaties, according to which states must refrain from any action which would not be consistent with the object and the purpose of a treaty.
- 11. The Assembly recalls that states parties to the ICC treaty have the general obligation to cooperate fully with the court in its investigation and prosecution of crimes within its jurisdiction (Article 86) and that the treaty applies equally to all persons without any distinction based on official capacity (Article 27). It considers that the exemption agreements are not consistent with these provisions.
- 12. The Assembly also recalls that in Recommendation <u>1408</u> (1999), it asked the Committee of Ministers of the Council of Europe, *inter alia*, to invite member and observer states to "refuse to enter into agreements with states which are not parties to the statute in order to prevent nationals of their country who are accused of crimes against humanity from being handed over to the court".
- 13. The Assembly is also concerned that the link made by some countries between the jurisdiction of the court and the renewal of the United Nations Security Council mandates for peacekeeping operations could put at risk the whole system of United Nations peace-keeping.
- 14. Accordingly, the Assembly calls:
 - i. as regards the Council of Europe member states:a. on Azerbaijan and Turkey to adhere to the Rome Statute of the ICC;
 - b. on Albania, Armenia, the Czech Republic, Georgia, Lithuania, Malta, Moldova, the Russian Federation and Ukraine to ratify the Rome Statute of the ICC;
 - c. on Romania not to ratify the bilateral exemption agreement signed with the United States of America, given that it was one of the first countries to ratify the Rome Statute of the ICC;
 - ii as regards the Council of Europe observer states:
 - a. on Japan to adhere to and on the United States to ratify the Rome Statute of the ICC;
 - b. on Mexico to ratify the Rome Statute of the ICC;
 - c. on Israel, having Observer status with the Parliamentary Assembly, to ratify the Rome Statute of the ICC and not to ratify the bilateral exemption agreement signed with the United States:
 - iii. on all member and Observer states of the Council of Europe:
 - a. to establish a joint and united position with a view to ensuring the efficient functioning of the ICC;
 - b. to refrain from any action which might compromise the integrity of the ICC treaty and efficient work of the court;

- c. not to enter into any bilateral exemption agreements which would compromise or limit in any manner their cooperation with the court in the investigation and prosecution of crimes within its jurisdiction;
- d. to provide all necessary co-operation and assistance with a view to ensuring the earliest possible effective functioning of the court;
- e. not to avail themselves of the provision in the ICC treaty which makes it possible to escape the court's jurisdiction on war crimes for seven years.
- 15. The Assembly welcomes that all members of the European Union have signed and ratified the ICC treaty and encourages the European Union to adopt a joint position on the issue of the exemption agreements as soon as possible along the lines of the present resolution.
- 16. The Assembly sincerely hopes that the United States of America will join the majority of democratic states in their support for the ICC.

Text adopted by the Assembly on 25 September 2002 (29th Sitting).

Parliamentary Assembly Recommendation REC 1581 (2002) Risks for the integrity of the Statute of the International Criminal Court

Parliamentary **Assembly Assemblée** parlementaire



Recommendation 1581 (2002)¹

Risks for the integrity of the Statute of the International Criminal Court

The Parliamentary Assembly, referring to its Resolution <u>1300</u> (2002), recommends that the Committee of Ministers adopt a joint position of the Council of Europe member states on the issue of bilateral exemption agreements along the lines of the above-mentioned resolution.

Text adopted by the Assembly on 25 September 2002 (29th Sitting).

¹ Assembly debate on 25 September 2002 (29th Sitting) (see Doc. <u>9567</u>, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty).

Parliamentary Assembly Recommendation REC 1408 (1999) International Criminal Court

Parliamentary **Assembly Assemblée** parlementaire



Recommendation 1408 (1999)¹

International Criminal Court

(Extract from the Official Gazette of the Council of Europe – May 1999)

