CICC Report
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Report on the March-April 1998 Session of the Preparatory Committee on the Establishment of an International Criminal Court

The last ICC Preparatory Committee session was successful in so far as it finalized the text of the draft ICC Statute that will be submitted to the Rome Diplomatic Conference. We were particularly encouraged by two proposals ‹ one that would enable the ICC Prosecutor to initiate proceedings ex-officio subject to judicial review and another on the universal exercise of ICC jurisdiction. What the final PrepCom session unfortunately failed to do is narrow the differences on some of the main political issues critical to the ICC's independence and effectiveness. This means that the most difficult decisions have been left for Rome. The Conference will therefore be a test of the international community's resolve to strengthen international justice by creating an independent, effective and fair Court.

‹ Jelena Pejic, Europe Coordinator
Lawyers Committee for Human Rights

Report on the March-April 1998 Session of the Preparatory Committee on the Establishment of an International Criminal Court

Below please find a summary prepared by the CICC-Secretariat of the working groups of the sixth and final Preparatory Commission on the Establishment of an International Criminal Court (ICC), held at the United Nations Headquarters in New York from March 16 - April 3, 1998.

The summary is divided into the following three sections:

I. Introduction

The final session of the UN Preparatory Committee (PrepCom) on the Establishment of an International Criminal Court (ICC) was held at the United Nations (UN) Headquarters in New York from March 16 - April 3, 1998. The PrepCom was successful in completing its principal mandate: to prepare a comprehensive draft ICC Statute for the Diplomatic Conference scheduled to be held in Rome from June 15 - July 17, 1998. The additional tasks of the PrepCom were to adopt the draft Rules of Procedure for the Conference, agree on the candidature of the conference officers, and accredit NGO representatives.

The sixth PrepCom session, chaired by Adriaan Bos of the Netherlands, was the final step in a long and difficult preparatory process. The states taking part in the negotiations continue to have very different views on the fundamental nature of the Court. However, as momentum for the establishment of the ICC has grown within the international community, governments have demonstrated a willingness to compromise to reach consensus and a certain flexibility on several important, more technical aspects of the Statute.

Almost every UN member state participated in the PrepCom negotiations, some with delegations of five persons or more. In addition, over 60 organizations representing all regions of the world took part in the PrepCom by monitoring and reporting on the negotiations, many of them members of the NGO Coalition for an International Criminal Court. Most of the negotiations took place in small "informal" working groups, closed to representatives of non-governmental organizations. Although the informal nature of these meetings made it difficult for NGOs to be included in the debates on many articles, these organizations were still able to play a key role in advocating positions and raising awareness on the most important issues. Overall, a great deal of work was accomplished, and great strides were made in the process of preparation for Rome.

II. Summary Report of the Working Groups

The daily notes of the working groups, drafted by members of the CICC, were used as a basis for this report. The summary

highlights the key issues that were discussed in the various working groups. The CICC cannot guarantee the accuracy of the summary.

A. Composition and Administration of the Court

Part 4 of the Zutphen report ‹ elaborated by the bureau during the intersessional period and integrating decisions taken during the 1997-1998 PrepComs ‹ was discussed at length in five plenary sessions and six informal sessions during the first two weeks. Part 4 is composed of the following articles, contained in document A/AC.249/1998/CRP.10:

Article 29: Organs of the Court
Article 30: Qualification and Election of Judges
Article 31: Judicial Vacancies
Article 32: The Presidency
Article 33: Chambers
Article 34: Independence of the Judges
Article 35: Excusing and Disqualification of Judges
Article 36: The Office of the Prosecutor
Article 37: The Registry
Article 38: Solemn Undertakings
Article 39: Removal from office
Article 40: Privileges and Immunities
Article 41: Allowances and Expenses
Article 42: Working Languages
Article 43: Rules of Procedure and Evidence

This Working Group was chaired by Lionel Yee from the delegation of Singapore.

Article 30: Qualification and Election of Judges

Delegations agreed that judges should be of high moral character and impartiality. Delegations failed to reach agreement on whether judges should have criminal law experience and / or competence in international law.

With regards to the mandatory retirement age for judges, many delegations agreed on the age of 65, and supported the proposal by Slovakia that this limit be applied to the candidate at the time of election.

Delegations stressed that in electing judges, consideration be given to the need for representing the principal legal systems,

equitable geographical distribution and gender balance (although several governments were opposed to the inclusion of a reference to gender balance in this, some arguing that it did not translate well into other languages).

Most states agreed with the German proposal to allow for flexibility with regards to the number of judges, although several states argued in favor of 18 judges. Judges are to be elected by states party in a secret ballot. Two options remain as to the modality of the voting. Governments agreed that no two judges should be nationals of the same state.

With regards to the length of the terms of office, some states argued for a short, renewable term of office, others were in favor of a nine year term, with no re-election possible.

Article 33: Chambers

Delegations generally agreed that the Court should be composed of three chambers: the Pretrial Chamber, the Trial Chamber and the Appeals Chamber.

Certain states stressed that this article needed to be simplified and that certain provisions could be dealt with in the Rules of the Court, as opposed to the statute.

Delegations were divided as to the number of judges to sit in the various chambers, although many delegations agreed that three judges for the Pretrial and Trial Chamber, and five judges for the Appeals Chamber would satisfy fair trial concerns. In order to ensure the fairness and the independence of the Court, several states stressed that judges should not rotate from one Chamber to another.

