

***THE FINANCING OF THE INTERNATIONAL CRIMINAL COURT***  
***A Discussion Paper***

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## FOREWORD

This paper has been prepared by the Center on International Cooperation under the auspices of the Project on International Courts and Tribunals (PICT) to provide the Preparatory Commission of the International Criminal Court with issues for consideration.

Aware that international law is the linchpin of a burgeoning international public sector, and that courts, tribunals and other dispute settlement bodies have emerged in virtually every area of international activity, in 1996 the Center on International Cooperation (New York University) and the Foundation for International Environmental Law and Development - FIELD (School of Oriental and Asian Studies, University of London) launched PICT.

PICT's mission is to address the legal, institutional and financial issues arising from the multiplication of international courts and tribunals and other dispute settlement bodies, as well as from the increased willingness of members of the international community to have recourse to them.

PICT addresses legal, institutional and financial issues arising out of the proliferation of international courts and dispute settlement bodies and the growing number of cases which these bodies are called upon to address. The overall objective is to promote research, training and public education activities that will contribute to the more effective, equitable and efficient delivery of international justice.

- *Effectiveness*: reinforcing the role of international courts and bodies in the administration and development of the international legal system; strengthening their credibility as convenient and efficient dispute settlement bodies; ensuring the implementation of their rulings;
- *Equity*: reducing financial and structural barriers that limit the ability of less well-endowed actors to use international courts and dispute settlement bodies; providing practical know-how and legal skills to their actual and potential users;
- *Efficiency*: ensuring the availability of adequate financial means and the use of the best management practices; decreasing costs and length of proceedings by streamlining statutes and rules of procedure.

To achieve these general objectives PICT promotes and undertakes research on legal, financial, procedural and access issues which affect the delivery of international justice, with the intent of identifying potential solutions.

## **The Financing of the ICC – A Discussion Paper**

This discussion paper focus on a crucial component of the future International Criminal Court: its Financing. It is intended to provide some ideas for debate at the 2000 meetings of the Preparatory Commission for the International Criminal Court.

PICT itself takes no position on the legal questions involved but believes that the views of the papers' authors can help to both clarify provisions in the Rome Statute and inform decisions on the financing of the Court. We invite readers to comment on the papers directly to the authors or to PICT staff at <cr28@acf2.nyu.edu>.

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The views presented in this paper are those of the authors and do not necessarily represent the ones of the collaborators or the commentators.

## **1. INTRODUCTION**

According to article 113 of the Rome Statute:<sup>1</sup>

*“Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties”.*

Part 12 of the Rome Statute details the basic elements of the financial framework for the International Criminal Court [hereinafter the ICC]. The Financial Regulations and Rules [hereinafter the Financial Regulations] and the budget for the first year, shall be drafted by the Preparatory Commission for the International Criminal Court. The Assembly of States Parties will consider and adopt the committee’s recommendations.<sup>2</sup> The remaining task is huge, as this involves highly political as well as technical aspects, which largely remain to be worked out. In addition, the implementation of ICC’s unique mandate and structure, which are different from existing international judiciary bodies, requires some inventiveness on part of the Preparatory Commission and the Assembly of States Parties.

One of the most important factors of the ICC’s financing is its funding. The Rome Statute stipulates the funds of the Court and the Assembly of State Parties as assessed contributions made by State Parties, and funds provided by the United Nations subject to the approval by the General Assembly. In addition, the Court may receive voluntary contributions, in accordance with relevant criteria adopted by the Assembly of State Parties. The ICC application of these resources must take into consideration various factors, most importantly the preservation of the Court’s independence and impartiality.

The unique challenge is to predict the ICC’s expenditures. As the Court’s future activities are unknown, and as the Court’s structure and operation are still being worked out in the Rules of Procedure and Evidence,<sup>3</sup> any estimate will be insufficient. However, some speculation about the Court’s start-up costs, including what resources are necessary for the minimum operation of the stand-by years, might be feasible.

The Assembly of State Parties is the sole budgetary authority of the Court, however all budgetary procedures are as yet undecided. The Rome Statute does not stipulate who shall prepare the budget, who shall submit it to the Assembly of States Parties, and how it shall be adopted. The procedures are further complicated as the Statute does not provide the Court with a secretariat. The adopted procedures will

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<sup>1</sup> Rome Statute of the International Criminal Court, Adopted in Rome on 17 July 1998, UN Doc. PCNICC/1999/INF/3.

<sup>2</sup>Each State Party shall have one representative in the Assembly. Other states that have signed the Rome Statute Final Act may be observers to the Assembly; see the Rome Statute, art. 112.1. This representation differs significantly from the Preparatory Commission, which consists of representatives of states that have signed the Final Act and other states that were invited to participate in the Rome Conference.

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inevitably effect the independence of the Chambers and the Office of the Prosecutor, as well as the extent of the Assembly's authority versus the Court.

This paper intends to address some issues for consideration by the Preparatory Commission for the International Criminal Court and the Assembly of State Parties. Its coverage is far from being inclusive, but hopefully extensive enough to facilitate some discussion during the coming planning of the ICC's financing.

## 2. FINANCIAL FRAMEWORK

### 2.1 Basic Elements

The ICC is an independent international organization established by a treaty. As the Court does not function within the wider scope of an international organization, it does not enjoy institutional support.

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Rather, it will need to establish and operate its own financial and administrative system. Different from most other courts and tribunals, the Court is therefore responsible for its own budget preparation and collection of contributions.<sup>4</sup> Despite the increased responsibilities resulting from the Court's self-sustaining position, the arrangement involves considerable benefits. The Court's financial framework is

established and developed solely for the needs of an international judiciary body, which can differ considerably from bigger institutions also engaged in different operations. The Court's own tailored structure and procedures should therefore be well equipped to promote effective and competent organization.

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The Rome Statute lays out the basic structure of the Court's financial framework:

- There is a single financial framework for both the Court and its overseeing body, the Assembly of State Parties (art. 113-115).<sup>5</sup>
- The Court and the Assembly are financed from assessed contributions from State Parties, which are based on the scale adopted by the United Nations for its regular budget; and from funds provided by

<sup>3</sup> The Preparatory Commission has the mandate of the drafting the Rules of Procedure and Evidence, and the draft text shall be finalized before 30 June 2000; see *Final Act of the United Nations Diplomatic Conference of plenipotentiaries on the establishment of an International Criminal Court*, Annex I, F.5 and 6.

<sup>4</sup> The Court differs significantly in this respect from many other international judicial bodies. For instance, the ad hoc international criminal tribunals are subsidiary organs of the Security Council and are incorporated in the UN financial framework. The European Court of Human Rights and the Inter-American Court of Human Rights function within the wider scope of international organizations (respectfully the Council of Europe and the Organization of American States) and are incorporated in their financial frameworks. A court that does enjoy a similar position to the ICC, is the International Tribunal for the Law of the Sea.

<sup>5</sup> The single framework for both the Court and the Assembly of States Parties differs from the ITLOS, which has a two-tier system. The expenses of the tribunal are paid by assessed contributions from state parties. However, the meetings of the states parties to the Law of the Sea Convention, which oversees the tribunal, are paid from the regular budget of the UN.

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the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council (art. 115).

- Voluntary contributions are allowed, as additional funds, in accordance with relevant criteria adopted by the Assembly of State Parties (art. 116).
- The Assembly of State Parties considers and decides the budget of the Court (art. 112.2(d)).
- The Court has an independent auditor (art. 118).

Various instruments will further develop the Court's financial framework. Most important are the Financial Regulations and the Court's relationship agreement with the UN.<sup>6</sup> These instruments must meet Court's objective of being an independent and effective international judicial body.

### 2.2 Financial Rules and Regulations

In addition to technical financial management matters, the Financial Regulations will determine major undecided issues such as who will prepare the budget and what kind of oversight mechanism will be

*In addition to technical financial management matters, the Financial Regulations will determine major undecided issues such as who will prepare the budget and what kind of oversight mechanism will be incorporated.*

incorporated.<sup>7</sup> Depending on the stipulations of the Assembly, the Financial Regulations could also regulate further delicate issues such as the scale of assessment of State Parties' contributions (e.g., if and how the UN minimum and maximum threshold will be used) and the possible UN contribution (e.g., guidelines for cases that the Security Council refers to the Court).<sup>8</sup> The Assembly of State Parties' criteria on voluntary contribution could have fundamental bearing on the Court's perceived independence.

Furthermore, the Rome Statute refers certain matters to the Assembly of State Parties which could be incorporated into the Financial Regulations. According to article 79, a Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. The Trust Fund shall be managed by criteria to be determined by the Assembly of States Parties. Furthermore, gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties (art. 44.4). To facilitate coherent and transparent rules, these provisions should be incorporated into the Financial Regulations.

The Financial Regulations shall be adopted by the Assembly of State Parties and, being a decision on a matter of substance, they would need to be approved by a two-thirds majority of those present and

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<sup>6</sup>Various other instruments will affect the Court's financing, like the Rules of Procedure and Evidence (criteria on fines, organization of the Court, manner of proceedings, victims' participation, etc.), the Headquarters agreement with the Netherlands, Staff Regulations, etc. The impact however will be more on the Court's budget than on the Court's financial framework.

<sup>7</sup>The ITLOS draft Financial Regulations of the Tribunal, has provisions on the financial period, the budget, appropriation, provision of funds, funds, other income, custody of funds, investment of funds, internal control, the accounts, audit, and decisions involving expenditures; *Financial Regulations of the Tribunal*, UN Doc. SPLOS/36, 31 March 1999.

<sup>8</sup>At ITLOS the scale of assessments has been incorporated in the decision on the budget of the tribunal, pending finalization of the financial regulations.

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voting (art. 112.7(a)). As the Financial Regulations might be adopted at a later date than the commencement of the Court, and surely of the Assembly, it has to be decided what financial rules will apply during the interim period. To illustrate, the International Tribunal for the Law of the Sea, now in its fourth year of operation, has still not adopted its financial regulations.<sup>9</sup>

### 2.3 Relationship of the Court with the United Nations

According to article 2 of the Rome Statute, the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties. The ICC-UN relationship

*The ICC-UN relationship agreement might shape the ICC's financial framework in at least three ways.*

agreement might shape the ICC's financial framework in at least three ways. First, the agreement could include UN contributions to the Court generally and/or specifically, as in relation to the Court's expenses resulting from Security Council referrals. Second, the agreement will likely oblige the Court to conform, as far as possible, to standard UN financial practices and forms.<sup>10</sup> Third, the agreement could entail rendering of certain financial and administrative services from the UN.<sup>11</sup> This

is material, as the Rome Statute does not provide the Court with any secretariat. The Assembly could prefer to use the UN Secretariat to carry out certain work such as the preparation of the budget and collection of state contributions. In addition, the Assembly has the mandate of establishing a Trust Fund for victims (art. 79). One of the Assembly's options is to establish an independent Trust Fund, administrated outside the Court, like by the UN.<sup>12</sup>

The ICC-UN relationship agreement could also indirectly affect the resources of the Court. Some collaboration between the Court and the UN International Criminal Tribunals for the Former Yugoslavia and Rwanda [hereinafter the ICTY and ICTR, respectively] might be feasible in certain circumstances. Such collaboration could be in the form of an exchange of resources, personnel, facilities, and equipment.

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<sup>9</sup> A draft of the financial regulations was drawn by the tribunal's Registrar and revised by the Committee on Budget and Finance, approved by the tribunal, and submitted to the meeting of the state parties for adoption in March 1999. The draft was discussed at the eighth, ninth and tenth meetings of the state parties but has still not been adopted. For the time being, the Financial Regulations and Rules of the United Nations are being applied *mutatis mutandis*. The President of the tribunal has urged final action on the regulation in order to enable the tribunal "to develop its Financial Rules in line with the requirements of transparency"; see Report of the ninth meeting of state parties, UN Doc. SPLOS/48, para. 35.

<sup>10</sup> An agreement between the ITLOS and the UN established a close budgetary and financial relationship between the two organizations. The tribunal "agrees to conform, as far as may be practicable and appropriate, to standard practices and forms recommended by the United Nations"; see *Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea*, UN Doc. A/RES/52/251, 15 September 1998, art. 10.3.

<sup>11</sup>As for the ITLOS, the UN may also "upon request" of the tribunal "provide advice on financial and fiscal questions of interest to the International Tribunal with a view to achieving coordination and securing uniformity in such matters". Furthermore, the registrar of the tribunal "may consult" with the UN Secretary-General "with a view to achieving consistency in the presentation of the budget" of the tribunal with that of the UN; *id.*, art. 10.4 and 10.5.

<sup>12</sup> In 1997 189 trust funds were administered by the UN Secretary-General. See Financial report and audited financial statements for the biennium ended 31 December 1997 and Report of Board of Auditors, UN Doc. A/53/5 (1998). See also discussion in *Reparations to victims of crimes (art. 75 of the Rome Statute) and the Trust Fund (art. 79), Recommendations for the Court Rules of Procedure and Evidence*, by Dinah L. Shelton and Thordis Ingadottir, Prepared by the Center on International Cooperation, New York University, 1999.

### 3. FUNDS OF THE COURT AND OF THE ASSEMBLY OF STATES PARTIES

According to article 115 of the Rome Statute:

*“The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:*

- (a) *Assessed contributions made by States Parties;*
- (b) *Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses occurred due to referrals by the Security Council.”*

This provision is the result of a compromise between two conflicting schools of thoughts at the Rome Conference. While in Rome all states agreed on the need to secure adequate and long-term funding for the Court, some delegates favored a budget funded primarily through the UN. This option would have provided reliable and stable source of financing and ensured the universal character of the Court by its linkage with the United Nations. Other delegates, however, felt that, as long as universality of the Court was a mere aspiration, exclusive or primary funding by the UN, could raise serious issues of state sovereignty and equity, as a potentially large number of UN members would be funding an organization to which they did not belong.

Article 115 struck a delicate balance between these opposing views by putting the greatest financial responsibility on states parties, but not excluding altogether UN contributions. In particular the wording of paragraph (b) of article 115 has been carefully crafted so as not to limit UN contributions only to expenses occurred due to referrals by the Security Council. The problem is to determine on what occasions other than referrals by the Security Council the UN might contribute to the expenses of the Court and the Assembly of States Parties.

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The following pages will analyze first how, under the Rome Statute, states parties contributions are to be allotted and, second, when and how the UN might contribute.

#### 3.1 Assessed Contributions by States Parties

Consistent with the practice of the UN and all major international organizations, the funds of the ICC are to be apportioned among the states parties. In particular, according to article 117 of the Rome Statute (assessment of contributions):

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*“The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.”<sup>13</sup>*

Unlike other international organizations, the Rome Statute does not mandate a pre-defined scale of assessment in its constitutive document. Article 117 provides a rather general model (“the scale adopted by the United Nations for its regular budget...”). That model can and should be adjusted and adjustments have to be made “...in accordance with the principles on which that scale is based”. Finally, the ICC scale of assessment has to be agreed on by states parties.

### 3.1.1 The UN Scale of Assessment

The assessment scale for the United Nations is decided by the General Assembly.<sup>14</sup> The Committee on Contributions, consisting of 18 members elected *ad personam*, advises the General Assembly and makes recommendations for the apportionment of expenses.

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Since the inception of the organization, the assessment scale of the UN has been based on the so-called “capacity to pay” principle.<sup>15</sup> The “capacity to pay” of a member state is measured mainly by national income (GNP – Gross National Product),<sup>16</sup> adjusted by factors such as external debt and population. National income is converted into US dollars, adjusted and expressed as a share of the total income of UN members.

Because the assessment scale is adopted by a political organ, the General Assembly, it is subject to political compromises. In particular, the scale of assessment is subject to arbitrary maximum and minimum levels. Currently, no state bears more than 25 percent or less than 0.001 percent of the

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<sup>13</sup> The Preparatory Committee’s Final Draft provided for two alternative assessment scales as models for the Court’s scale. One option provided that the scale would be based upon “... a multi-unit class system along the lines of that used in the International Telecommunication Union or the Universal Postal Union.” In these organizations, each member freely selects one of a limited number of classes, expressed in terms of a multiple or a fraction of other classes, each class corresponding to a different contribution expressed in units. The second option, which was eventually adopted in the Rome Statute, envisaged a system based on percentage rather than classes and units, which therefore provided an unlimited variation of assessments and in which states were not free to choose their own assessment. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act*, U.N. Doc. A/CONF.183/2/Add.1, art. 106.

<sup>14</sup> UN Charter, art. 17.2. Other organizations which use the UN assessment scale are ILO, FAO, WHO, UNESCO, UNIDO, IAEA and ITLOS.

<sup>15</sup> GA Res. 14 A9I), February 13, 1946. Over the years the principle has been further clarified by stressing the “real capacity to pay of member states” as “the fundamental criterion for determining the scale of assessments”; GA Res. 39/247 B, April 12, 1985.

In other international organizations interest in the work of the organization is taken into account (e.g. measured by length or railway lines, gross ship tonnage, share in trade of a given commodity), the number of subsidiary bodies in which members participate, the total population or each member, or no principle at all but the mere result of diplomatic bargaining. Schermers, H. G./Blokker, N., *International Institutional Law : Unity within Diversity*, The Hague, Nijhoff, 1995, at 613-617.

<sup>16</sup> In its recent review of the assessment process the Committee on Contributions did not support the idea of using states’ gross domestic product (GDP) as a base for assessment instead of GNP.

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budget<sup>17</sup>, and the quota for states recognized as least developed countries cannot exceed 0.01 percent.<sup>18</sup> In 2000, only the United States was hitting the upper ceiling of 25 percent, while there were 34 states (about 18 percent of all UN members) paying the minimum contribution.<sup>19</sup>

Usually, the UN scale of assessment is approved for three-year periods, the most recent of which (1998-2000) was adopted by the General Assembly in December 1997.<sup>20</sup> The present scale of assessment is currently under review, and the next one, for the triennium 2001-2003, is not expected to be adopted before the end of 2000.<sup>21</sup> The General Assembly has asked its Committee on Contributions to examine 12 specifications for calculation of the scale and to make recommendations on how the scale might work under each specification.<sup>22</sup>

*Currently, no state bears more than 25 percent or less than 0.001 percent of the budget, and the quota for states recognized as least developed countries cannot exceed 0.01 percent.*

Besides the scale of assessment for the UN regular budget, special accounts (budgets) are governed by other special assessment scales. For instance, the scale of assessment for peacekeeping expenditures grants all developing states a big discount off the regular assessment rate.<sup>23</sup> It reallocates the difference to the five permanent members of the Security Council, reflecting their special responsibility for maintaining international peace and security.<sup>24</sup>

In the case of the budgets of the two ad hoc criminal tribunals for the former Yugoslavia and Rwanda, half of the appropriations are assessed to UN member states on the basis of the regular budget scale, and the other half on the basis of the peacekeeping budget rate.<sup>25</sup>

### 3.1.2 A Hypothetical Scale of Assessment of the Court

<sup>17</sup> Considering that the UN regular budget in the 1990s was slightly more than \$1 billion, this corresponds respectively to slightly more than \$250 million and \$10,000.