- 1. In its <u>Recommendation 1189</u> (1992), the Assembly called for the establishment of an international criminal court by means of a multilateral convention;
- 2. It considers that the impunity enjoyed by the perpetrators of the most serious crimes, such as genocide, crimes against humanity and war crimes, is an obstacle to reconciliation, fostering revisionism and depriving future generations of irrefutable evidence of such crimes.
- 3. It is therefore with great satisfaction that the Assembly welcomes the adoption, at the end of the diplomatic conference in Rome on 17 July 1998, of the statute of an International Criminal Court (ICC), which represents an historical landmark for humanity.
- 4. However, the statute adopted in Rome is the result of a difficult compromise. A preparatory commission has been instructed to resolve the questions which were left in abeyance before 30 June 2000. In particular, this commission is to draw up the court's rules of procedure and evidence.
- 5. The statute contains a number of shortcomings, such as the fact that there may be no judgments in abstentia, or that criminals who are nationals of a state which has not ratified the statute or recognised the competence of the court fall outside its jurisdiction, as well as the United Nations Security Council's power to give the court a mandate to investigate and prosecute crimes in certain cases, which would enable member states to exercise their veto.
- 6. Even more serious is the exemption clause provided for in Article 124 of the statute, according to which "a state, on becoming a party to [the] statute, may declare that, for a period of seven years after the entry into force of this statute for the state concerned, it does not accept the jurisdiction of the court".
- 7. The financing of the court by contributions made by states parties and funds provided by the United Nations places it in a precarious situation.
- 8. However, in spite of these weaknesses, the Assembly considers that this statute must enter into force as soon as possible. Sixty ratifications are necessary for this. The forty-one states which make up the Council of Europe that is, two thirds of the necessary number thus have

¹ See Doc. 8401, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Marty.

- a decisive role to play in the matter and can make an important contribution to its entry into force.
- 9. The re-opening of the negotiations on the statute which certain states would like to prompt at the meeting of the Preparatory Commission in July 1999 should not be permitted, as it would seriously compromise the entry into force of the statute.
- 10. The Assembly recommends, therefore, that the Committee of the Ministers invite the member states and the observer states:
 - i. to ratify as soon as possible the Statute of the International Criminal Court adopted in Rome on 17 July 1998;
 - ii. to adopt domestic legislation enabling them to co-operate with the court;
 - iii. to avoid the re-opening of negotiations on the statute of the court;
 - not to avail themselves of the clause in Article 124 which makes it possible to escape iν. the court's jurisdiction for seven years;
 - to refuse to enter into agreements with states which are not parties to the statute in order to prevent nationals of their country who are accused of crimes against humanity from being handed over to the court;
 - to ensure that the Preparatory Commission fulfils the tasks assigned to it as rapidly as vi. possible;
 - vii. to make a financial contribution towards the functioning of the court:
 - viii. to forward the present recommendation to the Preparatory Commission.

Text adopted by the Standing Committee, acting on behalf of the Assembly, on 26 May 1999.



Declaration of the Committee of Ministers on the International Criminal Court forthcoming entry into force of the Rome Statute

(Adopted by the Committee of Ministers on 18 April 2002, at the 793rd meeting of the Ministers' Deputies)

The Committee of Ministers warmly welcomes the forthcoming entry into force, on 1 July 2002, of the Rome Statute, setting up the International Criminal Court, following the 60th ratification of the Statute on 11 April 2002, which should be a vital step towards ending the culture of impunity for the most serious crimes of concern to the international community as a whole.

Recalling its Declaration on the International Criminal Court, adopted on 10 October 2001, under the Liechtenstein Chairmanship, it reiterates its conviction that the Court is a fundamental factor for reconciliation, justice, peace and security, and that it will contribute to the strengthening of the rule of law and the international protection of and respect for human rights and international humanitarian law. The Court will also serve as a strong deterrent for potential perpetrators of war crimes, genocide and crimes against humanity.

The Council of Europe has played an important role in facilitating the entry into force of the Rome Statute in view of its competences and of the number of its members having ratified the Statute (30 to date).

The Committee of Ministers again calls on member, applicant and observer States to become Parties to the Statute and to enact without delay the necessary national implementing legislation in order to enable them to cooperate fully with the future International Criminal Court and to conduct domestic investigations and prosecutions of persons suspected of having committed a crime provided in the Rome Statute. The Council of Europe continues to be ready to provide States which so request, in the framework of existing legal cooperation programmes, with the appropriate assistance with a view to becoming Party to and implementing the Rome Statute.