Article 34: Independence of the Judges

Delegations managed to reach agreement on the provisions in these articles and succeeded in narrowing down the options significantly. The final text is completely unbracketed and states that in performing their functions, judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. Judges serving on a full-time basis shall not engage in any other occupation or profession.

Article 35: Excusing and Disqualification of the Judges

Delegations agreed that article 35 listing the reasons for disqualification of judges should not be exhaustive. Certain delegations felt that, in addition to the Prosecutor or the accused, an interested state should also be able to request the disqualification of a judge. It was agreed that the disqualification of a judge will be decided by an absolute majority of the judges of the Court.

Article 36: The Office of the Prosecutor

Most delegations agreed that the Prosecutor would be elected in a secret ballot by an absolute majority of state parties. States also agreed that the Prosecutor and Deputy Prosecutor should be persons of high moral character and have practical experience in the prosecution or trial of criminal cases, although delegations failed to agree as to the requisite amount of practical experience necessary.

States agreed that the Prosecutor should be assisted by one or more Deputy Prosecutors, and that the Prosecutor and Deputy Prosecutor should not be of the same nationality.

Certain states also proposed that this section include a provision that would require the Prosecutor to appoint advisers with legal expertise on specific issues, including but not limited to, sexual and gender violence and violence against children. This provision however, remains bracketed.

Article 37: The Registry

The Registrar would serve as the "principal administrative officer of the Court" and be responsible for the non-judicial aspects of the administration and servicing of the court.

With regards to the term of office to be served by the Registrar, states were divided on whether the Registrar should serve short, renewable terms, or lengthy, non-renewable terms.

Delegations agreed that the Registrar would be responsible for drawing up the staff regulations applicable to all staff, in consultation with the Presidency and the Prosecutor.

Delegates were unable to agree on whether the Registrar should set up a Victims and Protection Unit to provide counseling and other assistance to the victims, witnesses, their family members and

others at risk. Some states however were of the view that this responsibility should be borne by the Office of the Prosecutor.

Article 39: Removal from Office

With regards to the removal of the Judges, the Prosecutor, the Deputy Prosecutor, the Registrar and Deputy Registrar who have been found to have committed serious misconduct or a serious breach of his or her duties under the statute, states agreed to the following regime.

· In the case of the loss of office of a Judge, the decision should be made by absolute or 2/3 majority of the state parties, further to a recommendation adopted by a 2/3 majority of the other judges of the Court.
· In the case of loss of office of a Prosecutor or Deputy Prosecutor, the decision should be made by an absolute majority of states parties.
· In the case of loss of office of the Registrar or Deputy Registrar, by a majority vote of the judges or state parties.

Article 40: Privileges and Immunities

The final text provides that the judges, Prosecutor and Registrar shall enjoy diplomatic privileges and immunity, and that the staff of the office of the Prosecutor and the Registrar shall enjoy the privileges and immunities necessary for the proper functioning of the Court.

Article 43: Rules of Evidence and Procedure

Although the United States suggested that the rules of evidence and procedure should be annexed as an integral part of the statute, most states argued that these rules should be adopted by the assembly of state parties after the statute entered into force.

It was agreed that amendments to the Rules of Procedure and Evidence may be proposed by a state party, the judges acting by an absolute majority, and the Prosecutor, and that these would enter into force upon adoption by the Assembly of State Parties, although the requisite majority remains undecided.

B. Procedure

General Assessment

In the opinion of many observers, the discussion on procedure went well. Many articles revisited were simplified and brackets were removed. It appeared like the Working Group was catching up from the backlog accumulated during previous sessions. On some issues, like reparation the debate was very positive and the final text is a very good basis for discussion. In comparison with all previous PrepComs which were mainly dedicated to compiling proposals, real negotiation was taking place this time. The goal was to reduce the text and eliminate brackets. Discussion was conducted in informal working groups and within groups of interested delegations. Interested delegations revised articles that had been discussed during earlier PrepComs and 22 delegations introduced a proposal of a simplified and somewhat restructured text for Articles 51 through 54 Zutphen text (commencement of the prosecution, pre-trial detention or release and notification of the indictment) contained in A/AC.249/1998/WG.4/D.P 40. This compilation was the result of delegations withdrawing or abbreviating proposals contained in Zutphen and showed the decision by the authors to move away from national positions.

The Working Group recommended to the Preparatory Committee the text of the following articles concerning procedural matters as a first draft for inclusion in the draft consolidated text of the convention for an international criminal court:

Part 5. Investigation and prosecution (A/AC.249/1998/CRP.11)
Article 48. Information on national investigations or proceedings.
Article 49. Deferral of an investigation by the Prosecutor.

Part 6. The trial (A/AC.249/1998/CRP.12)
Article 55. Place of Trial.
Article 62. Evidence.
Article 63. Offenses or acts against the integrity of the Court.
Article 64. Confidential information/Sensitive national security information
Option 1: Text as contained in document A/AC.249/1998/WG.4/DP.39;
Option 2: Text as contained in document A/AC.249/1998/WG.4/DP.20, annex;
Option 3: Text as contained in document A/AC.249/1998/WG.4/DP.26 and Add.1;
Article 65. Quorum and judgment.

Article 66. Reparations to victims.
Article 67. Sentencing

Part 8. Appeal and review (A/AC.249/1998/CRP.14)
Article 73. Appeal against judgment or sentence.
Article 73 bis. Appeal against interlocutory decision

Article 74. Proceedings on appeal.
Article 75. Revision of conviction or sentence.
Article 76. Compensation to a suspect/accused/convicted person.