<sup>18</sup> I.e. slightly more than \$100,000.

<sup>19</sup> The United States is currently seeking to have its contribution lowered from 25 percent to 22 percent in the first instance, and then to 20 percent. See General Assembly Resolution 52/215 D. The General Assembly made the reopening of the issue, contingent upon the extinction of the U.S. debt toward the organization.

<sup>20</sup> UN GA Res. 215, 52<sup>nd</sup> Sess., U.N.Doc. A/Res/52/215 (January 20, 1998).

<sup>21</sup> A set of recommendations, focusing on the methodology, was submitted to the General Assembly at its 54<sup>th</sup> session 1999. See Report of the Committee on Contributions, G.A. Official Records, Fifty-fourth Session, Suppl. No. 11 (A/54/11), UN, New York, 1999.

<sup>22</sup> The specifications, set out in the resolution, involve instructions on such elements as the ceiling and floor rates, statistical base periods, conversion rates and debt burden adjustment; UN Doc. A/RES/54/237D, 7 April 2000. See also report of the Fifth Committee on the Scale of assessments for the apportionment of the expenses of the United Nations, UN Doc. A/54/685/Add. 1. The minimum rate will likely remain at 0.0001 percent. There has been a proposal to create a minimum rate for permanent members of the Security Council of three percent to reflect their special responsibility in maintaining peace and security, but China has opposed it.

<sup>23</sup> The scale for peacekeeping operations is based on a case-by-case basis and approved by the General Assembly. The methodology used was approved by the GA in its resolution A/Res/3101 (XXVIII) of December 11, 1973. Under the method the assessments of the poorer countries are reduced in accordance with to the regular budget scale, and the reduction is added to the assessment of the permanent members of the Security Council because of their special responsibilities under the Charter.

<sup>24</sup> In 1998, the US was assessed 25 percent of the regular budget and 30.52 percent for peacekeeping costs, and France 6.49 percent of the regular budget and 7.93 percent of peacekeeping costs, while India was assessed 0.31 and 0.061 percent respectively.

<sup>25</sup> Some states argued that the appropriation for the tribunals should be solely assessed on the basis of the peacekeeping budget scale, as the tribunals were sub-organs of the Security Council. The adopted compromise included an offering of gratis personnel by the some of the Security Council's permanent members.

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Given that at least for some time, not every UN member will be party to the Rome Statute and non-UN members might become party to the Statute, the UN scales of assessment cannot be applied as is to the

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Court. Indeed, the sum of the contributions of all states parties cannot be anything more or less than 100 percent of the Court's budget. This is not only dictated by logic but also by the fact that under the Rome Statute, expenses follow the budget and not vice versa.<sup>26</sup> Nonetheless, the ICC scale of assessment should be as close as possible to that of the UN. Not only is this mandated by the Rome Statute, but it is also advisable as it would reduce the need for politically arduous bargaining and tinkering with a scale which is carefully construed.

There is a formula that makes it possible to reconcile the asymmetry between the number of states Parties to the Rome Statute and the total members of the UN with the need to adhere as much as possible to the UN scale of assessment. The formula keeps proportions among parties to the Rome Statute the same as they are between contributions to the UN budget.<sup>27</sup> Thus the assessed contribution of, say Italy, which is Party to the Rome Statute and a member of the UN will be:

*(100 x assessed UN contribution of Italy) / Total of assessed UN contributions of all States Parties.*

In order to give some meaning to this abstract formula it might be interesting to generate a hypothetical scale of assessment for the first 60 parties upon entry into force of the Rome Statute [Table 1]. To this end, we have selected 60 states which currently seem to be most advanced in the ratification process and which have shown steady support for the Rome Statute [Table 1, Column 1], bearing in mind that one has to be realistic and admit that ratification is always contingent upon political developments, and many states are in the process of determining what steps are required for ratification.<sup>28</sup>

The imaginary list includes 14 out of 15 members of the European Union, four states which, in 2000, were assessed the minimum UN contribution, and Switzerland, which is not a member of the UN, although it does contribute to its budget. Conversely, it does not include the United States or Japan. These two states are the first and second largest contributors respectively to the UN budget and their inclusion in a first list might distort results significantly. Scenarios including one or both of them will follow.

<sup>26</sup> Similar to most public international organizations, the Court has a "closed system" of financing; i.e., the amount of funds is solely determined by the level of approved expenditures. See Maarten Halff & David Tolbert, "Funds of the Court and of the Assembly of States Parties", in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999), 1221, at 1221.

<sup>27</sup> Although there are two states which are not members and contribute to the UN budget (Switzerland and the Holy See).

<sup>28</sup> The selection is based on information provided by the Coalition for an International Criminal Court.

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These 60 states together contribute 46.35 percent of the UN budget, with the 14 chosen EU states contributing 36.23 percent collectively [Table 1, Column 2]. Now, if these 60 states are to pay 100 percent of the Court's budget, applying the above mentioned formula, a new scale of assessment can be generated [Table 1, Column 3]. Of course, the share of the ICC budget to be paid by each of these states will be greater than what they pay for the UN regular budget. Because of the relative preponderance of the EU group within the list, because it is, in the aggregate, the first contributor to the UN regular budget, and because of the absence of Japan and the United States, under this hypothetical scenario the EU states will be assessed 78.16 percent of the ICC budget (Germany 21.26, France 14.11, Italy 11.72, and UK 10.98 percent). The smallest UN contributors (i.e. those at the 0.001 minimum) will shoulder 0.0021 percent of the ICC budget. Argentina, Australia, Brazil, Canada, Norway, and Switzerland are the only other states whose contribution is going to be higher than one percent.

To give meaning to these percentages let's assume that, after the entry into force of the Rome Statute, for a while these 60 states remain the sole parties to the Statute and that, at the same time, the Court is called to conduct investigations and trials in connection with one or two major situations. Considering that the 2000 budget for the ICTY is \$106,149,400<sup>29</sup> while that of the ICTR is \$86,154,00,<sup>30</sup> it is not unrealistic to suppose that the budget of the Court, including the expenses of the Assembly of States Parties, could be roughly \$100 million. To be sure, the budget of the Court in its first years of operation will be much lower.<sup>31</sup> Still, \$100 million is plausible and facilitates generating figures on the basis of a hypothetical scale of assessment.

*It is noteworthy that under these circumstances, and even assuming a relatively high budget for the Court once it is running at capacity, the financial burden of becoming Party to the Rome Statute for the majority of the members of the UN would be minimal, under a couple of tens thousands of dollars.*

If this is so, then EU states will collectively pay \$78,166,051.90 (Germany \$21.26 million, France \$14.11 million, Italy \$11.72 million, and UK \$10.98 million). 14 states would pay less than \$10,000 each, the smallest contributors paying \$2,157.08 each. It is noteworthy that under these circumstances, and even assuming a relatively high budget for the Court once it is running at capacity, the financial burden of becoming Party to the Rome Statute for the majority of the members of the UN would be minimal, under a couple of tens thousands of dollars.

Let's now make the politically realistic assumption that the Japanese Diet has decided to sign and ratify the Rome Statute, joining those 60 initial states [Table 1, Column 4]. Because Japan is the second largest contributor of the UN regular budget, figures could change significantly, at least for some states. In particular, the EU total assessed share could decrease to 54.14 percent, while that of Japan alone would be 30.73 percent (or \$54,140,022.71 and \$30,737,166.08 respectively). The smallest contributors will

<sup>29</sup> UN General Assembly Resolution A/RES/54/239.

<sup>30</sup> UN General Assembly Resolution A/RES/54/240.

<sup>31</sup> *Infra* p. 30-34.

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owe 0.0014 of the budget (or \$1,494.06). Thus, Japan and the EU block together would pay 84.87 percent of the ICC's expenses.

Finally, the most daring scenario is the one where the initial 60 states and Japan are joined by the United States [Table 1, Column 5]. In that case, using *mutatis mutandis* the UN scale of assessment for the regular budget, the United States would take on 27.19 percent of the Court's budget (\$27,194,012.97), while Japanese and EU contributions would decrease to 22.37 and 39.41 percent respectively. The remaining 46 parties will bear 10.03 percent of the expenses. The smallest states' contributions in this case would go as low as \$1,087.76.

### 3.1.3 Possible Adjustments to the Scale of Assessment of the Court

These figures have been generated on the assumption that the UN scale of assessment for the regular budget is copied *mutatis mutandis* into the Court's scale. However, article 117 of the Rome Statute provides that, as the UN scale is subject to certain adjustments reflecting political compromises, so too is the ICC scale. In fact, most international organizations' scales of assessment are subject to arbitrary floors and ceilings. For instance, this is the case not only of the various UN scales of assessment (e.g., regular budget, peacekeeping, etc.) but also of the Sea-Bed Authority and the International Tribunal for the Law of the Sea.

*Most international organizations' scales of assessment are subject to arbitrary floors and ceilings... Floors and ceilings could also be applied to the ICC scale.*

Floors and ceilings could also be applied to the ICC scale [Table 2, Column 1]. The rationale for minimum levels of contribution is usually that leaving scales based on the "capacity to pay" principle unfettered would result in contributions so small as to be offset by banking and transfer fees. Thus in the case of the Sea-Bed Authority and the International Tribunal for the Law of the Sea, the minimum has been set at 0.01 percent, that is to say ten times higher than that of the UN regular scale. A similar adjustment might be considered in the case of the ICC. Again, in the case of the hypothetical \$100 million budget, that would represent a minimum of \$10,000.

A similar adjustment would affect 19 states out the 62 assumed first parties (including Japan and the United States), whose contributions would be greater than or equal to 0.001 but less than 0.01 [Table 2, Column 2]. Some would pay as much as \$8,912 extra and some (e.g., Zimbabwe) as few as \$210.15. Of course, the states saving the most would be the largest contributors (Germany \$12,369, Japan \$25,816, and the United States \$31,372, [Table 2, Column 5]).

If, for the sake of equity, a maximum of, say 25 percent was to be applied, only the United States (or Japan in the event the former is not party) would benefit from it (a U.S. savings of \$2,194,000) [Table 2, Column 3]. Indeed, although the EU as a group would surpass the threshold, none of its member states alone would do so. A 25 percent ceiling would translate into a negligible extra cost for the smallest

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contributors (from \$32.78 for Burundi, to \$295.08 for Zimbabwe), while it would be significantly higher for Japan (+\$674,519) and the EU (+\$178,374 for Italy, +\$214,593 for France, +\$323,185 for Germany, [Table 2, Column 6]).

Finally, if both the 0.01 percent floor and the 25 percent ceiling were to be applied to the hypothetical ICC scale with a \$100 million budget, with both Japan and the United States as parties, the results would not be substantially different from the scenario with only the upper ceiling applied [Table 2, Column 3, Table 2, Column 4 and Table 2, Column 7].

### 3.1.4 The Power to Assess Contributions

As the sole budgetary authority of the ICC, the power to adopt the ICC scale of assessments is vested in the Assembly of States Parties. Although the resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court mandates that the Preparatory Commission for the International Criminal Court prepares a draft text of the Financial Regulations and Rules and a budget for the first financial year, it is silent as to the eventual preparation of an assessment scale. However, as the scale of assessment will need to be adopted at the time of, or immediately after, consideration and approval of the first budget, it seems only logical that the Preparatory Commission submit a draft scale of assessment to the first Assembly of States Parties for consideration.

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Pursuant to article 112.7 of the Rome Statute, efforts should be made to adopt the scale by consensus. Failing that, the decision would need to be taken by a two-thirds majority, as the adoption of the scale of assessment is a decision on matters of substance rather than procedure.<sup>32</sup> Moreover, since states parties' contributions are expressed in terms of percentages of the total budget, adjustments will be required upon the accession or withdrawal of a State. Decisions relating to amendments of the scale also constitute a substantive decision requiring, in the absence of consensus, a two-thirds majority.

### 3.1.5 The Duty to Pay Assessed Contributions.

The fact that contributions are assessed implies that their payment is mandatory.<sup>33</sup> As the International

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Court of Justice stressed in its advisory opinion on *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the power to apportion expenses among parties also creates the obligation of each state to

<sup>32</sup> The Rome Statute, art. 112.7, a and b.

<sup>33</sup> Maarten Halff & David Tolbert, *supra* note 26, at 1227.

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bear that part of the expenses apportioned to it.<sup>34</sup> In other words, payment of contributions is a fundamental obligation of membership. Joining an organization means accepting the burden and obligation of contributing to its funding.<sup>35</sup> If expenses are approved lawfully by the organ which has the power to do so, there is no other option than for states parties to pay their dues.

The issue of non-payment, or delayed payment, of contributions is not moot. It is a problem which has affected the United Nations since its inception. It is also not unknown in the international judiciary domain. At the end of September 1998, unpaid assessments to the International Tribunals for the former Yugoslavia and Rwanda were estimated to be \$22 million.<sup>36</sup> By April 30, 1999, total outstanding contributions to those tribunals was a staggering \$73.2 million. Only 24 states (out of 188 UN members) had no outstanding contributions. As of December 31, 1999, the unpaid balance of assessed contributions to the International Tribunal for the Law of the Sea was \$1.47 million, or approximately 18 percent of its budget for the year 2001.

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Like the UN Charter, the Rome Statute contains a provision to address defaults on assessed contributions. According to article 112.8 (echoing article 19 of the Charter):

*"A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party."*

Inasmuch as article 112.8 makes the loss of voting rights dependent on arrears in the amount of contributions due for two full years, it implicitly provides that only contributions to the Court and Assembly of States Parties, as determined under articles 114, 115, and 117, are relevant. Only this type of financial obligation derives from membership. For instance, no obligations which have been accepted on a voluntary basis, but not exclusively under article 116 (Voluntary contributions), may be taken into account. A State Party may not be sanctioned if it has made a pledge which at a later stage it finds itself unable to fulfill.

*The Financial Regulations need to specify when contributions are to be considered due and payable, and when they are to be considered in arrears.*

The Financial Regulations need to specify when contributions are to be considered due and payable, and when they are to be considered in arrears. In the case of the United Nations, they are

<sup>34</sup> Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151.

<sup>35</sup> Certain Expenses of the United Nations, Judge Fitzmaurice, Sep. Op., at 208-209.

<sup>36</sup> UN Doc. A/C.5/53/SR.4.

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*“...due and payable in full within thirty days of the receipt of the communication of the Secretary General..., or as of the first day of the calendar year to which they relate, which ever is the later. As of 1 of January of the following calendar year, the unpaid balance of such contributions and advances shall be considered to be one year in arrears.”<sup>37</sup>*

The Financial Regulations of the International Tribunal for the Law of the Sea (ITLOS) have the same provision.<sup>38</sup>

Because the Court does not have a secretariat, and thus a Secretary General, it is not possible to transpose this provision from the UN Financial Regulations lock, stock, and barrel. In the case of the ITLOS, this function is carried out by the Registrar.<sup>39</sup> Alternatively, the Preparatory Commission might consider entrusting this task either to the President of the Bureau, or to the President of the Tribunal, or to any subsidiary body it might create.<sup>40</sup>

According to UN practice, dating back to its inception, the Secretary General has taken the view that arrears of the current year are to be left out of consideration.<sup>41</sup> This means that a balance is established only once a year, on January 1. On that occasion it is determined whether the accumulated arrears equal or exceed the amount due for the preceding two calendar years. If the answer is negative, the issue is settled for the whole year. Hence, since the commitments of the current financial year are disregarded, the permanent amount of arrears may consequently approach three full annual contributions.

This arrangement has allowed many financially weak states to be constantly in the red by an amount

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only slightly less than two full annual contributions and to postpone contributions until very late in the year. While such generosity might be warranted in the context of the UN regular budget (although, if large contributors were to profit from it, the UN would become rapidly insolvent), in the context of the International Criminal Court it seems unnecessary, if not dangerous. Indeed, the budget of the Court will be only a fraction of that of the UN, and to be able to carry out investigations the Office of the Prosecutor needs prompt funding, which could not be

guaranteed if too many members were to take advantage of similar lenient financial customs and regulations.

As a final consideration, it should be stressed that if the Security Council refers a case to the Court, UN funding is not mandatory and, in any event, is

*If the Security Council refers a case to the Court, UN funding is not mandatory and, in any event, is solely under the discretion of the General Assembly.*

<sup>37</sup> *Financial Regulations and Rules of the United Nations*, UN Doc. ST/SGB/Financial Rules/1/Rev. 3 (1985), Regulation 5.4.

<sup>38</sup> ITLOS draft Financial Regulations of the Tribunal, *supra* note 7, Regulation 5.5.

<sup>39</sup> *Id.*, Regulation 5.4.

<sup>40</sup> According to article 112.4 of the Rome Statute, “[t]he Assembly may establish such subsidiary bodies as may be necessary”.

<sup>41</sup> The Charter of the United Nations, A Commentary (Bruno Simma ed., 1994), at 331.

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solely under the discretion of the General Assembly.<sup>42</sup> If the United Nations is going to contribute to the expenses of the Court, either because of referrals by the Security Council or on any other regular basis that might be agreed for these considerations, the enforcement mechanism contained in article 112 cannot be resorted to because the UN as an organization is not party to the Rome Statute. If in arrears with payments, the UN cannot be deprived of the right to vote because, of course, it does not have one. The Preparatory Commission should keep this in mind when drafting the Relationship Agreement between the Court and the United Nations.

### 3.1.6 Other Costs Borne by States

Assessed contributions are not the only financial burden states parties will bear. Indeed, according to article 100 of the Rome Statute, the ordinary costs for execution of requests for assistance in the territory of the requested State shall be borne by that State. Nonetheless, there are some exceptions to this principle. Namely, the Court will bear:

- a) costs associated with the travel and security of witnesses and experts or the transfer, under article 93, of persons in custody;
- b) costs of translation, interpretation and transcription;
- c) travel and subsistence costs of the staff of any organs of the Court;
- d) costs of any expert opinion or report requested by the Court;
- e) costs associated with the transport of a person being surrendered to the Court by a custodial State; and
- f) following consultations, any extraordinary costs that may result from the execution of a request.

### **3.2 Funds Provided by the United Nations**

As mentioned above, at the Rome Conference several delegations, together with most NGOs, favored the idea of a Court budget funded primarily through the UN regular budget.<sup>43</sup> Towards the end of the Conference, when the hope of adopting the Statute by consensus was vanishing and it was rapidly becoming clear that several states, including the UN's foremost contributor, had no intention of joining any time soon, a more pragmatic and realistic approach prevailed and it was decided that the Court would have to be funded for the most part by states parties contributions. Nonetheless, the UN was not excluded altogether from the picture. In particular, under article 115.b, funds provided by the United Nations, subject to the approval of the General Assembly, were added to the resources of the Court.

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<sup>42</sup> See here in this regard the following footnote in the Preparatory Committee Draft Statute: "The view was expressed that, in case of a referral by the Security Council, the relevant expenses of the Court should be borne by the United Nations", Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.2, 1998, art. 104, note 2.