Committee of Ministers Reply to PA REC 1581 (2002) Risks for the integrity of the Statute of the International Criminal Court

Ministers'	Depui	ties
CM Documer	nts	

CM/AS(2003)Rec1581 final 24 June 2003

Risks for the integrity of the Statute of the International Criminal Court

Parliamentary Assembly Recommendation 1581 (2002)

(Reply adopted by the Committee of Ministers on 19 June 2003 at the 844th meeting of the Ministers' Deputies)

- 1. In its recommendation, the Parliamentary Assembly recommends that the Committee of Ministers adopt a joint position of the Council of Europe member states on the issue of bilateral "exemption agreements" concerning the International Criminal Court (ICC) along the lines of Parliamentary Assembly Resolution 1300 (2002).
- 2. The question of such agreements has been considered by the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe and at the two multilateral consultations organised in 2000 and 2001 by the Council of Europe on the implications of the ratification of the Rome Statute in the domestic legal order of member states.
- 3. The Council of Europe has consistently supported the early entry into force of the Rome Statute and-welcomes the recent establishment of the ICC. It will continue to support this body in the confident expectation of its efficient functioning.
- 4. The Committee of Ministers agrees with the Parliamentary Assembly that the entry into force of the Rome Statute represents a decisive step towards achieving justice and ending impunity for the most serious crimes. Universal adherence to the Statute is crucial for the efficiency of the Court's operation in preventing impunity and ensuring equal justice for all.
- 5. It considers that any efforts to undermine the integrity of the ICC are not acceptable and that bilateral agreements under article 98 of the Statute may only be acceptable if they respect the letter, object and purpose of the Statute. In this context, the Committee of Ministers takes note of the position of a number of states which is reflected in the EU General Affairs Council Conclusions on the ICC of 30 September 2002.
- 6. The Committee of Ministers will continue to work for the promotion of the Court and with that in mind, is considering convening a third Multilateral Consultation, in September 2003, on the Implications of the Ratification of the Rome Statute in the domestic legal order of member states. It would welcome the participation of members of the Parliamentary Assembly.

Committee of Ministers Reply to PA REC 1408 (1999) International Criminal Court

International Criminal Court – Recommendation 1408 (1999) of the Parliamentary Assembly

(CM/Del/Dec(2000)701/10.2)

Decision

The Deputies adopted the following reply to Parliamentary Assembly Recommendation 1408 (1999) on an International Criminal Court:

- "1. The Committee of Ministers has taken note with interest of Parliamentary Assembly Recommendation 1408 (1999) on an International Criminal Court.
- 2. The adoption in Rome, in July 1998, of the Statute of the International Criminal Court represents major progress for international criminal law and a significant step forward in the fight against impunity on a global scale, with the establishment of an instrument which should promote the processes of peace and reconciliation, while strengthening effective implementation of international humanitarian law and respect for human rights in a broader sense The Committee of Ministers welcomes the active contribution of member states to the success of this important initiative.
- 3. The Committee of Ministers notes that five member states have ratified the Statute of the Court to date, and that several others have begun the relevant national procedures. It also observes that, while certain states have opted for rapid ratification, deferring the requisite adaptation of their domestic legislation, others have opted to amend that legislation first, and then to ratify the Rome Convention.
- 4. The Committee of Ministers shares the Assembly's view that the re-opening of the negotiations on the Statute of the Court, and any attempt to water down its provisions or to narrow its scope, at the meetings of the Preparatory Commission which draws up the Court's rules of procedure and evidence and defines the essential elements of crimes, or by any other means, should not be permitted.
- 5. The Committee of Ministers takes note of the Assembly's concerns and recommendations with regard to the exemption clause provided in the Court's Statute and to the possible signature of agreements with states which are not Parties, in order to prevent their nationals from being handed over to the Court.
- 6. The Committee of Ministers is aware of the complexity of the constitutional and other procedures which face those member states wishing to ratify the Rome Convention as soon as possible. Hence it is gratified to note member states' desire for a multilateral consultation enabling them to exchange views about the problems encountered by Council of Europe member States in respect of the ratification and implementation of the Statute.
- 7. This consultation meeting was jointly organised by the European Committee on Crime Problems (CDPC) and the *Ad hoc* Committee of Legal Advisers on Public International Law (CAHDI). It took place in Strasbourg on 16 and 17 May 2000. The <u>Conclusions adopted by the participants are attached to this reply</u>."



Conclusions of the 1st Multilateral consultation (16-17 May 2000)

Following the joint initiative of the European Committee on Crime Problems (CDPC) and the *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI), the Council of Europe organised a consultation meeting on the implications for Council of Europe member States of the ratification of the Rome Statute of the International Criminal Court (ICC) in Strasbourg, 16-17 May 2000.