Working Group Discussion on Instruments Other Than the Statute

Part of the first session was dedicated to the discussion of instruments other than the statute. Most states agreed that procedural rules should not be in the statute, but there was a variety of views about which rules should be considered procedural and which should be in the statute. Many states did not favor drafting general criteria for determining which matters should be in the statute and which should be in the rules of procedure and evidence, but preferred dealing with this on a pragmatic basis, article by article. An overwhelming number of states rejected the US proposal that rules of procedure and evidence be presented as a package with the statute, before the statute is signed by states. Most states said that the rules of procedure and evidence should not be drafted by the Preparatory Committee or the diplomatic conference and that the signing should not be delayed pending the drafting of the rules.

Place of Trial, Article 55 (A/AC.249/1998/CRP.12)

The ILC draft proposition that places trial at the seat of the Court unless otherwise decided by the President was accepted in principle.

Evidence, Article 62 (A/AC.249/1998/WG.4/CRP.12)

The discussion was long and difficult in part due to the different approach taken by the two main systems (common law and civil law) and different views on the level of details to be included in the text. The final article is largely unbracketed (although footnotes tend to replace brackets) and the result of a good compromise. The Article contains an exclusionary rule allowing for exclusion of tainted evidence, a general provision on relevance or admissibility referring to the rules for more

detailed criteria and a bracketed provision on the onus of proof with regard to defenses. The section of this article dealing with witnesses testimony had been drafted by the fifth session of the PrepCom.

Offenses or acts against the integrity of the Court, Article 63 (A/AC.249/1998/WG.4/CRP.12)

The US insisted on sending this article to the rules of procedure and evidence. Two options now remain in the text. One defining the prohibited acts and the other sending the definitions of the acts to the rules of procedure and evidence.

Confidential information, Article 64 (A/AC.249/1998/WG.4/CRP.12)

This was certainly the most politically sensitive article for discussion. Understandably the chair avoided a thorough discussion of the issue. The final text is made up of three options respectively introduced by France, the United States, and the United Kingdom. The UK proposal seemed to receive broader support than the others, since it leaves it up to the Court to decide on the absence of good faith of the states putting forward national security interest. France on the other hand simply leaves it to the states to put forward the national security "excuse". The US provides for a complex procedure which eventually leaves it to the Security Council to decide, after the Court referred the matter to it.

Quorum and Judgment, Article 65 (A/AC.249/1998/CRP.12)

Different views were expressed with regard to quorum. A number of delegations expressed the view that all judges should make up the quorum (Austria, France, Argentina, Laos). Others thought a quorum of four judges would be sufficient or of a majority of the judges (Singapore, Korea, Sweden, Egypt).

The United States introduced a new text, which provides that all judges shall be present and participating at each stage of the trial provided that the trial or deliberations may proceed with four judges if one is absent for a good cause; this option appears in brackets in the final text.

With regard to judgment, the final text contains two options.
1) The judges shall attempt to reach unanimity, if they fail they shall take a decision by a majority vote.

2) Requires unanimity for conviction; three judges at least for decision on the sentence to be imposed.

Another delicate issue with regard to the different approach taken by the main legal systems is dissenting opinions. Seven countries spoke in favor of dissenting opinions and seven countries against it.

Reparations to victims, Article 66 (A/AC/1998/CRP.12)

France and the United Kingdom worked together during the intersessional period and introduced a joint proposal on reparations to victims. Although the two countries had slightly different positions on the issue of the court's power to order reparations, the text was an excellent basis for discussion. The two governments held extensive consultations with non-governmental organizations to discuss their proposals. Several delegations expressed concerns regarding the French proposal that the court would be able to order reparations by states (US, UK, Argentina, Egypt, Austria, Israel, South Africa, Poland, China). Other supported this provision (Lebanon, Syria, Malawi, Kuwait). One delegation (Japan) voiced opposition to including a provision on reparations.

The final text provides for the Court to:
· determine the scope and extend of the damage
· make order against a convicted person for an appropriate form of reparation to, or in respect of, victims including restitution, compensation and rehabilitation.
· [order] or [recommend] reparation to be made by a state in specific cases and seek enforcement by national authorities.

Sentencing, Article 67 (A/AC.249/1998/CRP.12)

The issue in this article is whether to accept the ILC draft proposal for a separate hearing or sentencing after an accused has been found guilty or to have the sentence pronounced at the same time as the guilty verdict.

Many states with civil law systems had problems with the idea of two separate hearings (France, Egypt, Mexico, Germany, Korea, Russia, Venezuela, Columbia, Indonesia, Greece, Algeria, Peru, Kuwait..). Other expressed support for the ILC model (Argentina, US, South Africa, Austria, Turkey, Canada, Australia, Netherlands, Trinidad and Tobago, Belgium, Guatemala.)

The final article drafted by Canada (one hearing in principle [para.1] with a series of exception [para.2]) reaches a good compromise between systems.

Appeal against judgment or sentence, article 73-75 (A/AC.249/1998/CRP.14)

Appeal and review was a long and difficult discussion because of the distinct approaches taken by the main systems. The major difficulties were the grounds for appeal and the effect of appeal, whether the prosecutor will be allowed to appeal acquittals and, if so, on what grounds, and what are the grounds on which the accused can appeal. In many civil law countries, the prosecutor is permitted to appeal on any unspecified ground. Some kind of compromise was reached in the final text which enumerates grounds of appeal for both prosecutor and convicted person.

The final text includes a provision allowing for interlocutory appeal of certain decisions (Article 73 bis).