<sup>43</sup> *Supra* p. 7.

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Although the Court was not to have an organic relationship with the UN, as the ICTY and ICTR do, the UN Security Council was still allowed to refer to the Prosecutor situations in which one or more crimes appear to have been committed.<sup>44</sup> Because in those circumstances the Court would be providing a “service” to the Security Council, it was deemed just and equitable that the UN would contribute to the expenses deriving from those additional investigations and/or trials.

Yet the wording of article 115.b was carefully drafted so as to make referrals by the Security Council one of the reasons for UN funding, but not necessarily the only one (*“in particular in relation...”*). Indeed, although membership in the UN and the ICC, for a while, will not coincide, the United Nations as a whole will greatly benefit from the existence of a permanent criminal court. Not only will it contribute significantly to the maintenance and restoration of peace and security through punitive action and a deterrent effect, thus facilitating the work of the Security Council, but it will also represent a fast and possibly cheaper alternative to the establishment of ad hoc criminal tribunals.<sup>45</sup> The Court has been conceived as an universal body working in the interest of humankind as a whole.

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There are two ways in which the UN could contribute to the Court and Assembly of States Parties’ expenses without circumventing the spirit and the letter of the Rome Statute. Of course, one does not exclude the other.

### 3.2.1 The UN Could Provide the Initial Funding of the Assembly of States Parties and the Court

The first budget of the Court will be prepared by the Preparatory Commission and approved and presumably assessed by the first Assembly of States Parties. As detailed above, this budget will be shouldered by a relatively small number of states.<sup>46</sup> In the Draft Statute there was a provision prescribing that “during the initial phase, the expenses of the Court shall be borne by the United Nations, subject to

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<sup>44</sup> Rome Statute, art. 13.b.

<sup>45</sup> This advantage can be seen in the case of Kosovo where the prosecution from the International Criminal Tribunal for the Former Yugoslavia was at the scene in a matter of weeks. Had the tribunal not already been in existence this would have taken months if an action would had been taken at all.

<sup>46</sup> *Supra* p. 11. The Court does not necessarily need to be established immediately upon entry into force of the Rome Statute. The Statute does not say when the process of nominations of candidates should be started and when the Assembly for the election of judges should be convened. Moreover, there are some precedents for tactical delays. Indeed, when the United Nations Convention on the Law of the Sea reached the critical threshold of 60 ratifications and entered into force in 1994, the contracting parties felt that it was too soon for setting up the International Tribunal for the Law of the Sea. They felt that the Tribunal would have a stronger basis, politically and financially, with a higher number of states parties. They found legal devices for setting the election of the judges to a date about one year later than that which was prescribed by the Convention. See the documents LOS/PCN/L.115, para. 37 (1994) and SPLOS/3, para. 16 (1994) and Tullio Treves, *Some practical remarks on the early functioning of the ICC*, forthcoming, at 5.

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the approval of the General Assembly of the United Nations.<sup>47</sup> But eventually, when the perspective of ensuring the ICC universal membership faded, the provision did not make it into the Rome Statute.<sup>48</sup>

The possibility of having the United Nations funding the start-up costs of an independent international body with a different membership is not unprecedented. Indeed, the International Seabed Authority, established by the United Nations Convention on the Law of the Sea, was financed during its early years through the UN budget. Not until one year after the definitive entry into force of the Agreement on Part XI did the autonomous financing system based on assessed contributions of member states apply.<sup>49</sup>

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Conversely, with the exception of a very modest amount covering expenses prior to the establishment of the International Tribunal for the Law of the Sea, the financing was covered from the beginning by the contributions of the states parties to a separate budget for the Tribunal.<sup>50</sup> Considering that the initial budgets of the ICTY were \$276,000 (1993) and \$10,800,000 (1994), funding the start-up costs of the Court is not going to create a significant dent in the UN budget.

### 3.2.2 The UN Could Pay for the Costs of the Assembly of States Parties

Another possibility, which does not exclude the former, is that the UN would pay the costs of the Assembly of States Parties. To date the United Nations has borne the costs of the Preparatory Committee, the Rome Conference (although with substantial contributions from certain states), and the Preparatory Commission.

Under Article 112.6 of the Rome Statute, the Assembly can meet either at the seat of the Court or at the Headquarters of the United Nations. If New York was to be used preferentially, the UN could contribute

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to the costs of the Assembly in-kind, by providing free space, and secretarial and conference services. This would create a link between the UN and the Court which would be, in the long run, beneficial to both. As the number of parties to the Rome Statute expands, it will become not only convenient but also a logical necessity, as states' embassies in The Hague might not have the competence nor be sufficiently staffed to follow the work of the Assembly and its Bureau. Moreover, many small states are not adequately represented in The Hague.

<sup>47</sup> Draft Statute and Draft Final Act, *supra* note 13, art. 104, option 3, paragraph 2.

<sup>48</sup> The Committee of the Whole at the Rome Conference on funds provided by the United Nations footnoted that "...this may include the possibility of start-up funding by the United Nations if so decided by the General Assembly"; UN Doc. A/CONF.183/C.1/L.78 of 15 July 1998.

<sup>49</sup> *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, adopted by the United Nations General Assembly with Res. 48/263 of July 28, 1994, Annex, Sect. I, para. 14.

<sup>50</sup> Treves, *supra* note 46, at 5.

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At the very minimum, the UN might consider underwriting the cost only of the first Assembly of States Parties. There are very practical reasons for doing so. Indeed, the first Assembly of States Parties will adopt and assess the budget. However, the budget includes both the expenses of the Court (which will start functioning, and therefore incur in costs, only after the Assembly has elected the Judges and Prosecutor), and the expenses of the Assembly of States Parties itself. Some actor will have to advance the cash necessary to convene the first Assembly of States Parties. The UN might help resolving this cash-flow problem.

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### 3.2.3 The Relationship between UN Contributions and Assessed Contributions

To summarize, the narrowest approach to the Rome Statute limits UN funding to only those situations that have been referred to the Prosecutor by the Security Council. In these cases, there should not be any need for adjustments to the budget, because UN contributions should be aimed at paying for the extra costs deriving from the new investigations and eventual trials and not to help parties defray costs which they would have incurred in any event.

It might happen that costs incurred by the Court to investigate and try cases arising from situations referred by the Security Council end up being less than the amounts transferred by the United Nations. Should that happen, surpluses should not be credited, directly or indirectly, to the Parties, but rather should be retained by the Court. Details on how to organize transfers and how to handle possible surpluses deriving from UN contributions should be handled in the UN-Court Agreement and the Financial Regulations.

If the United Nations were to contribute to the costs of the first Assembly of States Parties, that would not have any budgetary implications as the first budget will be approved by the Assembly itself. However, were the UN to bear either the start-up costs of the Court or all subsequent Assembly meetings, then arrangement should be made in the UN-ICC Agreement and the Financial Regulations to regulate responsibilities, transfers and accountancy procedures.

### **3.3 Voluntary Contributions (Article 116)**

In addition to the sources listed in article 115, article 116 provides a third, albeit distinct and supplementary, source of income for the Court.

To be precise,

*“[w]ithout prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.”*

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Voluntary contributions, both in financial assets and in-kind, are commonplace among international organizations. While they represent only a fraction of the assessed contributions, voluntary contributions are the second largest source of funds for many organizations.<sup>51</sup> The level of reliance on voluntary contributions varies considerably among organizations. They are mostly resorted to in the areas of development, humanitarian aid, technical assistance, and peacekeeping.<sup>52</sup>

Despite the importance voluntary funds have in the financing of international organizations and projects, the UN Charter and the constituent instruments of many organizations are silent about voluntary contributions. Nonetheless, the capacity to receive and create separate trust funds for the administration of voluntary contributions is generally regarded as inherent<sup>53</sup>.

*Among international tribunals voluntary contributions are quite rare.*

Be that as it may, among international tribunals voluntary contributions are quite rare. Among the very few exceptions one must mention the two ad hoc international criminal tribunals, where important and large-scale projects have been funded by donations. As of 30 September 1999, the voluntary fund for the former Yugoslavia Tribunal had received \$20.2 million, while that of Rwanda \$7.5 million as of October 1998. All states, both members of the UN and mere observers, have contributed to these funds. Still, voluntary contributions remain only a fraction of the regular budget of those tribunals.

In 1998, the UN General Assembly established a Trust Fund to facilitate the participation of the least developed countries in the work of the Preparatory Commission for the International Criminal Court. The United Kingdom and the Holy See have made contributions to the fund, totaling \$81,000. On average ten delegates make use of the fund at each session.<sup>54</sup>

In 1989, the UN General Assembly created the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice.<sup>55</sup> The Fund, which can accept contributions from states, corporations, foundations, legal organizations and other sources, is designed to encourage states to settle their disputes peacefully by submitting them to the Court, and eventually to help them finance the costs associated with the execution of a judgment of the Court.<sup>56</sup>

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<sup>51</sup> Jose Alvarez, "Financial Responsibility", in *The United Nations and International Law*, 409, at 410 (Christopher C. Joyner, ed., 1997).

<sup>52</sup> For instance, the IAEA engages in systematic solicitation of voluntary contributions, in which members are required to meet specific "targets" to be used to support its "operational program"; Paul Szasz, *The Law and Practices of the International Atomic Energy*, ch. 25, at 864-866.

<sup>53</sup> Alvarez, *supra* note 51, at 411.

<sup>54</sup> UN General Assembly Resolution 53/105 of December 1998. The Trust Fund is an expansion of a trust fund established for voluntary contributions towards meeting the cost of participation by the least developed countries in the work of the Preparatory Committee. A fund for the same purposes benefiting delegates from other developing countries has not received any contributions yet.

<sup>55</sup> 28 ILM 1589 (1989).

<sup>56</sup> States, intergovernmental organizations, national institutions, and NGOs, as well as natural and juridical persons, can make voluntary contributions to the Fund. In 1992 the UN Secretary-General reported that 34 states had contributed a total of \$583,705. To date the UN Secretary-General has received two applications.

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Similarly, in 1994, the Administrative Council of the Permanent Court of Arbitration established a fund to assist states in meeting the costs of arbitration (the Financial Assistance Fund for Settlement of Disputes) which can accept donations from states, intergovernmental organizations, national institutions and natural and legal persons.<sup>57</sup>

States parties to the United Nations Convention on the Law of the Sea recently adopted a decision recommending that the General Assembly establish a voluntary trust fund for the International Tribunal for the Law of the Sea, to be administered by the Secretary-General, to facilitate the submission of cases by states.<sup>58</sup>

Still, it should be stressed that in all instances except in the case of the ICTY and ICTR, voluntary funds are not used to finance the work of the courts and tribunals themselves but only to facilitate access to them.

*In all instances except in the case of the ICTY and ICTR, voluntary funds are not used to finance the work of the courts and tribunals themselves but only to facilitate access to them.*

### 3.3.1 Voluntary Contributions as Distinct from and Additional to the Court's Funds

It is the authors' view that under the Rome Statute, voluntary contributions are not funds of the Court and the Assembly of States Parties. First, article 115, titled "Funds of the Court and of the Assembly of State Parties", does not list voluntary contributions. Second, the term "as additional source" in article 116 strongly supports such a conclusion.<sup>59</sup> Furthermore, at the ICTY and ICTR, voluntary contributions have in general not been used for expenses included in the budget, but for extra-budgetary expenses only.<sup>60</sup> Therefore, voluntary contributions can not be included in the budget, nor can they affect the budget on either side of the balance sheet. They cannot be used to meet the expenses of the Court within the meaning of article 114.

*Under the Rome Statute, voluntary contributions are not funds of the Court and the Assembly of States Parties. ... Therefore, voluntary contributions can not be included in the budget, nor can they affect the budget on either side of the balance sheet.*

State Parties", does not list voluntary contributions. Second, the term "as additional source" in article 116 strongly supports such a conclusion.<sup>59</sup> Furthermore, at the ICTY and ICTR, voluntary contributions have in general not been used for expenses included in the budget, but for extra-budgetary expenses only.<sup>60</sup> Therefore, voluntary contributions can not be included in the budget, nor can they affect the budget on either side of

the balance sheet. They cannot be used to meet the expenses of the Court within the meaning of article 114.

Although voluntary contributions were generally regarded as desirable, both at the Preparatory Committee and at the Rome Conference it was widely felt that voluntary contributions should only be additional and accessory to the Court's budget.<sup>61</sup> Three concerns motivated their exclusion.

*The criteria on voluntary contributions has to stipulate whether the contributions can be utilized for core activities of the Court or only for collateral activities.*

<sup>57</sup> Permanent Court of Arbitration, 95th Annual Report, Annex 5, Financial Assistance Fund for Settlement of Disputes, Terms of Reference and Guidelines; Romano, pp. 44-45.

<sup>58</sup> See UN Press Release SEA/1680, Tenth meeting of parties to Law of the Sea Convention concludes, 30 May 2000, and UN Press Release SEA/1679, States Parties to Law of Sea Convention to recommend Assembly consideration of Trust Fund to assist parties in International Tribunals proceedings; both available at <http://www.pict-pcti.org/news/>.

<sup>59</sup> The Draft Statute did not have the term and it was added during consultations. Following the Conference Committee's adoption of the financial provisions, the representative of Sweden stated that it was Sweden's view that the term should be interpreted to mean that voluntary contributions would not be utilized to fund any core expenses of the Court; see Press Release, "International Criminal Court Conference Committee approves provisions on financing, procedural rules", L/ROM/20, 16 July 1998.

<sup>60</sup> There are exceptions. For instance, provisions for construction and equipment of the third courtroom, which was funded by voluntary contributions, had been included in the 1998 budget, \$419,600.

<sup>61</sup> Rama Rao, "Financing of the Court, Assembly of States Parties and the Preparatory Commission", in *The International Criminal Court, The Making of the Rome Statute* (Roy S. Lee ed., 1999), 399, at 404-406.

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First, many delegates expressed fears for the ultimate independence of the Court, and highlighted the risk of creating a donor-driven judicial body, considering that the budget of most international judicial bodies is easily within the capability of many states, not to speak of magnates and private organizations. Second, by their nature voluntary contributions are highly volatile and unreliable. They cannot provide long-term, secure funding. Finally, many delegates felt that the generosity of certain parties should not relieve states parties of their obligation to pay their assessed contributions.

The criteria on voluntary contributions has to stipulate whether the contributions can be utilized for core activities of the Court or only for collateral activities. This issue is pertinent, as at the ICTY and ICTR voluntary contributions have been utilized for essential activities of the tribunals, in particular for supporting the prosecution and investigation activities.<sup>62</sup> Furthermore, as the Court will be handling different situations, it can expect that donors might want to designate their contributions for the benefit of a certain situation, case or even particular work. In light of the delicate compromise reached in Rome on voluntary contributions, and stated concerns about the independence of the Court, strict criteria should be adopted in this respect. At least, cash contributions earmarked for a particular investigation or work of the

Prosecutor should not be allowed.

*It can expect that donors might want to designate their contributions for the benefit of a certain situation, case or even particular work... strict criteria should be adopted in this respect.*

Furthermore, the criteria also have to determine what constitutes “collateral activities” and what minimum link must remain between the Rome Statute and funded activity. These questions might arise particularly in relation to assistance to victims. For instance, at the ICTR, the policy of its Trust Fund has been a major issue. The tribunal developed a plan to use the fund to partially finance a program to provide funds to non-governmental organizations that provide assistance to victims of genocide and other war crimes in Rwanda. The UN Secretariat and the Office of Internal Oversight Services did not approve the funding until it was guaranteed that beneficiaries would be victims who had testified before the tribunal.<sup>63</sup> In the case of the ICC, a similar plan might be less controversial, as the Rome Statute explicitly provides that “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”<sup>64</sup> Additionally, the statute mandates the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court,

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<sup>62</sup>For instance, in 1999 the two biggest activities funded by voluntary cash contributions at the ICTY were an exhumation project in Bosnia and Herzegovina (\$1,132,300) and Kosovo investigations (\$389,200). See Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/54/518, Annex VI. In 2000, the former project was included in the tribunal’s budget and will be financed through assessed contributions.

<sup>63</sup> See Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, Report of the Secretary-General on the activities of the Office of Internal Oversight Services, UN Doc. A/52/784, para. 76-79.

<sup>64</sup> The Rome Statute, art. 68.1.

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and of the families of such victims. Depending on the criteria adopted for the Victims Trust Fund, the ICC might want to share some of the voluntary contributions it receives.<sup>65</sup>

### 3.3.2 Possible Contributors under Article 116

#### *Governments*

The term “governments” includes voluntary contributions both from states parties and states which are not Party or signatory of the Statute, although contributions of gratis personnel, under article 44 of the Rome Statute, are limited only to states parties.

Voluntary contributions do not affect states’ assessed contributions or their legal responsibility to pay them. States parties have no obligation, let alone the other donors mentioned, to make voluntary contributions, and failure to contribute is not sanctioned with the loss of voting rights in the Assembly, under article 112.8.

#### *International Organizations*

As the United Nations is already included as a possible source of financing for the regular budget, the inclusion of the term “international organizations” in article 116 refers to other international organizations of states. Among them, the European Union is likely to be one of the principal contributors, as it is one of the few international organizations which benefits from its own sources of revenue.

In the case of the ICTY, the European Union provided financial resources for several projects of non-governmental organizations that assisted the tribunal. These projects included the donation, through the International Commission of Jurists, of between 9 and 22 legal assistants at different periods between 1995 and 1998, to the Registry and Chambers for research and legal support. The EU also funded witness support and counselling services, through the International Rehabilitation Council for Torture Victims, from 1994 to 1999. The latter contribution was valued at \$96,100 in 1999 alone. In addition, via the Carnegie Foundation, the EU has provided approximately \$137,000 for the tribunal’s library.

#### *Individuals, Corporations and other Entities*

The inclusion in the constitutive document of international organizations of non-State entities among the possible donors is probably an absolute novelty, even more in the case of the constitutive instrument of an international judicial body. Still, individuals’ contribution are not unknown in the history of international law and international relations. Soon after World War I, the philanthropist Andrew Carnegie donated the funds to build the Peace Palace, the seat of the Permanent Court of International Justice and later the

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<sup>65</sup> See The International Criminal Court, Reparations to victims of crimes (art. 75 of the Rome Statute) and the Trust Fund (art. 79 of

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International Court of Justice, as well as of the Permanent Court of Arbitration. The most recent, notable, and conspicuous example of voluntary funding to international organizations from an individual has been the donation of \$1 billion by Ted Turner to a foundation for the UN to use in development projects not funded under the regular UN budget<sup>66</sup>.

Individuals and organizations have also made donations to both the ICTY and ICTR, mainly in-kind. In 1999, the New Hampshire Criminal Justice Resource Center donated a server and 50 computers valued at \$380,000 out of a total pledge package of \$1.34 million.