This meeting was organised in the framework of the intergovernmental programme of activities of the Council of Europe with a view to facilitating an exchange of views and information among the member states of the Council of Europe and considering the possible role that the Council of Europe could play in this respect.

Experts from 32 Member States, the European Commission, 3 Observer States and INTERPOL, NATO and ICRC took part in the meeting.

Participants were informed about developments concerning the Rome Statute and the activities of the Preparatory Commission. They exchanged views concerning the issues of implementation and co-operation with the ICC, including efforts undertaken in this perspective at the national level and in the framework of international organisations participating as observers.

CONCLUSIONS

Participants recognised that the ratification and implementation process requires thorough consideration by the competent national authorities of a number of legal, administrative and budgetary issues and that exchanges of information and views among Member States, Observer States and organisations mentioned above may benefit this process.

Participants noted that ratification requires that the State Party concerned be able to ensure compliance with the obligations derived from the Rome Statute. This may require *inter alia* adapting constitutional provisions taking into account the specific features of each State, or legislative enactments in the field of international co-operation and judicial assistance, to ensure effective and swift co-operation.

Participants agreed that the preparation of such legislation and of possible co-operation agreements between the States and the ICC and between the latter and international organisations, may to a large extent benefit from the experience of implementing the obligations resulting from United Nations Security Council Resolutions 827 (1993) and 955 (1994) establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda.

Participants acknowledged that the ICC is complementary to national criminal jurisdictions and, therefore, primary responsibility for prosecution of these crimes lies with States, taking also into account the relevant rules of international humanitarian law. To this effect, national legislation and practices should enable States to bring to justice the persons responsible for the crimes under Articles 6-8 of the Rome Statute.

Participants further acknowledged that different approaches are possible for the implementation of the Statute, taking into account different legal systems and traditions.

Participants noted the particular importance for the future work of the ICC of appropriate State support with regard to enforcement of sentences in accordance with Article 103 of the Rome Statute.

Participants noted that 3 Member States of the Council of Europe had ratified the Rome Statute and that a number of others were in a position to do so. They stressed their commitment to the integrity of the Rome Statute and reaffirmed the objective of the early establishment of the ICC

and, to that extent, recalled the important role that the 41 member States of the Council of Europe can play, as they represent two-thirds of the necessary number of 60 ratifications for the entry into force of the Rome Statute.

Participants recognised the useful role of the Council of Europe in conformity with the principles and rules contained in its Statute, as well as the treaties concluded within its framework.

Participants thanked the Council of Europe for the organisation of the consultation meeting and called upon the Council of Europe to continue assisting its Member States in the ratification and implementation process with a view to an early establishment of the ICC and its effective functioning by facilitating exchanges of information and views among its member States and observers by appropriate means and in particular by holding consultations at the appropriate time whenever the need arises. For that purpose, appropriate provision should continue to be made in the programme of activities of the Council of Europe.

Participants decided to submit these conclusions to the Committee of Ministers asking it to forward them to the CDPC and CAHDI so that they can take them into account in their work.

Conclusions of the 2nd Multilateral consultation (13-14 September 2001)

- Following a first Consultation Meeting in May of 2000, which had been the joint initiative of the European Committee on Crime Problems (CDPC) and the Committee of Legal Advisers on Public International Law (CAHDI), the Council of Europe at the initiative of the Principality of Liechtenstein, which holds the Chairmanship of the Committee of Ministers, organised a Second Consultation Meeting on the implications for Council of Europe member States of the ratification of the Rome Statute of the International Criminal Court (ICC) in Strasbourg, on 13-14 September 2001.
- 2. This meeting was held in the framework of the intergovernmental programme of activities of the Council of Europe with a view to facilitating an exchange of views and information among the member and observer States of the Council of Europe and considering the significant role that the Council of Europe can play in this respect.
- 3. Experts from 39 member States, the European Commission, 6 observer States and observers from INTERPOL and the International Committee of the Red Cross took part in the meeting, which was opened by the Deputy Secretary-General of the Council of Europe, Mr Hans-Christian Krüger, the Chairman of the Ministers' Deputies, Ambassador Josef Wolf of Liechtenstein and the Belgian Minister of Justice, Mr Marc Verwilghen. Ambassador Árpád Prandler of Hungary chaired the Consultation Meeting.
- 4. Participants first heard an intervention from Mr Lucius Caflisch, Judge of the European Court of Human Rights, who addressed selected issues of the ICC Statute from the point of view of the European Convention of Human Rights. The meeting then turned to the presentation of several national reports on the status and process of ratification and implementation of the ICC Statute. Written national reports from a large number of countries formed the basis for preparation for the meeting and were made available to the participants via a website.
- 5. The specific topics addressed in the detailed discussions of the meeting included the topics of national and international immunities and the implementation of the ICC Statute, the surrender of persons to the future ICC and other issues of co-operation with the ICC, such as the transit of persons over the territory of a State, the enforcement of sentences, as well as the reform of national substantive criminal law.