Article 74 on proceedings on appeal raised the issue of the extent of the powers of the appeal chamber compared to those of the trial chamber. Many countries also expressed that the article was too detailed and delegations concerned agreed on sending sections to the rules of procedure and evidence. France's proposal that the appeal would be converted to a new trial was unpopular among several common law countries and a few civil law countries. However, the result is a compromise by which the future Court has discretionary power to decide whether it reverses or amends the decision or sends it back for a new trial before a different chamber.

Two options remain regarding the revision of conviction or sentence (Article 75). Many delegations agreed that revision should not be allowed by the prosecutor on acquittal as this would amount to non bis in idem. Other delegations thought revision should be allowed on either conviction or acquittal.

Article 76 provides for compensation to a suspect/accused or convicted person who has been unlawfully detained or whose conviction has been reversed. There was little compromise offered in this debate. There was no consensus on the principle of compensation itself.

C. Relationship of the Court with the United Nations

Mr. Rama Rao from India chaired the Working Group on the Relationship of the Court with the United Nations. He introduced the following documents, to be used as a basis in this Working Group: A/AC.249/1998/L.10; A/AC.249/1998/L.11; A/AC.249/1998/L.12; A/AC.249/1998/L.13; and A/AC.249/1998/WG.7/DP.1. These discussion were based on two documents L.10 "The Establishment of the Court and Relationship with the UN" and L.11, "Final Clause, Final Act and the Establishment of a Preparatory Commission". They were prepared as background documents by the Secretariat. Proposals submitted by governments with regard to L.10 can be found in the L.12 document.

In his introductory comments the Chairman noted that the main issues relating to the financing of the court and the organizational matters addressed in L.10 had only been discussed in a preliminary manner so far. The Chair encouraged delegates to offer their general thoughts on the following three topics:

1. Should the court be financed by the regular budget of the UN or by State Parties?
2. The relationship between the proposed ICC and the UN:
   - option I: a principle organ of the UN
   - option II: a subsidiary organ of the UN
   - option III: a 'treaty body' of the UN
   - option IV: an independent international organization established by a multilateral treaty
3 Preparatory commission

Relationship with the Court

All states agreed that cooperation between the ICC and the UN is essential. An overwhelming majority of states spoke in favor of Option IV, establishing the Court as an independent ICC by a multilateral treaty.

Many states agreed that Option I was unrealistic. Establishing the court as a principle organ of the UN would cause major delay in the creation of the court since an amendment of the charter would be necessary. Option II, making the Court a subsidiary organ would limit the independence of the Court as the UN would have the power to change or abolish its mandate.

Option III was also favored by a large number of states. A treaty body, they argued would give it a firm legal foundation for decisions. As one state said, a treaty body would enjoy firm

financing as the costs would be borne by the UN budget and would enjoy the services of the UN Secretariat. A drawback is that some delegations felt that the ICC would not be fully independent.

Preparatory Commission

Most countries favored the establishment of a special legal relationship between the Court and the UN once the treaty is signed by all states parties. States generally agreed on the need to have a separate agreement with the UN. Examples of legal agreements such as with the International Seabed Authority and the UN and the International Tribunal for the Law of the Sea were cited.

There was consensus that a Preparatory Commission should be created by resolution at the Diplomatic Conference. This Commission should be set up, after Rome, to regulate the relationship of the Court to the UN, and address issues relating to the Rules of Procedure, Privileges and Immunities. A majority of states agreed that the Preparatory Commission should be open to all states, on equal footing, who are signatories of the statute or have signed the Final Act. There was also a consensus that there should also be an oversight mechanism for finance and administration, which should resolve outstanding issues before Rome.

Financing

One of the most contentious issues discussed at the final PrepCom was the financing of the Court. Countries could not reach agreement with regards to whether the ICC should be financed by assessed contributions from States Parties or the regular UN budget. The majority of countries agreed that when a matter is referred to the Court by the Security Council, then the Council should assume financial responsibility for it. Many states also supported the proposal of voluntary contributions.

A number of states pointed out that the ICC should be funded by State Parties (Japan, Iran, Germany, Spain, Syria, Indonesia, Brazil, Venezuela, USA, Mexico, Russia, France, Libya, Switzerland, Ukraine, Ecuador, China, Algeria, Colombia, Romania, Cuba, Nepal). The US argued the ICC will have over 400 people on its staff, resulting in a financial situation which is very different from that of a part time treaty body with 20 members. As the UN is going through financial difficulties, funding through the UN regular budget may cause hostility in those State Parties who are not signatories to the Treaty.

A sizable number of countries considered funding by States Parties based on the scale of assessments of the regular UN Budget if there was a guarantee that developed and underdeveloped countries would be members in equal numbers. Some states did not want States Parties to be the only source of funding because it would not be as financially stable. Many agreed that the ICC should have mastery of its own funds and services, funding supplemented by voluntary contributions. One state even said that the Trust Fund should be considered as a source.

Other countries preferred the use of the regular budget of the UN (Trinidad and Tobago, Belgium, Australia, Norway, Sweden, South Africa, Canada, Greece, Italy, Denmark, India, Portugal, Cote d'Ivoire, Ireland, Thailand, Kenya, Samoa, Poland, Macedonia, Slovakia, Slovenia, New Zealand, Austria, Vietnam). They argued that the regular budget is a stable and reliable source of funding which would attract more states and put the ICC on the same level as other human rights monitoring bodies. With regards to voluntary contributions, some states saw a voluntary fund as too unpredictable and argued that it could lead to inefficiency.