### 3.3.3 Nature of Contributions

#### *Cash and Financial Assets*

The first and most logical means of contributing to the Court's financing is by way of cash. However, for different reasons governments, international organizations, and individuals might want to contribute financial assets other than money. For instance, states might contribute bonds, corporations might wish to donate shares or stock options, and individuals might even go as far as designating the Court as legatee in their wills.

For expediency sake and to avoid imposing an unnecessary burden on the Court's administration, the Financial Regulations should stipulate that voluntary contributions to the ICC should be made only in cash or in-kind.

According to UN, including that the ad hoc international criminal tribunals, donations other than contributions in kind, are held in trust funds.

#### *In-kind Contributions*

Although article 116 defines voluntary contributions as additional "funds", thus considering them financial assets, in-kind contributions cannot be excluded. Indeed, in the case of individuals and corporations, in-kind contributions could be the only acceptable form of contribution.<sup>67</sup>

The ad hoc international criminal tribunals have greatly benefited from in-kind contributions. The host states for the two tribunals have provided active support, and more than 20 other states have provided significant amounts of resources. As of 30 September 1999, the ICTY had received in-kind contributions valued at approximately \$6.9 million, excluding the cost of staff and experts on loan from governments

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the Rome Statute), Recommendations for the Court Rules of Procedure and Evidence, *supra* note 12.

<sup>66</sup> Note that Ted Turner's contribution is ten times higher than the hypothetical Court annual budget sketched in this paper.

<sup>67</sup> The Committee of the Whole at the Rome Conference, on the issue of voluntary contributions to the Court, footnoted that: "The view was expressed that the Court may only receive contributions in kind from individuals and corporations"; UN Doc. A/CONF.183/C.1/L.78 of 15 July 1998.

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and international organizations and institutions. In the case of ITLOS, Germany donated the premises for the International Tribunal for the Law of the Sea.

### 3.3.4 Limitations to Voluntary Contributions

Not all voluntary contributions may be acceptable. Some might be made with the aim of influencing the Court, or the Prosecutor in some way. Others might come from morally dubious or politically awkward sources (e.g., states with a history of gross violations of human rights or individuals whose source of wealth is tainted with suspicion). In order to ensure that contributions are proper in all respects, the Rome Statute places the responsibility on the Assembly of States Parties to develop appropriate criteria to govern such contributions. These criteria should address the purposes for which contributions are made, who is going to decide whether contributions are consistent with the aim of the Court,<sup>68</sup> the way in which funds and or resources are to be transferred, how they are going to be used, and how they are going to be accounted for. These criteria should be incorporated into the Financial Regulations.

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In any event, voluntary contributions should not be subject to conditions contrary to the policies and aims of the Court. For instance, if contributions are used to provide support and compensation to victims, they should not benefit or discriminate against any particular ethnic, religious, or political group.<sup>69</sup>

*These criteria should address the purposes for which contributions are made, who is going to decide whether contributions are consistent with the aim of the Court, the way in which funds and or resources are to be transferred, how they are going to be used, and how they are going to be accounted for. These criteria should be incorporated into the Financial Regulations.*

Finally, the Financial Regulations should stipulate that the acceptance of voluntary contributions should not create additional expenses or financial liability to utilize that contribution, unless they have been accepted by the Assembly of States Parties<sup>70</sup>.

### 3.3.5 Gratis personnel

Apart from voluntary contributions according to article 116, the Court may also receive contributions in the form of gratis personnel. According to article 44.4:

*"[t]he Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by State Parties, intergovernmental organizations or non-governmental organizations to assist*

<sup>68</sup> The Secretary-General decides this for the UN; UN Financial Regulations, *supra* note 37, Rule 107.5). The Secretary-General may also delegate this authority to the Under-Secretary-General for Administration and Management. As for the ICTY, the General Assembly "invited member States and other interested parties to make voluntary contributions to the Tribunal both in cash and in the form of services and supplies acceptable to the Secretary-General"; UN Doc. A/53/755.

<sup>69</sup> UN Financial Regulations, *supra* note 37, Rule 107.6.

<sup>70</sup> *Id.* Rule 107.7.

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*with the work of any of the organs of the Court. ... Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties."*

The gratis personnel are not subject to the criteria adopted on voluntary contributions, but shall be employed in accordance with independent criteria. Similarly, gratis personnel are not staff members of the Court and are therefore not subject to the Court's Staff Regulations.<sup>71</sup>

However, the underlying issues of gratis personnel are similar to those of voluntary contributions. The acceptance of such personnel must be consistent with the need to ensure the impartiality, independence,

*The Rome Statute is even more concerned about this with respect to gratis personnel than to voluntary contributions, as gratis personnel are only allowed "in exceptional circumstances" and such personnel cannot be accepted from non-state parties, unlike voluntary contributions.*

and international nature of the Court. The Rome Statute is even more concerned about this with respect to gratis personnel than to voluntary contributions, as gratis personnel are only allowed "in exceptional circumstances" and such personnel cannot be accepted from non-state parties, unlike voluntary contributions. Also unlike voluntary contributions, the Court's need for gratis personnel might arise more from the need of specific expertise rather than the need for

additional funding.

The difficult issue of gratis personnel is reflected in the experiences of the ICTY and ICTR. Initially, governments were encouraged to contribute gratis personnel to the tribunals.<sup>72</sup> In light of the highly specialized work of the tribunals, gratis personnel were considered essential to initiate the necessary work and training.<sup>73</sup> States able to contribute the required expertise were de facto limited to the developed countries. As the work of the tribunals developed and gratis staff continued to carry out central functions, such as investigations, prosecutions and legal assistance, many states raised concerns about the perceived independence of such personnel (most often employees of their governments) and their negative effect on the international character of the tribunals. In 1997, the General Assembly finally ended the row and contracts on gratis personnel at the ICTY and ICTR were allowed to elapse in 1998.<sup>74</sup> The issue arose again in 1999 when the ICTY faced a new situation in Kosovo. In light of the urgent situation and the difficulties of the tribunal in recruitment generally, it became clear

*The Court's possibility of employing gratis personnel each time it is facing a new situation is therefore highly questionable. As noted before, the Rome Statute expressly limits this to "exceptional circumstances". Other ways for the Court to deal with the problem must therefore be considered.*

<sup>71</sup> The guidelines on gratis personnel are "established" by the Assembly. By contrast, the Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations, which shall then be approved by the Assembly. The view has been raised that the Assembly will not have the authority to change the Registrar's proposal, but only to accept or reject it. See David Tolbert, "Staff", in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999), 647, at 649.

<sup>72</sup> *Supra* note 68.

<sup>73</sup> The ICTY had approximately 50 gratis personnel during 1995 to 1998. In 1995, this included 35 investigators/advisors assigned to the Office of the Prosecutor, including 21 contributed from the United States. In 1996 six out of nine trial attorneys at the ICTY were gratis personnel; see Financing of the International Tribunal for the Prosecution of Persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, *Report of the Advisory Committee on Administrative and Budgetary Questions*, UN Doc. A/50/925, 10 April 1996, and report issued by the Secretary-General, *Gratis personnel provided by Governments and other entities*, UN Doc. A/51/688, 21 November 1996.

<sup>74</sup> GA Res. 243, 51<sup>st</sup> Sess., UN Doc. A/RES/51/243 (10 Oct. 1997).

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that the use of gratis personnel was the only possible way to fill investigations teams, which were urgently needed to document crime scenes before essential evidence were lost. Accordingly, the tribunal was allowed to depart from its restriction on gratis personnel, and from June to October 1999 the number of ICTY gratis personnel in Kosovo ranged from 82 to 130.

Because of the different nature of the ICC (a permanent international criminal court) as opposed to the ICTY (an ad hoc international criminal court), the ICTY emergency will likely become ICC rule rather than its exception. The Court's possibility of employing gratis personnel each time it is facing a new situation is therefore highly questionable. As noted before, the Rome Statute expressly limits this to "exceptional circumstances". Other ways for the Court to deal with the problem must therefore be considered.<sup>75</sup>

Acceptance of gratis personnel will inevitably involve financial liability for the Court, such as administrative support, equipment, office space, and services. As in the case of voluntary contributions, this cost should not be defrayed unless accepted by the Assembly of State Parties. The standard practice at the UN is to charge 13 percent for support services to donors of gratis personnel.<sup>76</sup> The ICC criteria on gratis personnel should adopt similar practice.

### 3.4 Other Resources

Under article 77.2, in addition to imprisonment, the Court may order fines and forfeiture of proceeds, property, and assets derived directly or indirectly from the adjudged crime, without prejudice to the rights

*Fines will be collected and property will be forfeited by states parties in accordance with the procedure of their national law, and those funds will be transferred to the Court (art. 109).*

of bona fide third parties. Fines will be collected and property will be forfeited by states parties in accordance with the procedure of their national law, and those funds will be transferred to the Court (art. 109). The Court may eventually order money and any other property collected through fines or forfeiture to be transferred to the Trust Fund (art. 79.2).<sup>77</sup>

The significance of this resource will largely depend on the amount of fines imposed.<sup>78</sup> In determining fines in accordance with the criteria provided in the Rules of Procedure and Evidence, the Court shall take into account such factors as the gravity of the crime and the individual circumstances of the convicted person (e.g., age or social and economic

*There are strong arguments in favor of using these funds solely for the benefit of victims and not to support operational costs of the Court.*

<sup>75</sup> See *infra* p. 36-37.

<sup>76</sup> See A/51/688, para. 55, and S/Al/231/Rev.1. One of the difficulties of gratis personnel accepted by the ICTY and ICTR was that its biggest donor, the United States, refused to pay the UN charge for support services.

<sup>77</sup> In addition, in case of offenses against the administration of justice, the Court may impose a term of imprisonment or a fine in accordance with the Rules of Procedure and Evidence (art. 70.3). Similarly, in case of misconduct before the Court, the Court can may sanction persons with a fine (art. 71).

<sup>78</sup> The international criminal tribunals for the former Yugoslavia and Rwanda offer no guidance, as they do not have provisions for the imposition of fines in their statutes.

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conditions, the motive of the crime, or superior orders), (art. 78.1).<sup>79</sup> A proposal has been made to let the Rules of Procedure and Evidence decide a maximum fine which can be imposed by the Court.<sup>80</sup>

However, there are strong arguments in favor of using these funds solely for the benefit of victims and not to support operational costs of the Court. First, the legislative history of the article supports such interpretation.<sup>81</sup> Second, the fact that funds deriving from fines and forfeiture are not included as sources of the Court's funding listed in article 115 also strongly supports such a conclusion. Having said this, it remains to be seen which victims should benefit and how from money and other property collected through fines or forfeiture.

### 4. THE BUDGET OF THE COURT

The budget includes the resource requirements of the Court and the Assembly of States Parties. The adopted budget will have a fundamental impact on the Court. In fact, a sufficient budget might enable the Court to carry out its mandate while a restricted one might limit its operation. In addition, the adopted budget will reflect the policy making for the Court, because while the budget determines the Court's resources, it also prioritizes the Court's activities. States parties also have a direct interest in the adopted budget, as it is the basis of their assessed contribution. In some instances, the budget might even affect states' decision whether to become parties to the Rome Statute.

#### 4.1 The Nature of the Budget

Two important elements will shape the budget of the Court. First, the jurisdiction of the Court, which determines the workload, and second, the nature of the Court as an international criminal judiciary body partly responsible for litigation costs before it.

*Two important elements will shape the budget of the Court. First, the jurisdiction of the Court, which determines the workload, and second, the nature of the Court as an international criminal judiciary body partly responsible for litigation costs before it.*

<sup>79</sup> Note included in the Report of the Working Group on Penalties at the Rome Conference, UN Doc. A/CONF.183/C.1/WGP/L.14/Corr.2.

<sup>80</sup> The current draft Rules of Procedure and Evidence stipulates that "[u]nder no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted persons and his or her dependants"; see Preparatory Commission for the International Criminal Court, Annex II, Rules of Procedure and Evidence, UN Doc. PCNICC/1999/L.5/Rev.1/Add.1, Rule 7.2.2.

<sup>81</sup> Article 79, providing for the establishment of the Trust Fund, is in Part 7 of the Rome Statute (Penalties). In earlier drafts the Trust Fund was part of the provision on fines collected by the Court. Both the International Law Commission Draft Statute and the Preparatory Committee Draft Statute indicated that fines could either be transferred to a trust fund, to the State of which the victims were nationals, or to the Registry to defray the costs of the trial. Conversely, during the negotiations in Rome, preference was given to using the funds collected through fines and forfeiture to benefit victims through a trust fund and other options were accordingly dropped from the text, see Report of the International Law Commission on its Forty-Sixth Session, *Draft Statute for an International Criminal Court*, May 2 – July 22, 1994 (UN Doc. G.A., 49<sup>th</sup> Sess., Supp. No. 10, A/49/10, 1994), art. 47 and Draft Statute & Draft Final Act, *supra* note 13, art. 79. In 1996, the Preparatory Committee on the Establishment of an International Criminal Court,

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### 4.1.1 The Jurisdiction of the Court

The limited jurisdiction of the Court restricts its operation and caseload significantly. The Court has jurisdiction over the most heinous international crimes: genocide, war crimes, crimes against humanity, and later aggression.<sup>82</sup> The Court's geographical jurisdiction is limited to states parties to the Rome Statute (territory), except when the Security Council refers a situation to the Court. The personal jurisdiction only extends to natural persons and trial *in absentia* is not allowed. Depending on the Prosecutor's policy, the Court might confine itself to the "big fishes".<sup>83</sup> Then the Court's jurisdiction is significantly limited by jurisdiction *ratione temporis* and the principle of complementarity to national jurisdiction. However, in instances when the Court does have jurisdiction, any member state or the UN Security Council can refer a situation to the Court, or the Prosecutor can start an investigation on his or her own initiative. Furthermore, in light of the crimes within the jurisdiction of the Court, each situation before it might entail several complicated investigations and trials.<sup>84</sup>

### 4.1.2 The Nature of the Court as an International Criminal Court

As an active international criminal court, the ICC will require a significant amount of resources. Unlike other international courts and tribunals, where plaintiffs and defendants bear the costs associated with preparing their cases, in international criminal tribunals the investigation of cases and evidence-gathering are costs borne by the Prosecutor's office, hence by the tribunal itself. Moreover, any international criminal tribunal will also invariably bear the costs, wholly or in part, of the defense of the indictees, their maintenance while in detention, and protection of the witnesses. These items do not exist in the case of all other international courts and tribunals (with some exceptions in the case of human rights courts). In comparison, the 1999 budget for the International Criminal Tribunal for the Former Yugoslavia was \$103.4 million, while in the same year the budget for the International Criminal Tribunal for Rwanda amounted to \$75.3 million.<sup>85</sup> Among international courts and tribunals, only the European Court of

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debated whether "...the International Criminal Court should concern itself with the collection of pecuniary sanctions, other than for the purpose of compensating victims"; UN Doc. G.A., 51<sup>st</sup> Sess., Supp. No 22, A/51/22, 1996, footnote 69, at 228.

<sup>82</sup> The Court's jurisdiction might be expanded by the addition of other crimes, in particular crimes of terrorism and crimes involving the illicit traffic in narcotic drugs and psychotropic substances. These crimes were included in the Draft Statute prepared by the Preparatory Committee (Draft Statute & Draft Final Act, *supra* note 13, at 33), but the proposal did not attract sufficient support. However, the Final Act of the Rome Conference "[r]ecommends that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court"; see Final Act of the United Nations Diplomatic Conference of plenipotentiaries on the establishment of an International Criminal Court; Annex I, E, *supra* note 3.

<sup>83</sup> This was the adopted policy at the Nuremberg and Tokyo trials, and at the ICTR. Depending on each situation, a different policy might exceed the capacity of the Court. The closest example is the situation in Rwanda, where 120,000 detainees charged with genocide and crimes against humanity are still waiting trials in national courts.

<sup>84</sup> The ICTY was established in 1993 and started operating in 1994. As of 31 August 1999, 91 individuals have been publicly indicted, seven have been convicted and one acquitted. It has been estimated that it will take four years to finish investigations and that it will take at least 10 years before trials will be completed. The ICTR has indicted 48 individuals and it is estimated that it will take seven or eight years for the tribunal to finish its work. See, the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, 22 January 2000, para. 28-34.

<sup>85</sup> The costs of the Lockerbie trial, which commenced on May 3, are expected to reach \$200 million.

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Justice has a higher budget (about \$140 million in 1998), while that of other international judicial fora is just a fraction of that of the two ad hoc criminal jurisdictions.<sup>86</sup>

### 4.2 Expenditure

The budget of the ICC will include both the expenses of the Court and the Assembly of State Parties. The budget of the Court will be made up of the expenses of the chambers, the prosecution and the Registry, while the budget of the Assembly will entail costs associated with its meetings and expenses of its Bureau and subsidiary bodies.

As a permanent institution, the Court will always incur some fixed expenses. The Court's operational budget will depend on the number and nature of cases before it, however because of the serious nature of the crimes within its jurisdiction, it is impossible to predict its future activity and consequent expenses. The Court might not have any activity for years or might face several situations at the same time. The experiences of the ICTY and ICTR, and their continuity, are therefore not applicable in this respect, as the ad hoc tribunals were established to handle specific situations.

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#### 4.2.1 Stand By Scenario

When the Rome Statute enters into force, the Court will have to prepare itself for future operation. This requires the establishment of its general operation. During this time the Court will endure start-up costs, which are offset by minimum operational costs. In this period, as well as during periods of low activity, the Court will have to maintain the difficult balance of keeping its expenses as low as possible (and therefore its operation) while being able to respond quickly to possible investigations and trials. A fundamental question will be what minimum level of operation the Court will have to establish when the Rome Statute enters into force and to what extent it is required to function during low activity periods. It seems irrational to have a fully staffed Court unless it is exercising its jurisdiction.

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#### *The Budget of the First Financial Year*

At the first meeting of the Assembly of States Parties, the Preparatory Commission shall submit a budget proposal for the first financial year,<sup>87</sup> which would have to start before that first meeting.<sup>88</sup> The Court will

<sup>86</sup> E.g. in 1998, the budget of the International Court of Justice was about \$10 million (half of the biennial 1998-1999 budget), the International Tribunal for the Law of the Sea \$5.7 million, the Dispute Settlement System of the World Trade Organization \$1.2 million and the European Court of Human Rights \$25 million.

<sup>87</sup> See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, *supra* note 3, Annex I, F.

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not incur any expenses until that time, apart from the expenses of the Preparatory Commission which are borne by the UN.

The budget of the first year will include the costs of the Assembly meetings. In light of the immense task of the Assembly to bring the Court into operation, it can be expected that the Assembly will meet for at least for four weeks during the first year.<sup>89</sup> Before the Court can operate, the Assembly has to elect the judges and the Prosecutor. The Assembly has to discharge several other responsibilities, such as adopting the recommendations of the Preparatory Commission. That task alone includes adoption of the Rules of Procedure and Evidence, Elements of Crimes, a relationship agreement between the Court and the United Nations, basic principles governing a headquarters agreement to be negotiated between the Court and the host country, financial regulations and rules, an agreement on the privileges and immunities of the Court, a budget for the first financial year and the rules of procedure of the Assembly. Other tasks include establishing a trust fund for victims, establishing guidelines on gratis personnel, and adoption of Staff Regulations.

