Executive Summary

In June of 1998 a diplomatic conference will convene in Rome, Italy, to approve a treaty establishing a permanent International Criminal Court (ICC), perhaps the most important international institutional innovation since the creation of the United Nations. Years of negotiations, debate, and compromise have been devoted to this endeavor. The eventual effectiveness of the ICC will depend on how states resolve a set of interrelated issues involving the court’s relationship with the UN Security Council, the independence of the prosecutor, and the court’s jurisdiction. At issue is the need to honor and effectuate the international rule of law through judicial means without compromising the Security Council’s singular role in ensuring international peace and security. The pur-
pose of the Stanley Foundation conference was to bring together key players to discuss these critical issues with the hope of facilitating consensus. Participants assessed the strengths and weaknesses of the current draft statute which negotiators are refining and consolidating in anticipation of the Rome treaty conference.

**ICC/Security Council Relations**

In theory, there should be no conflict between the ICC and the UN Security Council. To the extent the threat of prosecution deters criminal behavior and to the extent justice enables peace, the ICC will play a critically important role in helping maintain international peace. However, their functions are also fundamentally different: UN member states have entrusted the Security Council with the inherently political task of maintaining international peace and security, while the ICC would be a judicial mechanism designed to bring war criminals to justice and advance the international rule of law. Depending on the circumstances, external judicial intervention has the potential to compromise, as well as foster, peace and national reconciliation; thus, how the Security Council fulfills its role may alternatively complement and frustrate the workings of the proposed court.

A clear majority agreed that the Security Council should be able to refer to the court particular situations where it suspects criminal behavior of a dimension requiring the international community’s intervention. Conference participants forwarded a number of reasons why this right should be clearly written into the court’s statute:

- The Security Council, as the preeminent international body entrusted with maintaining peace, should have standing, like a prosecutor, to initiate judicial intervention.

- By referring a situation to the ICC, the Security Council would shoulder part of the political burden associated with pursuing sensitive investigations and prosecutions, and states would feel additional pressure to cooperate with the ICC knowing that the investigation is at the behest of the Security Council.

- A clear right of referral would eliminate ambiguities that often spark turf battles between international institutions, fostering
the cooperation and harmony that will be needed to make the court effective.

• Without the right to refer situations to the ICC, the Security Council would have the incentive to create additional ad hoc tribunals whose dockets it could better control.

• Under the draft statute, both state parties and the Security Council may refer situations to the court for investigation. If the Security Council is denied this right, the ICC would be reduced to merely an instrument of state parties. This right of referral would also enable the Security Council to step in in the face of state parties reluctance.

There was less consensus regarding the legal basis upon which the Security Council would exercise this right of referral. The current draft bases the authority in Chapter VII of the UN Charter which grants the Security Council certain enforcement powers. While some believed the Security Council should be able to refer situations under *any* authority, others suggested referral be made under Chapter VI as well (whereby the Security Council would be merely recommending the ICC investigate a situation, as opposed to requiring it). Still others believed the statute could remain silent with respect to the authority.

**Security Council Power to Halt ICC Proceedings**

The draft statute also empowers the Security Council to prevent or halt prosecution if it is related to or arises from a dispute or situation that “is being dealt with” by the Security Council. Some participants believed the Security Council must retain this right, arguing that given the potential political ramifications, it may be inappropriate for the court to commence or continue proceedings related to issues that are before the council. Most participants, however, opposed granting the Security Council this right as it would compromise the independence of the court, allowing a political body to control a judicial body thereby politicizing the court and undermining its independence and legitimacy. Justice could become a bargaining chip during peace negotiations. Granting this power to the Security Council also implies that justice can *disrupt* Security Council-sponsored peace negotiations, undermin-
ing growing international appreciation of the critical role justice plays in solidifying the peace.

There was general support for alternative language proposed last year by the Singapore delegation which puts the onus on the Security Council to vote to halt an ICC proceeding if it determines that the proceeding would be detrimental to international peace and security. Some participants favored this proposal because Security Council jurisdiction is presumed, but, unlike the current language, the Security Council would need to make a public and politically sensitive finding that continuation of an investigation or prosecution is unwise. This would discourage overt or excessive intervention by the Security Council. While the Singapore proposal was preferred, many participants expressed reservations due to ambiguities in the text. Most important, there was uncertainty regarding at which stage in a criminal proceeding the Security Council would be able to exercise this right.

**Independence of the Prosecutor**

Under the current draft, the ICC prosecutor may conduct investigations only after either the Security Council or a state party (or a group of state parties) refers a general situation to the court. There is a strong movement to give the prosecutor the authority to decide independently whether to initiate an investigation. A few participants opposed such independence citing the risk of abuse. For most participants, however, the advantages far outweigh any disadvantages. For example, if, for political reasons, neither the Security Council nor state parties refer a situation of international criminal behavior to the ICC, the prosecutor would have the independence to commence an investigation on her or his own initiative. This group rejected as unrealistic fears of a prosecutor “running wild” or otherwise acting in bad faith, calling attention to the various procedural protections within the statute as well as financial constraints on the prosecutor. Taken together, the safeguards will ensure the prosecutor will not be acting alone.