Alternative proposals were put forward by Republic of Korea, Chile and Finland. The third option in the final text now reads that "during the initial phase, the expenses of the Court shall be borne by the United Nations subject to the approval of the GA to the UN [..]," the duration of the initial phase as to be determined. This option would consist of first using the regular budget of the UN in the early stages, when there are high expenses and start up costs. Then when the Court has the backing of a sufficient number of states parties, the financial responsibility could be shifted or even shared. Most states agreed that UN backing will be necessary for several years before and during the establishment of the ICC to cover start up costs. It was stated by many countries that it would not be beneficial to saddle the first signatories of the Statute with the costs as this would dissuade countries from signing. This evolutionary approach is more favored by a majority of states as it would insure stability in the initial period and independence in the end. The Court could then gradually become financed by the States Parties and accept voluntary contributions.

However, as one country stated future members should not be expected to become a part of the Statute without knowing what their financial responsibilities will be. To what extent will the UN budget provide for financial security? The Chair felt that

both options were equally supported as well as the alternative option proposed where there would be the possibility to begin initially with UN budget and then transfer to the state party regime. Supplementary sources were strongly advocated and many states said that they would not object to it. The possible forms include a Trust Fund and contributions, which should be governed by a set of norms.

The Chair commented on the three major components of the discussion: the organizational relationship between the ICC and the UN, financing, and the Preparatory Commission. The Chair stated that generally there was an overall consensus for the ICC to be an independent judicial institution. The two main options of funding through State Parties to the Court or through the UN regular budget was equally supported. The chair felt that there was a broad support for the establishment of the Preparatory Commission.

D. Final Clauses

The final text is found in A/AC.249/1998/CRP.4

Several major variations were added to the standard clauses already included in this section:

An option was included which provides the option for the ICC itself to resolve disputes concerning the interpretation or application of the statute. This option would replace the ICJÕs role in resolving disputes of this capacity.

Members of the PrepCom decided to delete the provision for a fast-track amendment procedure included in the SecretariatÕs Draft. The draft text now provides for adopting amendments proposed by any State Party after a number of years, at a regular meeting of the assembly of states parties to be ratified by a supermajority of states parties.

A proposal states that after a specified number of years, the Secretary General would convene a meeting of the assembly to consider additions to the proposed list of crimes. However, the ICC would not have jurisdiction over the additional crimes if they are committed on the territory of a state which had not ratified this amendment. A widely supported proposal by Norway, ensured that states which signed the Statute must refrain from acts which would defeat the object and purpose of the Statute prior to its

entry into force.

Concerning withdrawal, an article provides that states parties are not relieved of their financial obligations, or of their duty to cooperate with the Court's investigations or proceedings commenced before withdrawal.

A new part 10bis, which is mainly unbracketed, establishes an assembly of states parties to meet one time per year to discuss management and administration of the ICC, budgetary concerns, staffing, and to consider recommendations and problems concerning states parties.

The committee adopted a text of a draft final act of the United Nations conference on the Establishment of an International Criminal court.

E) Ne Bis In Idem and Applicable Law

Ne Bis In Idem, Article 13

The discussion was based on A/AC.249/1998/ L.13 and proposals by Portugal (A/AC.249/1998/WG.2/DP.6) and the US.

Article 13, Ne bis in idem (the prohibition of double jeopardy), states, in part, that, except as provided in the statute, no person shall be tried before the court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the court. Also, no person shall be tried before another court for a crime referred in article 5, for which that person has already been convicted or acquitted by the court. The article still has many brackets and alternative approaches.

The Chairman summing up the main points in the ILC Draft text and other proposals stated that a person may be tried again if: 1) there is new evidence, and 2) if national courts fail to take information into account.

The Portuguese proposal stated a change in the title to ne bis in idem from non bis in idem, and suggested that the article be put under the General Principles of Law, since it is one of the most important ones.

The US introduced its proposal by wishing to submit an article 0 bis as they did not think there was a clear statement in other

texts setting out the full non bis in idem provision. They felt there was also the need to clarify if a national court would be barred from prosecuting the person at all, or just for the same crime.

Applicable Law, Article 14

The Chairman opened the session noting that the question of applicable law deals with the problem of which other sources of law other than the Statue should the ICC apply when trying a case. Should the Court apply national laws only to an extent authorized in the Statute of the ICC, or should there be an unlimited possibility of application of national laws as provided in the original ICC draft? In addition to the ILC draft the PrepCom had 7 other proposals to look at.

States wanted clarification of the hierarchy of norms applicable by the Court. There seemed to be a consensus of first using the Statute and rules of procedure and evidence as the primary source, then applicable treaties relevant to the subject matter and principles and rules of general international law and then if all else fails use in order: rules of national laws of the State on whose territory crime was committed, laws of the state of nationality of the accused and law of the custodial state.

However, many states could not accept a direct application of specific national law as the guilt of accused persons may vary due to the application of different laws in different cases or with multiple defendants with different nationalities accused of the same crimes and thus lead to inconsistency in the results of the trial.

Many states supported the Canadian proposal which stated

(t)he application and interpretation of law... must be consistent with international human rights, which include the prohibition of any adverse distinction founded on gender, age, race, color, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.

III. Key Unresolved Issues

The following does not represent an official CICC position. Prepared with the assistance of Niccolo Figa-Talamanca.

The key unresolved issues are:
A. the ICC's subject matter jurisdiction
B. the ICC's inherent jurisdiction and requirement of State consent
C. the concept of complementarity and the ICC's relationship with national courts
D. the role of the UN Security Council
E. the mechanisms to effect State compliance with ICC decisions
F. the authority of the Prosecutor to initiate proceedings ex officio
G. the financing of the ICC and its relationship with the UN.