Unlike other courts and tribunals, the judges of the Court have limited preparation duties. Generally, the first duty of judges has been to prepare the court's rules of procedure and evidence and the first budget. In the case of the ICC, this duty was assigned to the Preparatory Commission. However, the judges would need to meet early to elect the Registrar, the principal administrative officer of the Court. Furthermore, they also need to adopt the Regulations of the Court.

The budget of the first year will likely be limited to the meetings of the Assembly and judges. The election of the principal officers of the Court might take considerable time, and commencement of their duties will be at a still later date. The ICTY was established in May 1993, judges were elected in September 1993, and they began working in November of the same year. The acting Registrar started in January 1994 and the acting Prosecutor in July of that year.

*The budget of the first year will likely be limited to the meetings of the Assembly and judges.*

### *Establishment*

The establishment of the Court and preparation of its operation might take two years. After about a year the principal officers of the Court will likely assume their duties. The Registrar, the Deputy Registrar, the Prosecutor, and the Deputy Prosecutors, are required to serve on a full-time basis. Judges are elected as full-time members of the Court, and shall be available to serve on that basis from the commencement of their terms in office. However, only three judges, who compose the Presidency of the

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<sup>88</sup> The Rome Statute is silent on when the Assembly should first convene. According to article 112.6 the Assembly shall meet once a year. Consequently, the Assembly would need to meet not later than one year from the time the Rome Statute enters into force.

<sup>89</sup> The Preparatory Commission for the International Criminal Court met for 7.5 weeks in 1999 and is set to meet for 8 weeks in 2000.

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*The number of judges serving on a full-time base during the Court's preparation and low activity periods can be held to a minimum.*

Court, serve on a full-time basis as soon as they are elected. The number of judges serving on a full-time base during the Court's preparation and low activity periods can therefore be held to a minimum.<sup>90</sup>

As policies have to be prepared and adopted, various professionals (D-1 to P-5 positions) have to be hired to serve on a full-time basis. Based on the Rome Statute, the current draft of the Rules of Procedure and Evidence and the structure

of the ad hoc criminal tribunals, the number of principals is likely to reach at least 15 (at the ICTY and ICTR they are 43 and 31, respectively). This will include in the Registry a chief of security and safety, chief of administration,, chief of human resources, chief of finance, chief of Victims and Witnesses Unit and chief of services to the Defence. As for the Office of the Prosecutor, this would include senior legal advisors, a chief of prosecutions, a senior trial attorney, a chief of investigations, an investigations commander, a chief of information and evidence, a chief of administration and a chief of human resources. As the Court does not enjoy outside secretarial support, various administrators would need to be hired to carry out work relating to management and oversight. General support services for this core group can be estimated to be at least 7 general staff members. Annual total senior staff expenditures and support could be at least \$3 million.

*As policies have to be prepared and adopted, various professionals (D-1 to P-5 positions) have to be hired to serve on a full-time basis.*

The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court (art. 15). This investigation role requires the recruitment of investigators to analyze received information. Furthermore, as a referral of a situation to the Court, either by a state or the Security Council, would require a quick response from the Office of the Prosecutor, some permanent manpower is needed to handle the initial phase. In light of this, and as the success of the Court as a whole depends very much on the Office of the Prosecutor and its qualifications and capacity, a team of at least five investigators might therefore be necessary initially. In addition to general staff support, this could entail annual expenditures between \$500,000 and 1 million.

*As the success of the Court as a whole depends very much on the Office of the Prosecutor ... a team of at least five investigators might be necessary initially.*

The seat of the Court will be at The Hague (the Netherlands). As a criminal judiciary body the Court has several housing requirements. In addition to several security conditions, the premises would

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<sup>90</sup> This would though only mean reduction and not exclusion of judges' salaries, as all judges, serving full time or not, will receive partial salaries. At the ITLOS, the maximum annual remuneration of a judge is fixed at \$160,000. With the exception of the President, the annual remuneration of judges consist of three elements: a) an annual allowance of one third the maximum annual remuneration payable monthly; b) special allowance for each day that a judge is engaged in the business of the tribunal; c) subsistence allowance for each day that a judge attends meetings of the tribunal at the seat of the tribunal. Judges may also be paid a special allowance for preparatory work undertaken by them before meetings of the tribunal. See Draft Budget Proposals of the International Tribunal for the Law of the Sea for 2001, UN Doc. SPLOS/WP.12, para. 14 to 16. During the first years of the ICTR and before it was operational, its judges received partial salaries based on their work.

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need to have offices, at least two courtrooms,<sup>91</sup> detention rooms for defendants during trials, and waiting rooms for witnesses. With regard to appropriate separation between offices for the Chambers, Registry

*As a criminal judiciary body the Court has several housing requirements. With regard to appropriate separation between offices for the Chambers, Registry and Office of the Prosecutor, the Court would need to consider whether the prosecution should occupy different premises.*

and Office of the Prosecutor, the Court would need to consider whether the prosecution should occupy different premises. This concern has been raised with regard to ICTY premises, where the sharing of the building by the Chambers and the Office of the Prosecutor has caused needless accusations.<sup>92</sup> In the case of the ICC, such physical separation would at least be possible, as the Prosecutor has its own administration, unlike the ICTY Prosecutor, which shares

administration with the Chambers. The headquarters agreement with the Netherlands might include provision on possible leasing of detention facilities.<sup>93</sup>

Depending on when the Rome Statute enters into force, the Court might consider taking over the headquarters building of the ICTY.<sup>94</sup> However, this possibility is dependent on two factors. First, an agreement with the government of the Netherlands, which owns the building.<sup>95</sup> Second, a possible overlap of the ICTY operation and the ICC. Recent estimates suggest that it will take the ICTY about four years to finish its investigations and at least 10 years before trials and appeal proceedings will be completed.<sup>96</sup> Similarly, it has been estimated that the Rome Statute will enter into force in 2002, at the latest. Using these estimates, the overlap of the courts would be eight years; or six to seven

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years from the time when the ICC might be operational, or four to six years from the time when a trial might begin. Unfortunately, it is not possible to estimate the work of the tribunals during this period, as a decreased work load at the ICTY and low activity at the ICC might bridge the gap further. Another option for the ICC is to have a temporary premises before it can take over the ICTY premises. One of the possible temporary premises might be ICTY separate office space at the headquarters annex.<sup>97</sup> Again, this would depend on the work load of the ICTY, which might be still using the facilities, or whether it would be big enough for the ICC, as the annex only accommodates approximately 210 people.

In any event, expenses related to the Court's premises will largely depend on whether The Netherlands will provide the Court with a building free of charge. This is relevant, as the government of Germany provides the International Tribunal for the Law of the Sea with a building free of charge. If the

<sup>91</sup> The ICTY acquired its second courtroom in May 1998, and the third in June of the same year. The ICTY acquired its first courtroom in July 1996, the second in August 1997, and the third in February 1999.

<sup>92</sup> The Report of the Expert Group, *supra* note 84, para. 250.

<sup>93</sup> The ICTY currently leases 48 cells from the government of Netherlands, at a cost of \$559,600 for the year 2000.

<sup>94</sup> The building is 19,529 square meters of office and courtroom space, with underground parking that can accommodate 335 vehicles. The building is able to accommodate approximately 650 people.

<sup>95</sup> The ICTY now has its second lease agreement for the building, for the term 1 July 1998 to 30 June 2002.

<sup>96</sup> The Report of the Expert Group, *supra* note 84, para. 30.

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Court needs to finance its premises, such costs could be in the form of large start-up costs or periodic rent payments. Annual rent could range from \$600,000 to \$2 million. The rent of the ICTY headquarters building for the year 2000 is \$2.2 million and the rent for the annex is \$600,000.

The Court will likely have expenditures related to construction and alteration of its premises. The construction cost of the ICTY building in the first six months of 1994 was \$910,000. However, major construction of the ICTY premises has since been funded by various governments.<sup>98</sup> The construction costs of the ICTY new annex is estimated \$1.7 million.<sup>99</sup>

Regardless of whether the Court will eventually take over the ICTY headquarters and use temporary premises until it is available or choose another premises, it might need a courtroom until a permanent building is available or operational. A temporary use of ICTY or ICJ courtrooms should be secured in the UN relationship agreement or with the Netherlands, if such use is possible.<sup>100</sup>

The Court will also have start-up costs for furniture and equipment. In addition to regular office equipment the Court needs vehicles, video equipment, etc. A comparison to the ICTY and ICTR start-up costs is not useful as the tribunals were preparing themselves for particular situations. However, judging from the tribunals' experience, and depending on the adopted criteria on voluntary contributions, the Court might expect several contributions of equipment.<sup>101</sup>

### 4.2.2 Operating scenario

The budget of the Court will truly be decided by the number and nature of cases before it. As the Court is an unprecedented endeavor there are no precedents to rely on, and, as the Court's jurisdiction is not retroactive, there is no way to predict its future caseload. In light of the Court's jurisdiction, it could handle major situations, each including genocide, war crimes and crimes against humanity, involving complicated investigations, several trials, and hundreds of witnesses, much like the ICTY and ICTR. At the same time it could be handling situations involving a single incident, such as an intentional attack against civilians or against a building dedicated to charitable purposes. Any estimate will also be insufficient, as the Court's Rules of Procedure and Evidence have not been finalized. The rules will have various financial implications, including the manner of proceedings (for instance the possibility of combined trials), the size of the Victims and Witnesses Unit, the possible establishment of a Defence Unit, and the

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<sup>97</sup> In 2000 the ICTY acquired additional office space that accommodates 210 people (approximately 5,300 square meters). The annex is used by the Chief of Administration.

<sup>98</sup> For instance, the second courtroom was funded by the United Kingdom, while the third courtroom was funded by the United States, Canada, and the Netherlands.

<sup>99</sup> Those costs will be amortized by payments over for 11 years.

<sup>100</sup> Until the ICTY had its premises it used the Peace Palace, and until the ICTR premises were ready, the tribunal used the ICTY premises.

<sup>101</sup> In the case of the ICTY and ICTR, several states contributed equipment to the tribunals. The United States for instance contributed computer equipment for the ICTY Office of the Prosecutor valued at approximately \$2,300,000. In 1999, the New Hampshire Criminal Justice Resource Center (US) donated a server and 50 computers valued at \$380,000 out of a total pledge package of \$1.34 million.

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scope of victims' participation in the trials. That being said, and for the sake of this exercise, some speculation can be done about what factors might have considerable budgetary implications.

### *The expenses of the ICTY and ICTR*

Although the budgets of the ICTY and the ICTR are of little guidance, it is worth mentioning that to date the costs of the ICTY from its establishment have reached \$380 million, while the costs of the ICTR are at \$293 million. As for the ICTY, its costs have multiplied in the last three years. In 1997, with one operating courtroom, two trials, 142 witnesses, nine investigations, and 20 detainees (at the end of the year), its costs were \$36.3 million. In 1998, with three operating courtrooms from mid year, 26 detainees, eight trials, 407 witnesses and 20 investigations, its costs increased to \$65.5 million. In 1999, the estimated costs jumped to \$95.1 million, with nine trials, 270 witnesses, 14 investigations, and 40 detainees.

Based on the experience of the ICTY and the ICTR, it can be estimated that if the Court will handle similar situations, its cost will run high. Notably, if the ICC had handled these situations it is likely

*Based on the experience of the ICTY and the ICTR, it can be estimated that if the Court will handle similar situations, its cost will run high ... if the ICC had handled these situations it is likely that its costs would have been even higher.*

that its costs would have been even higher for four reasons. First, the ICTY and the ICTR are handling particular situations which their operations are tailored to, which creates substantial savings. Second, the Rome Statute implies that the Office of the Prosecutor shall have its own administration unlike the ICTY and ICTR, whose registries handle the administration for both the Chambers and the Office of the Prosecutor. This arrangement will incur extra costs, as it will cause some duplication of work. Third, there are six official languages of the ICC, compared to two at the ICTY and ICTR.<sup>102</sup> This will increase translation costs considerably, and increase the length of proceedings, thereby increasing other expenses.<sup>103</sup> Fourth, ICC procedures differ significantly, as victims have the right to participate in the Court's proceedings (art. 68) and the Chambers have jurisdiction to decide on reparation to victims (art. 75). These new elements will especially increase the work of the Registry compared to the ICTY and ICTR, as victims' participation requires information services and possible financial and legal assistance.<sup>104</sup> In addition, the ICC might fund its Assembly and administration.

<sup>102</sup> Arabic, Chinese, English, French, Russian, and Spanish. The judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages (art. 50). The working languages of the Court shall be English and French.

<sup>103</sup> Despite having only two official languages, the ICTY and ICTR incur immense translation work with related expenses. In 1999, the costs related to translation amounted 10.5 percent of the total budget. This high cost relates to requirements for translations to the official languages, the translation of documents for investigation purposes, and for translation of documents for the accused persons.

<sup>104</sup> The current draft Rules of Procedure and Evidence proposes that the Registry shall, if necessary, assist victims in choosing a common legal representative or representatives, and if a victim or victims lack the necessary means to pay for legal representation the Registry shall make available a lawyer and financial assistance from the Registry; See Preparatory Commission for the International Criminal Court, Proceedings of the Preparatory Commission at its first, second and third session (16-26 February, 26 July-13 August and 29 November–17 December 1999), UN Doc. PCNICC/1999/L.5/Rev.1/Add.1, Annex II, Rule 6.30(B).

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### *Object of expenditure*

Whenever a situation is referred to the Court, the Office of the Prosecutor will incur the bulk of expenses. At the ICTY the average time from the beginning of an investigation to indictment is 12 months, and from indictment to a trial another 12 months. The Registry has considerable responsibilities when an indictment is issued and following an arrest, as the office is responsible for the management of the defence counsel and detention units. When the trial begins, it is responsible for travel and support for witnesses and assistance to participating victims. In 1999, the distribution of the ICTY's expenditures among its three organs was 2.8 percent (Chambers), 28.5 percent (Prosecutor), and 68.7 percent (Registry), while the distribution was 1.9 percent (Chambers), 23.8 percent (Prosecution), and 74.0 percent (Registry) at the ICTR. The major costs of the tribunals have always been staffing, ranging from 45 to 60 percent of the tribunals' total expenditure. In second and third place, albeit far behind, are fees to defence counsel, and general operating expenses, each approximately 13 percent of the tribunals' total budgets.

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### *Staffing*

One of the major costs of the Court will be staffing. To illustrate, in the first two years of the ICTY the staffing cost of the tribunal was \$16,141,600 or 45 percent of the total expenditures of \$35,868,109 during that period. The staffing cost of the ICTY in its budget requirements for the year 2000 is \$58,802,200 or 59 percent of the total assessed budget for that year. Depending on the nature of the case or cases the Court might handle, its staffing needs might reach 1,000 employees. In comparison, the ICTY had 838 staff members in 1999, and the ICTR had 779 staff members the same year.

Because of the Court's unpredictable activity and in order to minimize staffing costs, it must be able to hire people on short notice and for short terms. In many instances, required expertise might be limited to a particular case, like translators, or to a certain task, such as forensic work. This will require more flexible staff regulations than other international institutions have.

However, due to the Court's highly specialized work and

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uncertain employment periods, it might face major difficulty in recruitment.<sup>105</sup> The Office of the Prosecutor at the ICTY and ICTR has been plagued with this problem; as of 31 August 1999 the vacancy rate at the ICTY was 13 percent and at the ICTR staggering 36 percent.<sup>106</sup> The Court's difficult staffing situation is further reflected in the ICTY experience when the tribunal was facing a new situation in Kosovo. For the tribunal to be able to handle the situation, the General Assembly restriction on gratis personnel to the tribunal had to be waived. Gratis personnel will probably not be used as a general interim resource at the ICC, as such staff may only be employed in exceptional circumstances. Some kind of "on call" staff status could be considered, similar to the national military reserves.<sup>107</sup> One option could be temporary use of investigators from an Institute for International Investigation, which is currently being planned by various NGOs. Depending on the UN relationship agreement, temporary use of the ICTY and ICTR staff might be possible. Such application is though implausible in light of the tribunals' own recruitment difficulties and caseloads.

### *Defence counsel*

A person being investigated and an accused has the right to legal assistance of his or her own choosing and paid by the Court in case of his or her indigence (art. 55.2.c and art. 67.1(d)). This right is consistent with most national and international criminal jurisdictions. In the case of the ICTY and ICTR, most indictees have claimed indigence, fulfilling the tribunals' requirements for payments of fees to defence counsel. At the ICTY, fees for defence counsel were \$9 million in 1998, an estimated \$14 million in 1999, and an estimated \$13.9 million in 2000, or approximately 13 percent of the tribunal's total budget annually. The tribunal experience has shown that defence costs can be \$30,000 during pre-trial stage and \$55,000 per month when the accused persons are in court.<sup>108</sup> This cost would include fees for defence counsel, co-counsel and investigators. Because fees are paid on hourly rates, critics have charged that there is little financial incentive for counsel to expedite proceedings. Allegations have even been made that in some instances counsels have issued excessive motions, partly to increase their fees. The ICTY Registrar is currently considering a lump-sum system of payments to defence counsel which the ICC directive on the assignment of defence council should take into consideration, at the same time ensuring fair and appropriate remuneration.<sup>109</sup>

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<sup>105</sup> In addition to highly specialized work, like forensic and investigation work, the Rome Statute imposes further requirements, like equal geographical, gender, and legal-system representation among staff (art. 44.2). At the ICTY, it has proved difficult to attract professional officers to take short-term contracts. The tribunal could not for instance fill short-term positions of legal assistants for Judges to complete the Celebice judgment in 1998.

<sup>106</sup> The Report of the Expert Group, *supra* note 84, para. 113 and 179.

<sup>107</sup> See "Organization of the International Criminal Court: Administrative and Financial Issues", Thomas S. Warrick, in *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, ed. M. Cherif Bassiouni, 37, at 64.

<sup>108</sup> See Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/54/518, para. 54(a).

<sup>109</sup> The Report of the Expert Group, *supra* note 84, para. 207. The current rate at the ICTR is \$400 per hour.

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### *General Operating Expenses*

With increased activity, the Court's general operating expenses will proportionally increase. As said before, rent payments for premises are unknown. An active Court might also entail additional housing needs. Temporary field offices might be required, both for the prosecution and the Registry.<sup>110</sup> In such instances, and depending on whether all security concerns can be met, the Court might consider sharing housing with other international organizations.<sup>111</sup>

In addition, the Court will also have regular maintenance and operational expenses for telephone, electricity, water, and gas, etc.<sup>112</sup> In the biennium 1994-1995 the general operational expenses of the ICTY were \$5,741,900, or 16 percent of the tribunal's expenditures during that period. In 1996 this figure was \$4,163,000, or 14 percent of the tribunal's expenditures of that year. In the budget requirements for the year 2000, this figure is \$9,121,100, or nine percent of the total budget.