CONCLUSIONS

- 6. Participants thanked the Principality of Liechtenstein for its important initiative to convene this second round of consultations.
- 7. Participants welcomed the significant and encouraging developments in the field of the ratification and implementation process since the holding of the first Consultation Meeting in May of the year 2000.
- 8. Participants noted that since the first Consultation Meeting the number of member States of the Council of Europe which had ratified the Rome Statute had grown from 3 to 16 and learned in the course of debates that a number of other member States were in a position to ratify soon. Participants recognised that this task requires thorough consideration by the competent national authorities and that exchanges of information and views among member States, observer States and Organisations mentioned above may benefit this process.
- 9. In this connection participants welcomed the setting up of the website as well as the network of country co-ordinators which were both established in response to the first Consultation Meeting conclusions in which participants had called upon the Council of Europe to facilitate co-

- operation on the ICC among its member States and Observers. This co-operation should also include activities on a sub-regional level.
- 10. In the context of States' obligations with respect to the European Convention of Human Rights and Fundamental Freedoms, participants considered that deferral of jurisdiction to the ICC may not entirely free a State in a given case from its obligations arising from the Convention. The provisions of the Convention should, therefore, be borne in mind when undertaking the process of ratification and implementation of the ICC Statute.
- 11. Participants noted that in order to ensure compliance with the obligations derived from the Rome Statute various approaches are possible for the Statute's implementation, taking into account different legal systems and traditions.
- 12. On the subject of immunities the participants noted the Venice Commission report on constitutional issues of ratification of the Rome Statute which had been prepared on the basis of reports provided to the first Consultation Meeting. Participants considered that, as regards immunities provided for by national and international law, solutions must be found in order to secure full compliance with the ICC Statute. Constitutional amendments, where necessary, afford one solution to this end, but other legislative or interpretative means may also be appropriate.
- 13. Participants further discussed the subject of putting in place the necessary procedures for effective and swift co-operation with the ICC, in particular, the issue of compliance with requests from the ICC for the surrender of persons, and noted the growing acceptance of a distinction between this type of transfer procedure and traditional extradition procedures. Various issues were discussed with regard to situations in which a person, in the course of the compliance with a co-operation request from the ICC (Article 89, par. 3, of the Rome Statute), would be afforded transit over the territory of a State Party. Participants discussed the responsibilities of the State affording transit, the possibility of a competing request for extradition from a third State and the filing of a competing complaint against the person with the national judicial authorities of the State of transit.
- 14. Participants agreed that, in connection with co-operation, the experience of implementing the obligations resulting from United Nations Security Council Resolutions 827 (1993) and 955 (1994) establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda may be useful, but that there are also differences to be borne in mind.
- 15. Participants noted the particular importance for the future work of the ICC of appropriate State support with regard to enforcement of sentences in accordance with Part 10 of the Rome Statute and were encouraged by the willingness of States to receive sentenced persons.
- 16. Participants acknowledged that the ICC is complementary to national criminal jurisdictions and that, taking into account the relevant rules of international humanitarian law, primary responsibility for prosecution of these crimes lies with States. To this effect, national legislation and practices should enable States to bring to justice the persons responsible for the crimes under Articles 6-8 of the Statute. Participants noted that national law already exists in several States, while other States contemplate introducing legislation to this effect.
- 17. Participants reaffirmed the objective of the early establishment of the ICC and their commitment to the integrity of the Rome Statute, particularly in the context of the work in progress in the Preparatory Commission at the United Nations. In this connection, participants noted that it is very likely that the Rome Statute will enter into force in the near future. They also stressed the urgent need to negotiate the remaining instruments necessary for the functioning of the Court and expressed their willingness to support the practical measures required for the effective establishment of the Court.