The following paragraphs attempt to describe for each key unresolved issues: (1) the nature of the debate, (2) the implications of the principal options and the positions of key players, and (3) the possible compromises at Rome.

A. Subject Matter Jurisdiction

The nature of the debate

The text of the draft Statute has remained substantially the same since the December 1997 PrepCom session, although some progress has been made in defining crimes involving children. The current draft provides for jurisdiction over genocide, crimes against humanity, serious violations of international humanitarian law (i.e. war crimes), and an option for the inclusion of the crime of aggression. The principal questions are whether the ICC will have jurisdiction over
(1) aggression, subject to the finding of aggression by the Security Council, (2) crimes against humanity irrespective of the existence of an armed conflict; and (3) war crimes committed during internal armed conflict.

The exclusion of crimes of internal armed conflict and crimes against humanity irrespective of any conflict would do away with the last fifty years of development of international humanitarian law. This was noted even by the USA delegation. It is essential that the definition of these crimes in the Statute reflect the current state of international law. In particular, genocide and crimes against humanity should be defined in accordance with the jurisprudence of the ICTY, and war crimes should be punishable in

internal as well as international armed conflicts. There is still no consensus on the inclusion of aggression, but a new definition was introduced by Germany and it received the support of a large number of delegations.

The possible compromises at Rome

Compromise may be reached at Rome on the inclusion of the crime of aggression, and the role of the Security Council in relation to that crime. However, there can be no compromise on the definition of genocide, crimes against humanity and war crimes. Many States consider that the detailed definition of these crimes in the Statute of the Court could already have the unwelcome but inevitable effect of "freezing" the progressive development of international law. If the definitions are regressive, the damage to international law would be irreparable.

B. Inherent Jurisdiction and State Consent

The nature of the debate

The question is whether State consent will be necessary for the ICC to exercise its jurisdiction. A State consent regime could in effect give all 185 countries the capacity to veto cases coming to the ICC and would result in the total paralysis of the Court. The only time the Court would operate would be in the case of a Security Council referral under Chapter VII of the United Nations charter.

The implications of the principal options and the positions of key players

There are four options that will be considered by the Diplomatic Conference:

(i) A German proposal would assign universal jurisdiction to the Court over the core crimes. Only States parties, however, would have the obligation to cooperate with the Court. States non-parties would have the option to give their consent to be bound by ICC decisions. This option is legally the most sound. The core crimes covered by the Statute already attract universal jurisdiction: any country has the right (and in most cases the duty) to prosecute them, without the consent of any other State and irrespective of where they are committed or of the nationality

of the defendant. The ICC would therefore have the same authority to prosecute as that recognized to any third State. This option was proposed by Germany and is likely to be adopted by most like-minded States.

(ii) A more restrictive proposal would assign the ICC jurisdiction only when the State where the suspect or accused resides and the State where the crime was allegedly committed are either parties to the Statute or consent to jurisdiction. This option is less coherent from a legal point of view. It would mean that if genocide was committed in a country that was not a Party to the Statute, the perpetrators could not be tried by the ICC, even if they were arrested in the territory of a State Party. The result would be that in situations such as that of the Tadic case, where the defendant was arrested in Germany, the ICC would not have jurisdiction to try him without the ratification or consent of Serbia. In the "Pol Pot" situation, the ICC would need the consent or ratification of Cambodia. The ICC would have less authority to try persons accused of genocide, crimes against humanity and serious war crimes than is currently afforded to the domestic courts of any country pursuant to the principle of universal jurisdiction for these crimes. In practice it would mean that when the perpetrators of a genocide remain in power, and therefore deny consent to jurisdiction, the ICC would have to stand back and allow them impunity for their actions. Moreover, a selective use of the consent requirement would allow the State to authorize the ICC to act only against one particular faction in an internal conflict, threatening its credibility as an independent court. This option was proposed by the UK but is yet to receive any endorsements.

(iii) The original ILC option would give the court jurisdiction on genocide, but would require optional consent of a number of States for other crimes. This option was conceived when the draft Statute still included crimes such as aircraft hijacking, drug trafficking, terrorism and other so-called treaty crimes. Now that the subject matter jurisdiction of the court is restricted to the "core crimes" of genocide, crimes against humanity and serious violations of international humanitarian law, there is no reason why the latter two should be treated any differently from the first. Most states have conceded that from a legal point of view, all three are crimes under international law that attract universal jurisdiction. From a human point of view, all three are crimes of the most serious nature that shock the conscience of mankind and all three should be prosecuted by the ICC when domestic judicial authorities are unable or unwilling to pursue

justice.

(iv) Finally, the "case-by-case consent" regime would require the State consent for each prosecution, unless the case is referred to the Court by the Security Council. In cases initiated by the Prosecutor or by a State "complaint" procedure, the Court would be unable to undertake any action unless it received the consent of a number of States. The requirement of "case-by-case" consent would cripple the ability of the ICC to intervene when national judicial system has collapsed or is held hostage by the perpetrators of such crimes. As noted above, requiring the consent of the very government agencies that have been found unable or unwilling to prosecute is patently absurd. It is precisely because States have time and again failed to carry out their obligations to investigate and prosecute heinous international crimes that the ICC is being created. The positions of States in this respect are not clear. The States that have formulated this option are "reserving their position" on it, probably as an additional "bargaining chip" in the negotiations. In option (iii) and (iv) the States of which consent could be required include: the State where the crimes have allegedly been committed, the State of nationality, of custody or of domicile of the suspect or accused, and any State that requests his or her extradition.