### 4.3 Budget Procedure

The Rome Statute is remarkably silent on the budget of the Court. The only provision is that the Assembly considers and decides the budget (art. 112.2(c)). The Court's Financial Regulations must include the budget cycle, who shall draft the budget, instruction and principles on how it shall be drafted, whether and how the Court shall adopt it before its submission to the Assembly, and who will present it before the Assembly. The same provisions are necessary for the Assembly budget *mutatis mutandis*.

#### 4.3.1 Budget Cycle

The Financial Regulations must determine the budget cycle of the Court. This determination can provide stability to the Court by giving it enough room to plan and implement its activities. This is extremely

*A two-year budget cycle is followed by the UN and most other international judicial bodies. Such a cycle would give the Court some stability while at the same time be limited enough to enable practical budget estimates to be made.*

important in light of the experiences of the ICTY and ICTR. The ad hoc tribunals have only a one-year budget cycle, which has at times prevented sufficient long-term planning. The Assembly should seriously consider adopting a biennial budget cycle to place the Court on firmer ground. A two-year budget cycle is followed by the

<sup>110</sup> The ICTY has field offices in Zagreb, Sarajevo, Belgrade, Skopje, Pristina, and Banja Luka, while the ICTR has a field office in Kigali.

<sup>111</sup> With the exception of the Skopje office, all of ICTY field offices are located in offices of United Nations peacekeeping missions. See also in this regard recommendation of the Office of Internal Oversight Service to the ICTR that "rather than spending the additional and substantial sums that would be required to make the existing facilities adequate, the Tribunal should consider the option of obtaining funding for a suitable facility in each of the host countries, which might include sharing of space with other United Nations offices or, as appropriate, international organization offices"; UN Doc. A/C.5/53/15, at p.86.

<sup>112</sup> Provision on exemption from taxes and duties, and rates on public services for the premises of the Court would need to be addressed in the Headquarters agreement with the Netherlands.

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UN and most other international judicial bodies.<sup>113</sup> Such a cycle would give the Court some stability while at the same time be limited enough to enable practical budget estimates to be made. According to article 118 of the Rome Statute, the Court shall be audited annually. This provision does not necessarily preclude a budget cycle of more than one year.

To be sure, because it is not possible to predict the number of cases the Court will handle, this might be too long a period. Any shortcomings caused by two-year budget cycles could be addressed by a reserve fund financed by the regular budget. In fact, the experience of the International Tribunal for the Law of the Sea strongly supports such an arrangement.<sup>114</sup> As the Assembly of States Parties does meet every year it could also, in a non-budget year, adopt a supplementary budget to cover large unforeseen expenses. It should also be borne in mind that whenever the Court faces a new situation, initial expenses will mostly be limited to the Office of the Prosecutor. From the time an investigation starts it can be estimated that it will take one year to issue an indictment.<sup>115</sup>

The Court has to avoid cash flow problems in its first year. Various expenses have to be met before the Assembly adopts the first budget, agrees on a scale of assessment and collects state parties contributions. This cash flow problem can be solved in at least three ways. First, as already discussed, the UN could contribute start-up funds for the Court.<sup>116</sup> Second, the UN might advance the necessary funds until the Court has adopted its budget and assessment scale, and collected assessments. That budget would include an amount for repaying the UN. Third, some or all state parties could provide advance contributions that are later credited to their established assessment. This arrangement was made for the International Tribunal for the Law of the Sea. Nothing prevents application of all or some of these methods. The UN might host and provide secretariat services for the Assembly and advanced contributions by some state parties pay other start-up costs. Such an approach would both bring the Court into a relationship with the UN, while at the same time emphasizing the Court's independence.

*The Court has to avoid cash flow problems in its first year. Various expenses have to be met before the Assembly adopts the first budget, agrees on a scale of assessment and collects state parties contributions.*

### 4.3.2 Preparation of the Budget and Submission to the Assembly

#### *Budget preparation*

The budget preparation for the Court must coincide with the authority and mandate of its different organs. As stated before, the judges and the Prosecutor shall act independently. The Presidency is responsible for

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<sup>113</sup>See UN Financial Regulations, supra note 37, art. 2.1. Similarly the financial period of the ITLOS consists of two consecutive calendar years, beginning with the year 2002. Until then the financial period shall consist of one calendar year, see Financial Regulations of the Tribunal, supra note 7, regulation 2.

<sup>114</sup> The ITLOS budget for 1996-1997 did provide for amount for a possible first case. However, the amount was used for a meeting of the tribunal. When the tribunal did receive a case, the necessary expenses were met, in part, by a bank loan. A supplementary budget was then adopted for the expenses and the tribunal received the amounts about two years after the expenses were incurred; See Treves, supra note 46, at 6.

<sup>115</sup> Supra p. 36.

<sup>116</sup> Supra p. 17.

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“the due administration” of the Court, with the exception of the Office of the Prosecutor (art. 38.3(a)). The Registrar is the principal administrative officer of the Court (43.2), but is responsible for the servicing of the Court *without prejudice to the functions and powers of the Prosecutor* (art. 43.1). The Registrar also has a close relationship with the Chambers, as the former is elected by the judges and exercises his or her function under the responsibility of the President of the Court (art. 43.2). Similarly, the Prosecutor shall have the full authority over the administration and management of his or her office (42.2).

*The budget preparation for the Court must coincide with the authority and mandate of its different organs.*

The Prosecutor's independence and limited relationship with the Registrar and the Chambers seem to exclude the possibility that the Registry or the Presidency can scrutinize his or her budget proposal.<sup>117</sup> As the Prosecutor's budget planning is also highly related to investigation and prosecution plans, any interference by the judges at this stage could be construed as prejudicial for their later work and chip away at their required impartiality.

*The Prosecutor's independence and limited relationship with the Registrar and the Chambers seem to exclude the possibility that the Registry or the Presidency can scrutinize his or her budget proposal.*

As for the Chambers' budget, the judges should be given the final say. Giving the Registrar the power to scrutinize their budget would interfere with their independence.<sup>118</sup> Since the Presidency has the final responsibility for the administration of the Court (with the exception of the Office of the Prosecutor), it should also have the final decision regarding the Registrar's budget proposal.

*As for the Chambers' budget, the judges should be given the final say. Giving the Registrar the power to scrutinize their budget would interfere with their independence.*

Hence, in light of the statutory authority of the organs of the Court, the Financial Regulations should adopt a provision on two budget proposals submitted to the Assembly; one for the Chambers and the Registry, and one for the Office of the Prosecutor. The drafting of the budget of the Assembly could be handled by its Bureau (art. 112.3(a)) or another established subsidiary body.

To ensure clarity, efficiency, and coherence, some kind of blueprint of the Court's budget planning is necessary. The Financial Regulations should include instructions on form, categories, and reasoning.<sup>119</sup>

Furthermore, as the budget of each organ is interdependent, some harmonization is needed. The Chambers' budget is to some extent dependent on the Prosecutor's planning (number of investigations, indictments, etc.) and the Registrar's budget is largely dependent on the Chambers' planning (number of

<sup>117</sup> The Prosecutor of the ICTY and ICTR has expressed that its office would function more effectively if it assessed its own needs, sought its budget accordingly, and then deployed its resources. The Expert Group shares the same view and has recommended that the Prosecutor would assume responsibility with regard to its own budget, see Report of the Expert Group, *supra* note 84, para. 251 and 252.

<sup>118</sup> The Registry of the ICTY and ICTR does scrutinize the budget proposals of the chambers before its submission to the Secretary-General. This authority has been criticized as working against the independence of the judges, which should be entitled to have the final say on the tribunal's budget proposals; *id.*, para. 245 to 252.

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trials, etc.). In light of this, before the budget proposals are adopted by the judges and the Prosecutor, a referral to a established budgetary committee might be considered. In the case of the ITLOS, the Registrar prepares the tribunal's budget and submits it to a Committee on Budget and Finance (CBF) for examination. The CBF transmits the draft with comments and recommendations to the tribunal, which considers and approves the draft before sending it to the Meeting of State Parties for consideration and adoption.<sup>120</sup>

*In light of this, before the budget proposals are adopted by the judges and the Prosecutor, a referral to a established budgetary committee might be considered.*

### *Budget Submission*

The Financial Regulations must also determine who will submit the budget to the Assembly. According to article 112.5, the President of the Court, the Prosecutor, and the Registrar or their representatives may participate, as appropriate, in the meetings of the Assembly and of the Bureau. As the principal administrative officer of the Court, the Registrar would seem to be the appropriate party to submit the budget to the Assembly, mindful though that the Registrar has neither a statutory relationship with nor is accountable to the Assembly. The Presidency is accountable for the administration of the Court and the President might therefore be more appropriate for this task. With the same argument as before, in light of the independence of the Office of the Prosecutor, the Prosecutor should submit his or her own budget to the Assembly. According to the Final Act of the Rome Statute the Preparatory Commission shall prepare the budget for the first year of the Court. The Chairperson of its Bureau would therefore submit the proposal to the Assembly.

### 4.3.3 The Adoption of the Budget

The Assembly, as the sole budgetary authority of the Court and the oversight mechanism regarding its administration, inevitably shapes its operation. Significantly, this power is limited to the Court's management as the judges and the Prosecutor enjoy independence (art. 40.1 and 42.1), respectively. However, especially when there are a large number of complicated cases, the size of budget might de facto determine how much business the Court can do.

*The Financial Regulations must clarify to what extent the Assembly can change and adjust the budget proposals. This is particularly important regarding the Prosecutor's budget proposal.*

According to article 112.2(d), the Assembly shall *consider and decide* the budget of the Court. The Financial Regulations must clarify to what extent the Assembly can change and adjust the budget proposals. This is particularly important regarding the Prosecutor's budget proposal. In light of the Prosecutor's independence, an authority for the Assembly to cut or prioritize

<sup>119</sup> See in this regard Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation, UN Doc. ST/SGB/PPBME Rules/1 (1987); and ITLOS Financial Regulations of the Tribunal, *supra* note 7, regulations 3.

<sup>120</sup> See ITLOS Financial Regulations of the Tribunal, *supra* note 7, regulation 3.1, 3.4, 3.5.

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objects in his or her proposal, like funding investigation X but not Y, might be highly questionable. The budget procedures at the Inter-American Court of Human Rights are interesting in this respect. The court draws up its own budget and submits it for approval to the General Assembly of the OAS, through the General Secretariat. However, the latter may not introduce any changes in it.<sup>121</sup> It is also noteworthy, that later this year proposals will be put to the Committee of Ministers by the Secretary General of the Council of Europe for far-reaching amendment of the Financial Regulations, which would among other things significantly increase the autonomy of the European Court of Human Rights as far as expenditure is concerned.

To ensure efficiency, the Rules of the Assembly Procedure (art. 112.9) should stipulate the process of the adoption of the budget. The Assembly might want to refer the matter to a subsidiary committee or a smaller working group for comments before deciding on the issue. The General Assembly of the United Nations follows a scrutinizing procedure before adopting the UN budget. First, a proposal is referred to an Advisory Committee on Administrative and Budgetary Questions (ACABQ), a panel of 18 individual experts elected by the General Assembly. After reviewing the proposal, the ACABQ sends its recommendation to the Fifth Committee of the General Assembly. Following their comments the General Assembly gives its final approval.<sup>122</sup> The UN-ICC relationship agreement could provide that the ICC can use the ACABQ to support its financial instruments. The establishment of a Finance Committee, comparable to the ACABQ, has been debated by the states parties to the United Nations Convention on the Law of the Sea and a final decision on the matter has not been reached.<sup>123</sup>

*To ensure efficiency, the Rules of the Assembly Procedure should stipulate the process of the adoption of the budget. The Assembly might want to refer the matter to a subsidiary committee or a smaller working group for comments before deciding on the issue.*

The budget for voting could constitute a proposal on the Chambers' and the Registry's budget, a proposal on the Office of the Prosecutor's budget, and a proposal on the Assembly's budget. In any event,

*The budget for voting could be made of a proposal on the Chambers' and the Registry's budget, a proposal on the Office of the Prosecutor's budget, and a proposal on the Assembly's budget. In any event, the budget to be voted on should constitute one combined proposal.*

the budget to be voted on should constitute one combined proposal. Such an arrangement would balance the interest of the Court as an independent judicial body and its oversight body, which is a political organ. In adopting the budget, the general voting rules of the Assembly, provided for in the Rome Statute, apply. They stipulate that every effort shall be made to reach a decision by consensus in

<sup>121</sup> Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz, Bolivia, October 1979 (Resolution No. 448), article 26.

<sup>122</sup> Before a submission to the General Assembly, a draft is prepared by the heads of departments following the Secretary-General's instruction and in accordance with the UN Regulations and Rules Governing Programme Planning, the Programme Aspects of the Budget, the Monitoring of Implementation and the Methods of Evaluation. The draft is reviewed by the Secretary-General's Programme Planning and Budgeting Board. Based on their deliberation the Secretary-General submits the proposal to the General Assembly.

<sup>123</sup> See relevant discussion at the tenth meeting of states parties, UN Press Release SEA/1679, States Parties to Law of Sea Convention to recommend Assembly consideration of trust fund to assist parties in International Tribunal proceedings, 25 May 2000, available at <http://www.pict-pcti.org/news/>.

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the Assembly. If consensus is not reached, the budget would need a two-thirds majority of those present and voting, provided that an absolute majority of states parties constitute the quorum for voting (art. 112.7).<sup>124</sup>

### 4.4 Oversight Mechanisms

According to article 118 the records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor. Most inter-governmental organizations use “external auditors” who are elected, from among the national auditors-general of member states, by the general representative organ of the IGO, and who perform their function singly (for most specialized agencies) or in panels of three (the UN). The normal IGO model, a single national auditor-general, appointed for a period of three years and then rotated, might be considered for the ICC.<sup>125</sup>

The Financial Regulations must include an oversight mechanism for the Court’s and Assembly’s operations. The importance of such an arrangement has long been proven by the UN Office of the

*The Financial Regulations must include an oversight mechanism for the Court’s and Assembly’s operations. The importance of such an arrangement has long been proven by the UN Office of the Internal Oversight Services.*

Internal Oversight Services (OIOS),<sup>126</sup> which has served an important role in monitoring the ICTY and ICTR operations.<sup>127</sup> In fact, the Rome Statute implies such a mechanism, as “[t]he Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy” (art. 112.4).

An external, systematic, and objective inspection and evaluation of the Court’s activities is essential for its efficient operation. A review by a joint team of auditors and investigators might effect improvements in general management, like the handling and transferring of funds,<sup>128</sup> and/or the

<sup>124</sup> At the tenth meeting of States Parties to the United Nations Convention on the Law of the Sea the United Kingdom submitted a proposal that would amend Rule 53 of its Rules of Procedure, concerning decisions on questions of substance. Under the proposal, decisions on budgetary and financial matters would be taken by a three-fourths majority of states parties present and voting, provided that such majority included states parties contributing at least three-fourths of the expenses of the International Tribunal for the Law of the Sea, as well as a majority of states parties participating in the meeting. The representatives of the United States, Japan, the Russian Federation and Germany supported the proposal. However, a number of delegations opposed the proposal, stating that it would introduce weighted voting. The United Kingdom consequently amended the proposal to delete the concept of weighted voting, but delegations continued to object to the proposal. Further discussion on the matter was postponed. See UN Press Release SEA/1678, Parties to Law of the Sea Convention approve International Tribunal 2001 budget, 25 May 2000; UN Press Release SEA/1680, Tenth meeting of parties to the Law of the Sea Convention concludes, 30 May 2000, both available at <http://www.picti.org/news/>.

<sup>125</sup> The ITLOS appoints an auditor which shall be an international recognized firm of auditors. The auditor is appointed for a period of four years and may be reappointed. See ITLOS draft Financial Regulations of the Tribunal, *supra* note 7, regulation 12.

<sup>126</sup> The OIOS was created in 1994 to establish a credible, effective, and permanent system of oversight of UN operations. The office incorporates all major oversight functions, including internal auditing, management consulting programme evaluation and monitoring, and inspection and investigations; General Assembly Resolution 48/218B, 29 July 1994.

<sup>127</sup> See for instance, OIOS Audit and Investigation of the ICTY, UN Doc. A/54/120; and OIOS Audit and Investigation of the ICTR, UN Doc. A/51/789 and UN Doc. A/52/784.

<sup>128</sup> In the 1997 OIOS report on ICTR activities, the operation of the Finance Section had the most troubling deficiencies. Key among them was the absence of financial information on the accounts of the tribunal and the regular handling and transport of large amounts of cash; see UN Doc. A/51/789.

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investigation of alleged misconduct by an employee.<sup>129</sup> The same mechanism could also provide general management consulting. In the case of the ICTR, assistance has been provided by the UN Secretariat, primarily by the Department of Management and the Office of Legal Affairs.<sup>130</sup>

A financial body, similar to the UN Committee on Contracts,<sup>131</sup> should also be considered for the ICC. Advice on major contracts, such as leases for premises or equipment, might be highly beneficial. Such arrangement would strongly protect the independence and impartiality of the Court by securing transparent and legitimate commitments on its behalf. In addition, the body might prevent confrontation between the Presidency and the Assembly of States Parties. As the Presidency is responsible for the administration of the Court, the judges can theoretically be subject to administrative accountability. A prior advice on major commitments might prevent later controversy and possible responsibility.<sup>132</sup> An established mechanism, carrying out the general oversight work, could carry out this function.

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## 5. CONCLUSIONS

The financial matters of the International Criminal Court are of fundamental importance. Not only will they have a major bearing on its daily operation, but they will also affect the independence of the judges, the Office of the Prosecutor and ultimately the Court itself. Because the Rome Statute only provides the basic financial framework, the Financial Regulation will play an essential role. Furthermore, the Court's relationship agreement with the United Nations might establish a close budgetary and financial relationship between the two organizations.

The ICC's states parties will shoulder the financial responsibility of the Court. The first funds of the Court will be assessed contributions made by state parties. Using a hypothetical scale of assessment, based on the UN regular budget scale, and assuming the United States and Japan do not ratify, the

<sup>129</sup> The 1997 OIOS report on the ICTR questioned the integrity of an Finance Assistant. Subsequently, a panel established by the Registry investigated the alleged misconduct; see OIOS 1998 report on ICTR activities, UN Doc. A/52/784.

<sup>130</sup> The relationship agreement between the ITLOS and the UN contains a provision of conference services by the United Nations on a reimbursable basis and a provision on the establishment of close budgetary and financial cooperation or a relationship between the organizations. The UN may "upon request" of the tribunal "provide advice on financial and fiscal questions of interest to the International Tribunal with a view to achieving coordination and securing uniformity in such matters". Furthermore, the registrar of the tribunal "may consult" with the UN Secretary-General "with a view to achieving consistency in the presentation of the budget" of the tribunal with that of the UN. See Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea, *supra* note 10, art. 7 and 10.