- 18. In this context, participants recalled the important role that the 43 member States of the Council of Europe can play, considering that the number of ratifications and accessions world-wide had reached 38 and the number of ratifications necessary for the entry into force of the Rome Statute is 60. Participants agreed to contribute towards the achievement of this goal and welcomed national initiatives to hold seminars on the ratification and implementation process, involving the media and parliamentarians, so that awareness and confidence in the future Court may be fostered among the public.
- 19. They appreciated the efforts of the Council of Europe in facilitating the exchange of information and views among its member States and observers, thereby providing assistance to its member States in the ratification and implementation process with a view to an early establishment of the ICC and its effective functioning.
- 20. Participants called upon the Council of Europe to continue to provide this opportunity for mutual consultations, in particular by maintaining its useful ICC website, by providing support to the network of country liaison officers and by holding further consultations in an appropriate and regular form. For that purpose, appropriate provision should continue to be made in the programme of activities of the Council of Europe, in particular to enable the participation of all member and observer States in such activities. Furthermore, co-ordination of the Council of Europe's efforts with other organisations should also be ensured, in particular with the European Union, whose Council adopted an important Common Position in June of 2001.
- 21. Bearing in mind the Declaration of the Committee of Ministers of the Council of Europe of 10 December 1998, in particular, calling on States to sign and ratify the Rome Statute and facilitate the rapid establishment of the International Criminal Court, participants invite the Committee of Ministers to lend further support to this end and decided to submit these conclusions to the Committee of Ministers asking it to forward them to the CDPC and CAHDI so that they can take them into account in their work.

Conclusions of the 3rd Multilateral consultation (17 September 2001)

- Following the Consultation Meetings in May of 2000 and September 2001, which had been the
 joint initiative of the European Committee on Crime Problems (CDPC) and the Committee of
 Legal Advisers on Public International Law (CAHDI), the Council of Europe organised a Third
 Consultation Meeting on the implications for Council of Europe member States of the
 ratification of the Rome Statute of the International Criminal Court (ICC) in Strasbourg, on 17
 September 2003.
- 2. This meeting was held in the framework of the intergovernmental programme of activities of the Council of Europe with a view to facilitating an exchange of views and information among the member and observer States of the Council of Europe and considering the role that the Council of Europe can play in this respect.
- 3. Experts from 36 member States, 4 observer States and observers from EUROPOL, INTERPOL, ICRC, ICC and NATO took part in the meeting, which was opened by the representative of the Secretary General of the Council of Europe, Mr Roberto Lamponi, the representative of the Presidency of the Committee of Ministers, Ms Victoria Iftodi and the representative of the Presidency of the European Union, Mr Roberto Bellelli. Ambassador Juan-Antonio Yañez-Barnuevo of Spain was elected by participants to chair the Meeting.
- 4. Participants first heard an intervention from Mr Mauro Politi, Judge of the ICC, who addressed the Conditions for the application of the Statute of the ICC.
- 5. The meeting then turned to the presentation of developments in the ratification and implementation of the ICC Statute in the member and observer States of the Council of Europe, including to references to developments elsewhere. Written national reports from a number of countries formed the basis for preparation for the meeting and were made available to the participants via a website.
- 6. Two specific topics were addressed in the detailed discussions of the meeting, namely:
 - a. Universal jurisdiction and obligations under international law the extension of jurisdiction to include the prosecution of genocide, war crimes and crimes against humanity, which was presented by Mr Pål Wrange (Sweden) and
 - b. the Interaction between universal jurisdiction at national level and co-operation with the ICC, in particular the scope of universal jurisdiction, the advantage of transferring cases to the ICC, transfer to the ICC in cases of immunity impeding criminal prosecution at national level, which was presented by Mr Josef Brink and Mr Eberhard Desch (Germany).

CONCLUSIONS

- 7. Bearing in mind the conclusions adopted at the two prior consultation meetings, participants welcomed the significant and encouraging developments in the field of the ratification and implementation process since the holding of the second Consultation Meeting in September 2001, in particular the entry into force of the Rome Statute on 1 July 2002 and the setting up of the organs of the ICC in 2003.
- 8. Participants noted that since the second Consultation Meeting the number of member States of the Council of Europe which have ratified the Rome Statute has grown from 16 to 38. Participants recognised that this task requires thorough consideration by the competent national authorities and that exchanges of information and views among member States, observer States and Organisations mentioned above have benefited this process and will continue to do so.