The possible compromises at Rome

Some compromise may emerge at Rome in respect of rights and duties of non States parties to the ICC treaty. However, compromise on case by case consent or consent by class of crime is unlikely. Most States know that creating an international criminal court that requires the consent of any number of States to conduct its proceedings is worse than creating no international criminal court at all. The delegations that have reserved their position on a consent requirement either have not yet considered fully the implications of this requirement or do not in good faith support the establishment of an effective Court.

C. Complementarity

The nature of the debate

By rights, complementarity is not an "unresolved issue", as a compromise text was laboriously negotiated and adopted by consensus at the August 1997 session of the PrepCom. The concept of "complementarity" defines the relationship between the ICC and

national courts. The ICC is "complementary" to domestic courts and it is not meant to replace them. The ICC would act as a "safety net", and a case would only be admissible before the ICC if the Prosecutor is able to show that national courts are either unwilling or unable to conduct proceedings impartially. Despite the previous agreement by consensus, the US delegation has reopened the subject at the final PrepCom session and introduced a new proposed Article 11bis.

The implications of the principal options and the positions of key players

The US proposal introduces a "double-lock" system whereby the ICC would have to overcome an additional review of complementarity. Under the proposal, even before the commencement of investigation, the Prosecutor would be required to make a public announcement that it is seized of a "situation" for investigation. If any State informs the Court that it wishes to exercise its domestic jurisdiction over the matter, the Prosecutor would be required to defer the investigation to that State. Only a preliminary decision of the Pre-Trial chamber on complementarity can prevent that deferral. The hurdle proposed in 11bis is in addition to the complementarity review under Article 12 (formerly 36) and would have very damaging effects on the integrity and confidentiality of investigations. Other details of the Article as currently drafted raise additional concerns, for example the time restrictions before the Prosecutor can re-apply to the Chamber, or the procedure for appealing a Pre-Trial Chamber decision.

The US proposal on 11bis was not well received at the PrepCom. The existing provisions on complementarity make it clear that servicemen and women of a country with a functioning military justice system would not come under the jurisdiction of the ICC. Most States have relied on the already adopted text on complementarity as the basis for making further decisions. In particular, they maintain that while complementarity is a necessary shielded against undue interference, the procedures to review a case should not compromise the integrity of the investigations, nor it should obstruct international justice, or give rogue States the opportunity to intimidate witnesses and destroy evidence.

The possible compromises at Rome

Some compromise might be possible if the US were to make concessions on other important areas, such as the ex officio powers of the Prosecutor. Should the US decide to link an early

review of complementarity with the ex officio powers of the ICC Prosecutor, some version of 11bis might be worked into the German-Argentinean proposal.

D. The Role of the Security Council

The nature of the debate

There were no developments at this last session of the PrepCom on the role of the Security Council in the future ICC. The principal question is the authority of the Security Council to authorize or stay proceedings in situations that are in its agenda under Chapter VII of the UN Charter.

The implications of the principal options and the positions of key players

The issue was not discussed, and options remain the same:

(i) No role for the Security Council (other than the ability to refer matters to the ICC Prosecutor). The Security Council does not have control over cases brought against States at the International Court of Justice, or at any of the regional human rights courts. If cases against States can go forward irrespective of the Security Council in these fora, there is even less legitimacy in requiring it's approval for cases to go forward in a criminal court, with jurisdiction limited to individuals. This is the position of some like-minded States and has been expressed in very strong terms by African countries in particular.

(ii) Security Council authorization required for most cases to even reach the Court (i.e. each P5 would have veto power over most cases). The result would be a "permanent ad hoc Tribunal", i.e. an institution ready to receive cases but only when all permanent members of the Security Council do not object in the matter. This is the position of the US and possibly Russia.

(iii) Some version of the Singapore proposal. The proposal would give the Security Council the authority to order a stay of proceedings in sensitive situations when deemed necessary under Chapter VII. The stay would be effective for a specified (but renewable) period. This would reverse the veto requirement: all permanent members would have to agree to stay proceedings when they find that they would interfere with the Security Council responsibility over peace and security. This position is

supported by some of the like-minded, including the UK. Even the US has at times signaled its willingness to accept some version of the Singapore proposal subject to the resolution of other aspects of the Statute.

The possible compromises at Rome

The most likely compromise in Rome will be a variant of the so-called "Singapore Proposal". The questions open to compromise include: the period of validity of the order and its renewal; the authority of the prosecutor to continue investigations during the validity of the stay; the authority of the Court to issue interim orders for the preservation of evidence, including the protection of witnesses.

E. State Cooperation and Compliance

the nature of the debate

The problem of ensuring judicial cooperation and compliance with decisions of the ICC was examined in detail at the December 1997 session of the PrepCom. The main issues in respect of State cooperation were then (a) whether States would be under the obligation to comply with orders of the Court or only to "respond" to them, as provided in the draft, and (b) whether the Statute should provide for any measures to effect compliance against a non cooperative State. At the latest session, issues of cooperation and compliance arose only in the contexts of (a) the establishment of an Assembly of State Parties to assist the Court in the exercise of its functions and (b) the protection of sensitive national security information.

the implications of the principal options and the positions of key players

In the context of the establishment of an Assembly of State Parties, this session adopted an article (Article 90bis) that ‹ in one of its variants ‹ provides for the Assembly and its Bureau to undertake measures to address non-compliance. This would satisfy the concerns of many States that do not wish to see the Security Council as the automatic recipient of any reports of non-compliance. These States believe this would place Court's effectiveness at the mercy of the political considerations of the P5.