<sup>131</sup> The UN Committee on Contracts has the mandate to render written advice to the Assistant Secretary-General for General Services, including on all contracts to be entered into which involve commitments to a single contractor in respect of a single requisition or a series of related requisitions totaling \$70,000 or more; Financial Regulation and Rules of the United Nations, *supra* note 37, rule 110.17.

<sup>132</sup> The ICC structure of having the Presidency responsible for the overall administration of the Court, and having no link between the Registrar and the Assembly, was harshly criticized by the Registrar of the ICTY. She commented that "[t]he independence and effectiveness of an international court would be seriously hampered if the judicial organ and individual judges would be made subject to administrative accountability."; See Address of the Registrar of the International Criminal Tribunal for the former

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member states of the European Union will likely be responsible for up to 80 percent of the Court's budget. The financial burden of becoming a party to the Rome Statute for the majority of the members of the United Nations would therefore be minimal. Nonetheless, prompt payments by all state parties is essential for the Court to be able to carry out its work. To emphasize their commitment to the responsibilities of membership, states parties should adopt strict regulations in this respect.

The United Nations might become a significant source of funding for the Court. The Rome Statute implies that the United Nations should at least provide funds in relation to the expenses incurred due to referrals by the Security Council. However, drawing from the precedent of the Convention on the Law of the Sea, this paper proposes two other ways for possible funding by the United Nations. First, the UN could provide the initial funding of the Assembly of States Parties and the Court, and second, the UN could pay for the costs of the Assembly of States Parties. Still, any funding from the UN is subject to the total discretion of its General Assembly.

As additional funds, the Court may receive voluntary contributions, in accordance with relevant criteria adopted by the Assembly of States Parties. To ensure the impartiality, independence, and the international nature of the Court this paper proposes a strict criteria on voluntary contributions. They should not be utilized for core activities of the Court and should not be subject to conditions contrary to the policies and aims of the Court. Underlying issues of gratis personnel are similar to those of voluntary contributions. In fact, the Rome Statute is even more concerned about gratis personnel than voluntary contributions, as gratis personnel are only allowed "in exceptional circumstances" and such personnel cannot be accepted from non-state parties, unlike voluntary contributions.

The Court has a single financial framework and its budget will include both the expenses of the Court and of the Assembly of States Parties. The budget of the Court's first financial year will likely be limited to meetings of the Assembly of States Parties and judges.

Any estimate of the Court's expenditures will be insufficient as the Court is an unprecedented endeavor and there is no way to predict its caseload. In addition, the Court's Rules of Procedure and Evidence have not been finalized but they will have various financial implications. However, for the sake of the exercise, this paper did speculate about what factors might have considerably budgetary implications.

A fundamental question will be what minimum level of operation the Court will have to establish when the Rome Statute enters into force and to what extent it is required to function during low-activity periods. Being a permanent institution the Court will always incur some fixed expenses. This applies both to housing and staffing. In addition to the judges, the Prosecutor, and the Registrar, a core of principal officers would need to be hired on a permanent basis. In addition, the office of the Prosecutor would need

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Yugoslavia, Mrs. Dorothee de Sampayo Garrido-Nijgh to the Preparatory Committee on the Establishment of an International Criminal Court, March/April Session, 16 March - 3 April 1998, New York).

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some full-time staff to be able to respond quickly to new situations. The total expenses of the Court during low activity periods should be kept to a minimum.

As the experience of the ICTY and ICTR teach, it can be estimated that the cost of the Court during operational periods will be high. By far, the largest item of expenditure will be staffing, perhaps up to half of the Court's expenditure. Fees to defence counsel and general operating expenses will also be considerable.

The Rome Statute is silent on the budget procedures of the Court. The Financial Regulations will have to determine how the budget shall be drafted and how it shall be submitted to the Assembly of States Parties. The procedure is highly related to the proper separation between the chambers and the Prosecutor and this paper suggests that the two organs should prepare and submit their budgets separately. To the same extent, the procedures for the adoption of the budget have significant meaning for the independence of the Court versus the Assembly of States Parties. Particularly, this paper questions the wisdom of giving the Assembly of States Parties broad power to cut or prioritize items in the budget proposal of the Prosecutor. Recent developments at other international judicial bodies, which restrict such power, are notable in this regard.

Oversight mechanisms are becoming fundamental instruments for efficient operations of international institutions. The Rome Statute implies the establishment of such a mechanism and the Financial Regulations should firmly implement that object. The oversight mechanism at the UN can give important guidance on possible procedures.

**RECOMMENDATIONS**

1. The Preparatory Commission for the International Criminal Court should consider it within its mandate to submit a draft scale of assessment to the first Assembly of States Parties.
2. The ICC scale of assessment should be as close as possible to the UN scale of assessment for its regular budget. Floors and ceilings should also be applied.
3. The Financial Regulations should specify when contributions are to be considered due and payable, and when they are considered in arrears. This determination should be stricter than that of the UN.
4. The ICC-UN relationship agreement should stipulate that the latter should provide funds in relation to the expenses incurred by the Court, due to referrals by the Security Council.
5. The UN could provide the initial funding of the Assembly of States Parties and the Court and/or the UN could pay for the costs of the Assembly of States Parties.
6. Voluntary Contributions should not be considered funds of the Court and the Assembly of States Parties.
7. The criteria on voluntary contributions should stipulate whether contributions can be utilized for core activities of the Court or only for collateral activities.
8. The criteria on voluntary contributions should address the purposes for which contributions are made; who is empowered to decide whether contributions are consistent with the aim of the Court; the way in which funds and or resources are to be transferred; how funds are going to be used; and how funds are going to be accounted for.
9. Funds collected from fines and forfeiture should only be used for the benefit of victims.
10. During low activity periods the Court should keep its operation to a minimum.
11. The Court's premises should fulfill requirements of a criminal judiciary body. The Court should consider whether the prosecution should occupy separate premises.
12. The Court must be able to hire people on short notice and for short periods. Its Staff Regulations must therefore be more flexible than those of other international institutions.
13. The Financial Regulations should adopt a two-year budget cycle.
14. An establishment of a budgetary committee should be considered.
15. The Financial Regulations should adopt a provision for two budget proposals to be submitted to the Assembly from the Court: one for the Chambers and the Registry, and one for the Office of the Prosecutor.
16. The Financial Regulations must clarify to what extent the Assembly of States Parties can change and adjust budget proposals.
17. The Rules of the Assembly Procedure should stipulate the process of the adoption of the budget. The budget to be voted on should constitute one combined proposal.
18. The Financial Regulations should establish an oversight mechanism for the Court's and Assembly's operations. A financial body, similar to the UN Committee on Contracts, should also be considered for the ICC.

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## Annex I

### Article 44

#### *Staff*

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

## PART 11. ASSEMBLY OF STATES PARTIES

### Article 112

#### *Assembly of States Parties*

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

- (a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
- (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
- (c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
- (d) Consider and decide the budget for the Court;
- (e) Decide whether to alter, in accordance with article 36, the number of judges;
- (f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
- (g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

## **PART 12. FINANCING**

### **Article 113**

#### *Financial Regulations*

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

### **Article 114**

#### *Payment of expenses*

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

### **Article 115**

#### *Funds of the Court and of the Assembly of States Parties*

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

### **Article 116**

#### *Voluntary contributions*

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

### **Article 117**

#### *Assessment of contributions*

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

### **Article 118**

#### *Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor

## Annex II

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**Annex III**  
**HYPOTHETICAL SCALE OF ASSESSMENT FOR THE ICC**

**TABLE 1**  
(all figures are percentages)

	<b>COLUMN 1</b>	<b>COLUMN 2</b>	<b>COLUMN 3</b>	<b>COLUMN 4</b>	<b>COLUMN 5</b>
	<b>STATE</b>	<b>UN Scale of Assessment for the Year 2000</b>	<b>Scenario without USA and Japan</b>	<b>Scenario with Japan and without USA</b>	<b>Scenario with both Japan and USA</b>
<b>EU MEMBER STATES</b>	Austria	0.942	2.031967903	1.407398554	1.024670409
	Belgium	1.104	2.381414612	1.649435248	1.200887613
	Denmark	0.692	1.492698289	1.033885137	0.752730279
	Finland	0.543	1.1712936	0.811271141	0.590653962
	France	6.545	14.11807847	9.778581247	7.119392595
	Germany	9.857	21.26232231	14.72688699	10.72205543
	Ireland	0.224	0.483185573	0.334668021	0.243658356
	Italy	5.437	11.72803555	8.123169784	5.91415394
	Luxembourg	0.068	0.146681335	0.101595649	0.073967715
	Netherlands	1.632	3.520352035	2.438295584	1.775225166
	Portugal	0.431	0.929700813	0.64393713	0.468824784
	Spain	2.591	5.588990272	3.87109305	2.818387504
	Sweden	1.079	2.327487651	1.612083906	1.1736936
	United Kingdom	5.092	10.98384348	7.607721269	5.538876561
<b>OTHER UN MEMBERS (* not a UN member)</b>	Andorra	0.004	0.008628314	0.005976215	0.004351042
	Angola	0.01	0.021570785	0.014940537	0.010877605
	Argentina	1.103	2.379257534	1.647941194	1.199799852
	Australia	1.483	3.198947346	2.215681587	1.613148849
	Bangladesh	0.01	0.021570785	0.014940537	0.010877605
	Benin	0.002	0.004314157	0.002988107	0.002175521
	Bolivia	0.007	0.015099549	0.010458376	0.007614324
	Botswana	0.01	0.021570785	0.014940537	0.010877605
	Brazil	1.471	3.173062404	2.197752943	1.600095723
	Bulgaria	0.011	0.023727863	0.01643459	0.011965366
	Burundi	0.001	0.002157078	0.001494054	0.001087761
	Canada	2.732	5.893138333	4.081754617	2.971761737
	Cape Verde	0.002	0.004314157	0.002988107	0.002175521
	Central African Republic	0.001	0.002157078	0.001494054	0.001087761
	Chile	0.136	0.29336267	0.203191299	0.147935431
	Costa Rica	0.016	0.034513255	0.023904859	0.017404168
	Cyprus	0.034	0.073340667	0.050797825	0.036983858
	Czech Republic	0.107	0.230807394	0.159863742	0.116390375
	Ecuador	0.02	0.043141569	0.029881073	0.02175521
	Fiji	0.004	0.008628314	0.005976215	0.004351042
	Ghana	0.007	0.015099549	0.010458376	0.007614324
	Hungary	0.12	0.258849414	0.17928644	0.130531262
	Iceland	0.032	0.06902651	0.047809717	0.034808337
	<b>Japan</b>	<b>20.573</b>	<b>0</b>	<b>30.73716608</b>	<b>22.37849715</b>
	Lichtenstein	0.006	0.012942471	0.008964322	0.006526563
	Lithuania	0.015	0.032356177	0.022410805	0.016316408
	Malawi	0.002	0.004314157	0.002988107	0.002175521
	Malta	0.014	0.030199098	0.020916751	0.015228647
	Monaco	0.004	0.008628314	0.005976215	0.004351042
	New Zealand	0.221	0.476714338	0.33018586	0.240395075
	Nigeria	0.032	0.06902651	0.047809717	0.034808337
	Norway	0.61	1.315817856	0.911372737	0.663533916
	Paraguay	0.014	0.030199098	0.020916751	0.015228647
	Samoa	0.001	0.002157078	0.001494054	0.001087761
	San Marino	0.002	0.004314157	0.002988107	0.002175521
	Sao Tome and Principe	0.001	0.002157078	0.001494054	0.001087761
	Senegal	0.006	0.012942471	0.008964322	0.006526563
	Slovakia	0.035	0.075497746	0.052291878	0.038071618
	Slovenia	0.061	0.131581786	0.091137274	0.066353392
	South Africa	0.366	0.789490714	0.546823642	0.39812035
	Swaziland	0.002	0.004314157	0.002988107	0.002175521
	Switzerland*	1.215	2.62085032	1.815275205	1.32162903
	Tanzania	0.003	0.006471235	0.004482161	0.003263282
	Trinidad and Tobago	0.016	0.034513255	0.023904859	0.017404168
	Uganda	0.004	0.008628314	0.005976215	0.004351042
	<b>United States</b>	<b>25</b>	<b>0</b>	<b>0</b>	<b>27.19401297</b>
	Venezuela	0.16	0.345132552	0.239048587	0.174041683
Zimbabwe	0.009	0.019413706	0.013446483	0.009789845	
<b>Total</b>	<b>91.932</b>	<b>100</b>	<b>100</b>	<b>100</b>	
<b>Total EU</b>	<b>36.237</b>	<b>78.1660519</b>	<b>54.14002271</b>	<b>39.41717791</b>	
<b>US</b>	<b>25</b>	<b>0</b>	<b>0</b>	<b>27.194</b>	
<b>Japan</b>	<b>20.573</b>	<b>PICT</b>	<b>0</b>	<b>30.73716608</b>	

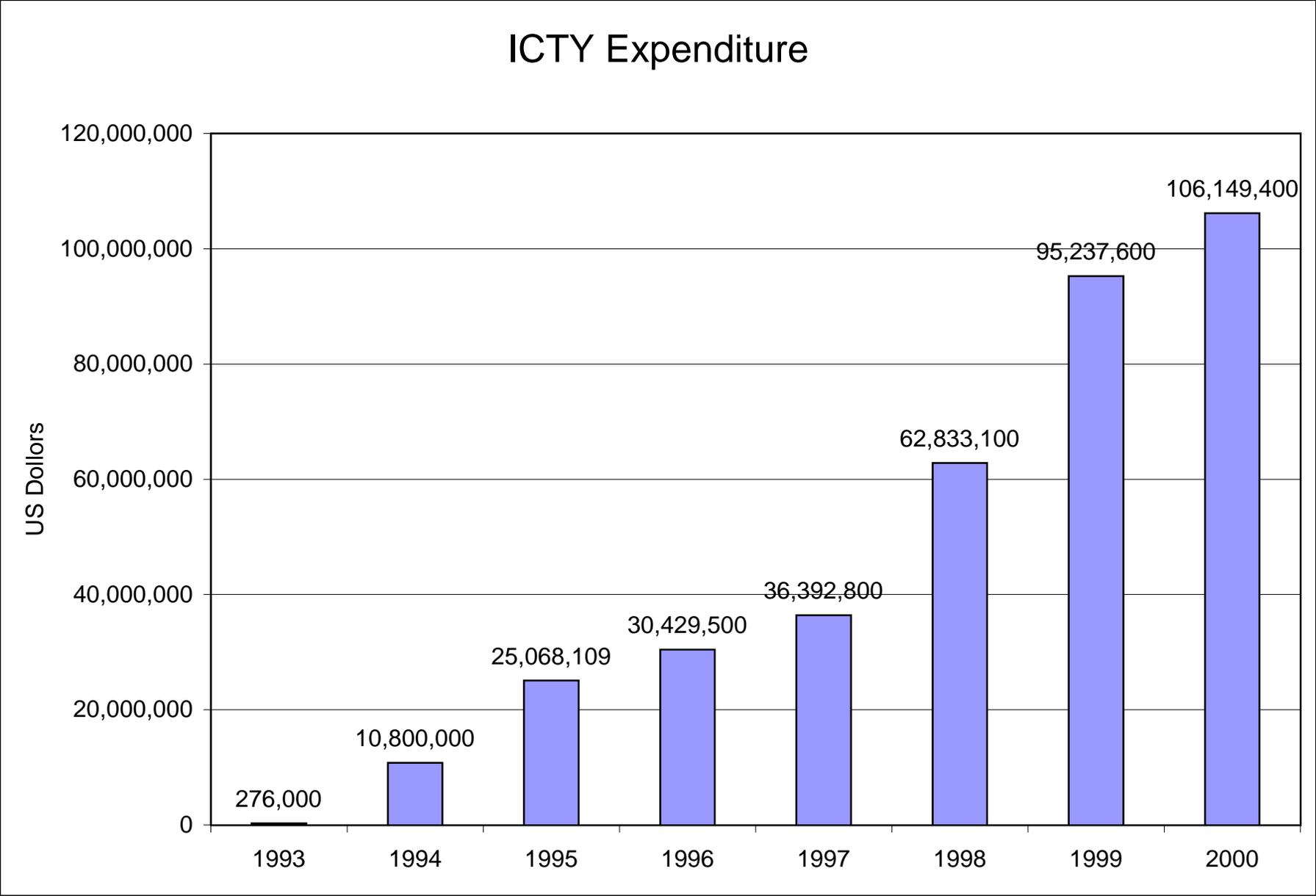
HYPOTHETICAL SCALE OF ASSESSMENT FOR THE ICC WHEN FLOORS AND CEILINGS ARE APPLIED  
TABLE 2

