

PART 1
ESTABLISHMENT OF THE COURTArt. 1. *The Court*

An International Criminal Court («the Court») is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in

this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

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Article 1 formally establishes an International Criminal Court. This introductory provision may appear as redundant or even superfluous (W.A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford, Oxford University Press, 2010, p. 57). But the establishment of the Court constitutes indeed the rationale of the Statute as a whole.

As such, it seems that Article 1 merely summarises issues set out elsewhere in the Statute. It nevertheless appears to be customary for statutes of *ad hoc* Tribunals to start with such a declamatory provision (see e.g. The London Agreement creating the International Military Tribunal of Nuremberg, 8 August 1945, Art. 1, or the Charter of the International Military Tribunal for the Far East, 19 January 1946, Art. 1).

Due to its general character and the fact that it has been discussed in informal consultations during the negotiations of the Statute, the precise historical drafting of this Article is difficult to reconstruct (O. TRIFFTERER, (ed.), *Commentary on the Rome Statute of the International Court: Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 50) and the official record does not provide any revealing insights. A few remarks can nevertheless be made.

First, that the Court would be established by a treaty had been widely accepted long before the 1998 Rome Conference (according to the *ad hoc Committee* itself, see Report of the *ad hoc Committee* on the Establishment of an International Criminal Court, A/50/22, paras. 15-16). It is stated in the Preamble and other provisions of the Statute that the Court is 'permanent' (in Rome, the Drafting Committee transplanted this precision from Article 4 to Article 1: see the Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, p. 10). The general debate about the creation of an ICC lost its intensity after the creation by a treaty was chosen, the permanent character of the Court being deeply connected to the issue of its independence from States' pressures (see O. TRIFFTERER, 'Article 1. The Court' in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Court: Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 50).

Secondly, the title of the first international, permanent institution and criminal jurisdiction was the subject of some debate: Article 1 establishes a 'Court' and not a 'Tribunal'. In 1993, the International Law Commission changed the term 'Court' (used since the beginning of the debates within the United Nations) to 'Tribunal', in order to present the 'Court' or the judicial organ, the 'Registry' and the 'Prosecutor' (the future Office of the Prosecutor) 'as constituting an international judicial system as a whole' (Report of the International Law Commission to the General Assembly on the work of its 45th session, A/CN.4/SER.A/1993/Add.I (Part 2), 101, para. 12). The same year, the UN Security Council had chosen to call the *ad hoc* judicial body with authority to prosecute mass atrocities in the Balkans a 'Tribunal'. However, some members of the International Law Commission thought that it was unusual to have a 'Court' within a 'Tribunal', and others preferred not to use the word 'Tribunal' in relation to a permanent body intended to exercise criminal jurisdiction (Report of the International Law Commission to the General Assembly on the work of its 46th session, A/CN.4/SER.A/1994/Add.I, Part 2, p. 27). The Commission then decided 'that the term 'Court' should be used to refer to the entity as a whole, and that where specific functions were intended to be exercised by particular organs (such as the Presidency, the Procuracy, the Registry), this would be specifically stated' (*ibid.*, p. 27). In its final draft, the UN GA, the *Preparatory Committee* on the Establishment of the International Criminal Court, established by the General Assembly of the United Nations, recommended to use the term 'Court' to include its constituent organs, including the Prosecutor (Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, p. 10). This recommendation does not seem to have been followed in the Statute. In several provisions, the term 'Court' is used to refer to the Chambers or the judges. Article 15(4) for instance refers to 'determinations by the Court' regarding jurisdiction and admissibility, and obviously means the Chambers (see also Art. 19(4), Art. 19(8) and Art. 103 of the Statute).

Secondly, an explicit reference to the principle of complementarity is made in Article 1, which indicates clearly that this mechanism constitutes 'the cornerstone of the Statute and of the functioning of the Court' (ICC, *Situation in Uganda, Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05, Decision on the admissibility of the case under Article 19(1) of the Statute, 10 March 2009, para. 34. See also K. AMBOS et al., 'Establishing an International Criminal Court and an International Criminal Code, Observations from an International Criminal Law Viewpoint', *European Journal of International Law*, 7, 1996-4, p. 523 or S.A. WILLIAMS and W.A. SCHABAS, 'Article 17. Issues of admissibility' in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Court: Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden,

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Beck/Hart/Nomos, 2008, p. 606). Complementarity is not defined as such in the Statute: but is proclaimed by the Preamble, repeated in Article 1 and then further elaborated in several Articles (see Art. 17 and 18 in particular, but also Art. 12 to 15 or 86 to 102). Its insertion in Article 1 met 'certain concerns about the symbolism and image of the very first Article of the draft Statute' (as explained in Rome by the coordinator of Part 1 of the Statute, Summary record of the 1st meeting, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/Conf.183/C.1/SR.1, 16 June 1998, para. 10).

Finally, it should be noted that the Court's 'power to exercise its jurisdiction' applies to 'persons' (natural persons, as made explicit by Article 25(1)) and is limited to what is 'referred to in this Statute' (see O. TRIFFTERER, (ed.), *Commentary on the Rome Statute of the International Court: Observers' Notes, Article by Article*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2008, p. 54-55).