On the protection of sensitive national security information there are currently three proposals:

(i) a French proposal simply leaves it to the states to put forward the national security "excuse".

(ii) a British proposal sets out a detailed procedure to evaluate claims of national security before the ICC can issue a final binding order. This proposal is based on the assumption that the distinction between matters for the Rules of Procedure and Evidence and matters for the Statute should also take into account the political sensitivity of the relevant provisions. The UK has argued that it is necessary to spell out and agree upon the detailed procedures at the normative level of the Statute to give sufficient confidence to States that their national security concerns will be addressed carefully by the Court.

(iii) a US proposal that would leave it up to each State to decline an order of the Court on the basis of a claim of national security. This would mean that the ICC will not have the authority to make a judicial finding in respect of a claim of national security. Any State would be excused from abiding with a order of the ICC by simply declaring that the order would threaten its national security. The ICC, therefore, would not be able to access crucial evidence for or against a defendant, and therefore would be unable to guarantee a fair trial.

the possible compromises at Rome

It is likely that at Rome the obligations of States to comply with orders of the ICC will remain in the Statute. However, the type of mechanism that the ICC can call upon to effect compliance is yet to be determined. If it is agreed that the Statute should provide for such a mechanisms, the referral to a treaty body composed of States Parties will be the most likely solution.

F. The ex officio Powers of the Prosecutor

the nature of the debate

The debate concerns the mechanism by which cases will come before the Court, and specifically whether the ICC Prosecutor will have authority to initiate investigations ex officio. The authority of the Prosecutor to initiate cases is at the heart of the debate on

the role of the ICC in the international legal system. The resolution of this issue will defines the authority of the ICC to actively look for violations to redress, rather than simply respond to the political assessment of States and of the Security Council.

The implications of the principal options and the positions of key players

A compromise position was introduced at this latest PrepCom session by Argentina and Germany. It was presented as a solution to concerns that some States had expressed about the risk of politically motivated or frivolous ex officio investigations or prosecutions. The proposal provides for judicial review of ex officio investigations by the Pre-Trial Chamber and was well received at the PrepCom. States that until this PrepCom session were opposed to the Prosecutor having ex officio powers have made very encouraging remarks. Notably, France has explicitly stated that such a judicial review process would provide sufficient guarantee to the accountability of an ex officio Prosecutor and thus allow them to re-consider their position. The UK had already indicated in December 1997 its change of policy in the same direction.

Other countries, including Canada and many of the like-minded "core", were rather more skeptical and considered that such a review would be too much of an impediment for the Prosecutor. These countries remain committed to a fully independent Prosecutor, subject only to judicial confirmation of indictments at the conclusion of an investigation.

A small number of countries, including the US, want an ICC Prosecutor with no authority to initiate investigations and -at present- would not be satisfied by any mechanisms to ensure accountability. They favor a "reactive" institution, able to act only if it is considered politically expedient to trigger its jurisdiction. The US considers that the only necessary independence relates to the choice of whom to indict and on what charges within a given "situation".

The possible compromises at Rome

The principal debate now seems to be between delegations that wish to see a fully independent prosecutor, able to conduct ex officio investigations and those that favor an additional judicial supervision for investigations to go forward without a State

complaint or a Security Council referral. If a compromise is reached at Rome, it will probably rest on some variant of the German-Argentinean proposal.

G. Financing the Court, Method of Establishment and Relationship with the UN

The nature of the debate

The last PrepCom session considered in some detail the possible sources of funding for the ICC and its relationship with the UN. The issue of funding in particular is very sensitive, as some States are worried that the cost of joining the ICC could prove prohibitive.

The implications of the principal options and the positions of key players

On the method of establishment of the ICC and its relationship with the UN, the general consensus was that the ICC would be established by treaty and that it will not be a UN organ, but would have independent international personality. However, it was also generally agreed that the ICC would need to work closely with other UN institutions and that its relationship with the United Nations Organization would be formalized by agreement. The program of work provides for the treaty establishing the ICC to be opened for signature in Rome as of Tuesday, 21st July 1998. The memorandum of agreement with the UN would be drafted and signed at a later date.

On funding, the three primary options that will be remanded to Rome by the PrepCom are:

(i) financing through the regular UN budget. This was supported by many like-minded States, including the UK. The argument in favor of this option is that the UN regular budget would guarantee a regular flow of money necessary to maintain the independence of the ICC and would strengthen the structural links with the UN organization.

(ii) financing by States Parties. This was supported by the US, but also by some like-minded States that are genuinely concerned that reliance on the UN budget would subject the court to the organizational and budgetary difficulties of the UN. Moreover it was observed that the ICC, much like the UN in general, would be

at the mercy of a very small minority of countries that continue to withhold their assessed contributions.

(iii) a compromise whereby the UN would pay only for setting up the Court and the States Parties would assume responsibility only after a set number of ratifications. This compromise position was presented at the latest PrepCom. This solution would have the advantage of allowing the ratification of the ICC treaty without placing an undue burden on participation by smaller and less developed countries. At the same time it would release the ICC from the UN financial difficulties once it is solidly on its feet.

The possible compromises at Rome

After the first few discussions on the issue of financing, when the PrepCom seemed equally divided among the two principal options of UN or State Parties financing, the compromise position attracted increasing interest among delegations and it is quite likely that it will prevail in Rome.