	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	
STATE (sorted from the smallest to the largest contributors)	Hypothetical ICC Scale of Assessment (Including Japan and the USA)	ICC Scale of Assessment with a 0.01 percent floor	ICC Scale of Assessment with a 25 percent ceiling	ICC Scale of Assessment with both 25 percent ceiling and 0.01 percent floor	
States affected by a 0.01 floor	Burundi	0.001087761	0.01	0.001120548	0.01
	Central African Republic	0.001087761	0.01	0.001120548	0.01
	Samoa	0.001087761	0.01	0.001120548	0.01
	Sao Tome and Principe	0.001087761	0.01	0.001120548	0.01
	Benin	0.002175521	0.01	0.002241096	0.01
	Cape Verde	0.002175521	0.01	0.002241096	0.01
	Malawi	0.002175521	0.01	0.002241096	0.01
	San Marino	0.002175521	0.01	0.002241096	0.01
	Swaziland	0.002175521	0.01	0.002241096	0.01
	Tanzania	0.003263282	0.01	0.003361644	0.01
	Andorra	0.004351042	0.01	0.004482192	0.01
	Fiji	0.004351042	0.01	0.004482192	0.01
	Monaco	0.004351042	0.01	0.004482192	0.01
	Uganda	0.004351042	0.01	0.004482192	0.01
	Lichtenstein	0.006526563	0.01	0.006723287	0.01
	Senegal	0.006526563	0.01	0.006723287	0.01
	Bolivia	0.007614324	0.01	0.007843835	0.01
	Ghana	0.007614324	0.01	0.007843835	0.01
	Zimbabwe	0.009789845	0.01	0.010084931	0.01
	Other Hypothetical Rome Statute Parties	Angola	0.010877605	0.010865056	0.011205479
Bangladesh		0.010877605	0.010865056	0.011205479	0.011188459
Botswana		0.010877605	0.010865056	0.011205479	0.011188459
Bulgaria		0.011965366	0.011951562	0.012326027	0.012307305
Malta		0.015228647	0.015211078	0.015687671	0.015663843
Paraguay		0.015228647	0.015211078	0.015687671	0.015663843
Lithuania		0.016316408	0.016297584	0.016808218	0.016782689
Costa Rica		0.017404168	0.01738409	0.017928766	0.017901535
Trinidad and Tobago		0.017404168	0.01738409	0.017928766	0.017901535
Ecuador		0.02175521	0.021730112	0.022410958	0.022376918
Iceland		0.034808337	0.034768179	0.035857533	0.035803069
Nigeria		0.034808337	0.034768179	0.035857533	0.035803069
Cyprus		0.036983858	0.036941191	0.038098629	0.038040761
Slovakia		0.038071618	0.038027696	0.039219176	0.039159607
Slovenia		0.066353392	0.066276842	0.068353422	0.068249601
Luxembourg		0.073967715	0.073882381	0.076197257	0.076081523
Czech Republic		0.116390375	0.1162561	0.119898625	0.119716513
Hungary		0.130531262	0.130380673	0.134465748	0.13426151
Chile		0.147935431	0.147764762	0.152394514	0.152163045
Venezuela		0.174041683	0.173840897	0.179287664	0.179015347
New Zealand		0.240395075	0.240117739	0.247641086	0.247264948
Ireland		0.243658356	0.243377255	0.25100273	0.250621486
South Africa		0.39812035	0.397661051	0.410120531	0.409497607
Portugal		0.468824784	0.468283916	0.482956145	0.482222591
Finland		0.590653962	0.589972543	0.608457509	0.607533335
Norway		0.663533916	0.662768419	0.683534219	0.682496011
Denmark		0.752730279	0.751861878	0.775419147	0.774241377
Austria		1.024670409	1.02348828	1.055556121	1.053952857
Sweden		1.1736936	1.172339547	1.209071184	1.207234748
Argentina		1.199799852	1.198415682	1.235964333	1.23408705
Belgium		1.200887613	1.199502188	1.237084881	1.235205896
Switzerland*		1.32162903	1.32010431	1.361465698	1.359397793
Brazil		1.600095723	1.598249744	1.64832596	1.645822348
Australia		1.613148849	1.611287812	1.661772535	1.659248499
Netherlands		1.775225166	1.773177147	1.828734172	1.825956541
Spain		2.818387504	2.815136022	2.903339608	2.898929778
Canada		2.971761737	2.968333312	3.061336862	3.056687053
United Kingdom		5.538876561	5.532486539	5.705829905	5.697163424
Italy		5.91415394	5.907330973	6.09241893	6.083165266
France		7.119392595	7.111179183	7.333986003	7.322846546
Germany		10.72205543	10.70968575	11.04524065	11.02846423
Japan		22.378	22.35218323	23.0525198	23.01750575
USA		27.194	27.16262717	25	25

HYPOTHETICAL SCALE OF ASSESSMENT FOR THE ICC WHEN FLOORS AND CEILINGS ARE APPLIED  
**TABLE 2**

	COLUMN 5	COLUMN 6	COLUMN 7	
STATE (sorted from the smallest to the largest contributors)	These are the savings and extra costs if only the 0.01 floor was applied (if ICC budget = \$100 million)	These are the savings and extra costs if only the 25 ceiling was applied (if ICC budget = \$100 million)	These are the savings and extra costs if the both the 0.01 floor and the 25 ceiling were applied (if ICC budget = \$100 million)	
States affected by a 0.01 floor	Burundi	\$8,912.24	\$32.79	\$8,912.24
	Central African Republic	\$8,912.24	\$32.79	\$8,912.24
	Samoa	\$8,912.24	\$32.79	\$8,912.24
	Sao Tome and Principe	\$8,912.24	\$32.79	\$8,912.24
	Benin	\$7,824.48	\$65.57	\$7,824.48
	Cape Verde	\$7,824.48	\$65.57	\$7,824.48
	Malawi	\$7,824.48	\$65.57	\$7,824.48
	San Marino	\$7,824.48	\$65.57	\$7,824.48
	Swaziland	\$7,824.48	\$65.57	\$7,824.48
	Tanzania	\$6,736.72	\$98.36	\$6,736.72
	Andorra	\$5,648.96	\$131.15	\$5,648.96
	Fiji	\$5,648.96	\$131.15	\$5,648.96
	Monaco	\$5,648.96	\$131.15	\$5,648.96
	Uganda	\$5,648.96	\$131.15	\$5,648.96
	Lichtenstein	\$3,473.44	\$196.72	\$3,473.44
	Senegal	\$3,473.44	\$196.72	\$3,473.44
	Bolivia	\$2,385.68	\$229.51	\$2,385.68
	Ghana	\$2,385.68	\$229.51	\$2,385.68
	Zimbabwe	\$210.16	\$295.09	\$210.16
	Other Hypothetical Rome Statute Parties	Angola	-\$12.55	\$327.87
Bangladesh		-\$12.55	\$327.87	\$310.85
Botswana		-\$12.55	\$327.87	\$310.85
Bulgaria		-\$13.80	\$360.66	\$341.94
Malta		-\$17.57	\$459.02	\$435.20
Paraguay		-\$17.57	\$459.02	\$435.20
Lithuania		-\$18.82	\$491.81	\$466.28
Costa Rica		-\$20.08	\$524.60	\$497.37
Trinidad and Tobago		-\$20.08	\$524.60	\$497.37
Ecuador		-\$25.10	\$655.75	\$621.71
Iceland		-\$40.16	\$1,049.20	\$994.73
Nigeria		-\$40.16	\$1,049.20	\$994.73
Cyprus		-\$42.67	\$1,114.77	\$1,056.90
Slovakia		-\$43.92	\$1,147.56	\$1,087.99
Slovenia		-\$76.55	\$2,000.03	\$1,896.21
Luxembourg		-\$85.33	\$2,229.54	\$2,113.81
Czech Republic		-\$134.28	\$3,508.25	\$3,326.14
Hungary		-\$150.59	\$3,934.49	\$3,730.25
Chile		-\$170.67	\$4,459.08	\$4,227.61
Venezuela		-\$200.79	\$5,245.98	\$4,973.66
New Zealand		-\$277.34	\$7,246.01	\$6,869.87
Ireland		-\$281.10	\$7,344.37	\$6,963.13
South Africa		-\$459.30	\$12,000.18	\$11,377.26
Portugal		-\$540.87	\$14,131.36	\$13,397.81
Finland		-\$681.42	\$17,803.55	\$16,879.37
Norway		-\$765.50	\$20,000.30	\$18,962.09
Denmark		-\$868.40	\$22,688.87	\$21,511.10
Austria		-\$1,182.13	\$30,885.71	\$29,282.45
Sweden		-\$1,354.05	\$35,377.58	\$33,541.15
Argentina		-\$1,384.17	\$36,164.48	\$34,287.20
Belgium		-\$1,385.43	\$36,197.27	\$34,318.28
Switzerland*		-\$1,524.72	\$39,836.67	\$37,768.76
Brazil		-\$1,845.98	\$48,230.24	\$45,726.63
Australia		-\$1,861.04	\$48,623.69	\$46,099.65
Netherlands		-\$2,048.02	\$53,509.01	\$50,731.37
Spain		-\$3,251.48	\$84,952.10	\$80,542.27
Canada	-\$3,428.42	\$89,575.12	\$84,925.32	
United Kingdom	-\$6,390.02	\$166,953.34	\$158,286.86	
Italy	-\$6,822.97	\$178,264.99	\$169,011.33	
France	-\$8,213.41	\$214,593.41	\$203,453.95	
Germany	-\$12,369.69	\$323,185.21	\$306,408.80	
Japan	-\$25,816.77	\$674,519.80	\$639,505.75	
USA	-\$31,372.83	-\$2,194,000.00	-\$2,194,000.00	

Table 1



**Table 2**

**ICTR Expenditure**

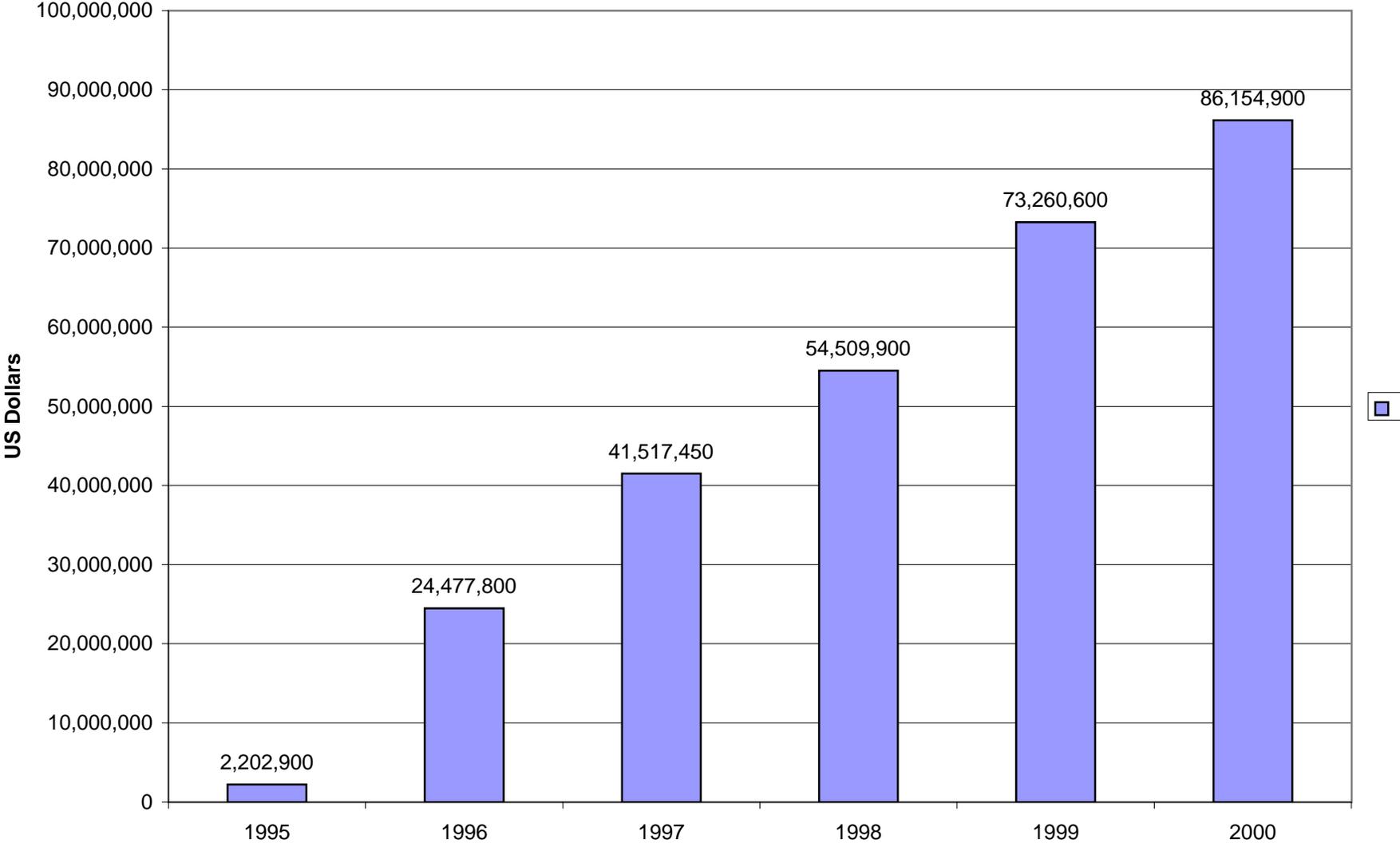
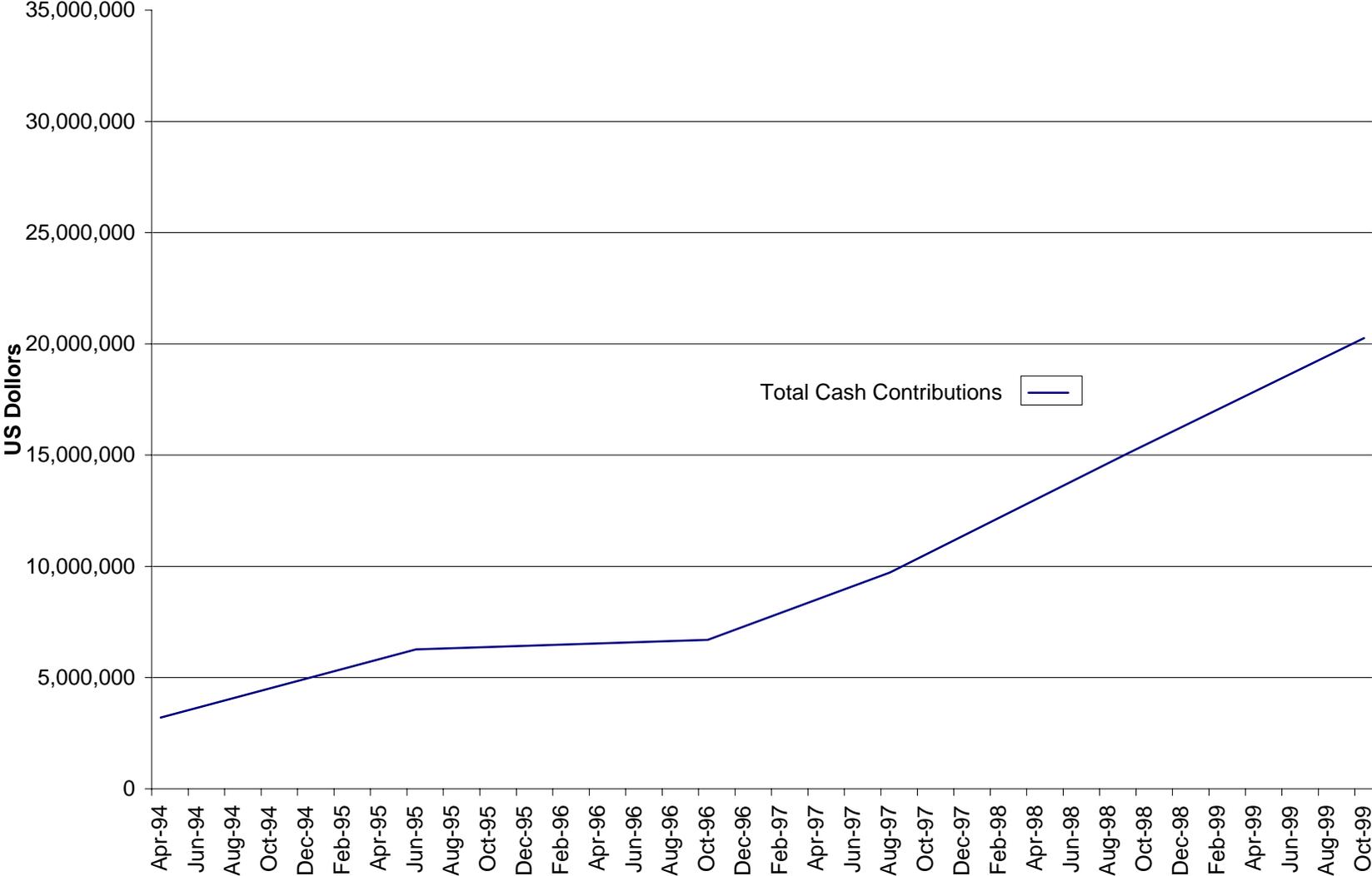


Table 3

ICTY TRUST FUND



**Table 4**

**ICTR TRUST FUND**

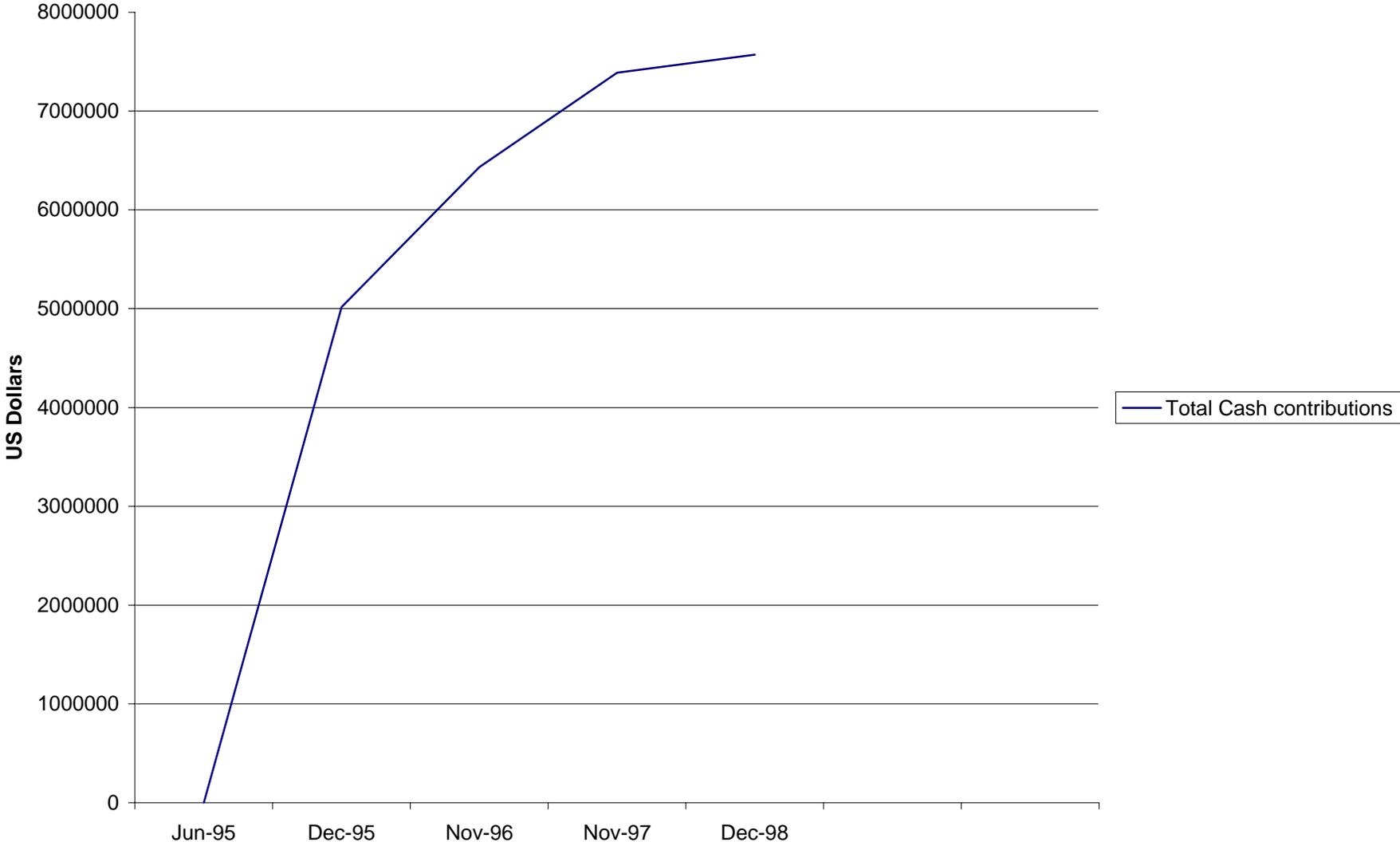


Table 5

ICTY Trials/Investigations/Detainees