- 9. Participants noted that in order to ensure compliance with the obligations derived from the Rome Statute various approaches are possible for the Statute's implementation, taking into account different legal systems and traditions.
- 10. Participants stressed the importance for the proper functioning of the ICC of the Agreement on Privileges and Immunities of the International Criminal Court and called upon States to become Parties to it and to adopt, where necessary, national implementing legislation at the earliest opportunity.
- 11. Participants further stressed the importance of putting in place the necessary legislation and procedures for effective and swift co-operation with the ICC, in particular as regards compliance with requests from the ICC for the surrender of persons, and noted the broad acceptance of a distinction between this type of transfer procedure and traditional extradition procedures.
- 12. Participants bore in mind Council of Europe Parliamentary Assembly Resolution RES (2003) 1336 Threats to the International Criminal Court and the reply of the Committee of Ministers to Parliamentary Assembly Recommendation REC 1581 (2002) Risks for the integrity of the Statute of the International Criminal Court, according to which "any efforts to undermine the integrity of the ICC are not acceptable and [...] bilateral agreements under article 98 of the Statute may only be acceptable if they respect the letter, object and purpose of the Statute", while taking note of EU General Affairs Council Conclusions on the ICC of 30 September 2002.
- 13. Participants agreed that any bilateral agreement regarding a State's co-operation with the ICC must be in conformity with the Rome Statute and other relevant provisions of international law. In this context, participants agreed that States Parties to the Statute could exchange information and support and assist each other in their efforts to meet their treaty obligations emanating from the Statute, particularly where the integrity of the Statute is being challenged.
- 14. Participants acknowledged that the ICC is complementary to national criminal jurisdictions and that, taking into account the relevant rules of international humanitarian law, primary responsibility for prosecution of these crimes lies with States. To this effect, national legislation and practices should enable States to bring to justice the persons responsible for crimes under Articles 6-8 of the Statute. Participants noted that national law already exists in several States, while other States are in the process of introducing legislation to this effect.
- 15. In this connection, participants further stressed that, as regards immunities provided for by national and international law, solutions ought to be found in order to secure full compliance with the ICC Statute.
- 16. The development of universal jurisdiction in accordance with international conventions and other applicable norms was noted. Various aspects of universal jurisdiction were discussed, including legal, practical and other problems. In particular, participants noted the importance of the development of universal jurisdiction in the fight against impunity for grave crimes of international concern.
- 17. Participants addressed the issue of a reasonable division of labour between the national and international levels of jurisdiction. Whereas the ICC will have to develop criteria for the types of cases it takes on or leaves to national jurisdictions, national judicial authorities must consider that the ICC may ultimately have to give priority to dealing with cases of international importance. It is to be hoped that, from this perspective, mutual cooperation and a division of labour between the ICC and national prosecutors and courts will develop. This will help alleviate such problems as simultaneous investigations at both international and national levels, and related evidentiary problems and delays.

- 18. Participants noted the entry into force on 27 June 2003 of the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (ETS 082).
- 19. Participants noted the necessity to finalise the Relationship Agreement between the ICC and the United Nations.
- 20. Participants recalled the important role that the 45 member States of the Council of Europe can play in supporting the ICC and the efforts of the Council of Europe in facilitating the exchange of information and views among its member States and observers, thereby providing assistance to its member States in the ratification and implementation process, and supporting the universality and effective functioning of the ICC.
- 21. Participants thanked the Council of Europe for organising this third Multilateral Consultation and called upon it to pursue its efforts in support to the ICC, in particular through its ICC website, the network of country liaison officers and by holding further consultations as appropriate. For that purpose, provision should continue to be made in the programme of activities of the Council of Europe, in particular to enable the participation of all member and observer States in such activities. Furthermore, co-ordination of the Council of Europe's efforts with other organisations should also be ensured, in particular with the European Union, which has issued a revised Common Position on the ICC on 16 June 2003.
- 22. Bearing in mind the above-mentioned reply of the Committee of Ministers to Parliamentary Assembly REC 1581 (2002), participants invited the Committee of Ministers to lend further support to the ICC and decided to submit these conclusions to the Committee of Ministers asking it to forward them to the CDPC and CAHDI so that they can take them into account in their work.