Participants discussed how to shield the prosecutor from undue political pressure to investigate and prosecute, or to refrain from investigating or prosecuting. Most participants approved of the internal indictment review process in the current draft and recom-
mended additions to current safeguards. For example, the prosecutor could be required to seek permission from a special chamber to begin the investigation and would be given a time limit to carry it out.

**Jurisdiction**

The three core crimes that the ICC will be authorized to hear are genocide, crimes against humanity, and serious violations of the laws and customs of war. Whether the court may actually exercise jurisdiction in any given case will depend on it satisfying different jurisdiction requirements, some of which are controversial. Any state that becomes a party to the ICC statute automatically submits to the court’s jurisdiction over the crime of genocide. But with respect to crimes against humanity and war crimes, the state has a choice.

While a few participants approved of this liberality with respect to jurisdiction, arguing the opt-in regime will make the treaty politically easier for states to ratify. Most participants, however, were opposed and argued that the ICC’s inherent jurisdiction should extend to all three core crimes. It would be duplicitous for a state to claim to be ratifying the ICC statute when it is in fact “opting out” of crimes. Moreover, it is questionable whether a state may legally “opt out” of jurisdiction over a crime that is considered part of international customary law. In addition, the international community could find itself with a court used against democratic states by states that abuse human rights. If the consent regime is to be retained, restructuring was recommended.

Participants discussed the merits of including aggression and various treaty-based crimes in the court’s subject matter jurisdiction as well. Under the current draft, a complaint alleging aggression may be brought before the court if the Security Council first makes a determination that a state has committed aggression. Some participants argued that referral by the Security Council of a suspected crime of aggression would have no impact on the ICC’s decision, but participants questioned that assumption and cautioned that the relationship between the ICC and the Security Council would become much more political and delicate. The political pressure to validate the Security Council would be immense. There was no consensus on the extent to which treaty crimes should be included
in ICC statute, although expanding jurisdiction to other treaty-based crimes may bring more countries to support the court. Overall, however, participants were wary of extending the jurisdiction of the court at this late stage because delegations would have to choose which treaties to include, which would in turn require identifying those that have reached the status of international customary law. Moreover, an entirely new consent regime parallel to what is already in the statute would need to be created to accommodate them.

**The Road Ahead**

Participants were of varying opinions with respect to what can reasonably be accomplished before the Rome treaty conference. A few participants believed issues related to the Security Council powers, the independent prosecutor, jurisdiction, and the consent regime will not be resolved until the last hour as part of the package deal. Others were more hopeful.

To facilitate negotiations during the last stages, efficient state consultations, perhaps with intermediaries, and more intersessional meetings will be required. It would be helpful to develop a streamlined draft with annotations so delegations may know who proposed what and their rationale. This would greatly assist those who will be dealing with the ICC for the first time at the Rome conference. The sensitive political issues and more technical issues should be negotiated separately, with the latter addressed first. There has been clarification recently on controversial issues including the role of the Security Council, jurisdiction, and the national security exception, but there is much more room for more compromise.

Some felt delegations should not sacrifice efficacy of the court for the sake of having it ratified. A weak court may not survive inevitable changes that could occur in the international system in the near or far future. Therefore, essential points of principle should not be conceded simply to maximize the number of countries ratifying the treaty. Others believed it would be better to accept a less-than-optimal court than to leave Rome with nothing. It would be preferable to achieve something now before momentum withers. Some were hopeful that delegations could come away from Rome with both the best court possible and to do so in the
time allotted. Failure in Rome would be a huge stumbling block politically to a second try, no matter how far off in the future. Proponents of the court can “have their cake and eat it too.”

Parliamentary Considerations
The challenge for delegations and nongovernmental organizations (NGOs) will be to persuade government officials, legislatures, and parliament of the wisdom of this court, particularly the US administration and Congress. Although there are members with the House and Senate who are sympathetic to the ICC, a vast majority has no interest. It was anticipated that most congressional debate will focus on complementarity, the process of selecting judges and jurisdiction, trigger mechanisms, and due process protections. There will be fear of unwarranted, politically motivated prosecution of US peacekeeping forces. A strong complementarity regime would go a long way in garnering US support and assuaging many congressional fears. Problems experienced in Congress will plague other legislatures as well.

Promoting and Lobbying for the Court
Some participants believed proponents of the court need to dedicate more time educating the public and legislators on the need for and operation of a future international criminal court. The ICC must be made understandable. A public education and lobbying campaign would do best to focus on what the ICC is for—to enable the international community to prosecute humanity’s most heinous and egregious crimes. Civil society will play a crucial role in educating the public and promoting the court. Of course, NGO support would depend on what is produced in Rome.

There is a feeling that this project is different from others, that there is an urgency and seriousness unlike other endeavors in treaty-making. In the time that remains before the Rome conference, delegations and NGOs will need to be imaginative problem solvers and work hard to bridge opposing concepts and proposals in a way satisfactory to all. In the long run it will be a well-functioning court that will garner the most support. Once the credibility, prestige, and strength of the court are established, it is anticipated that the court will be universally accepted.
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Opening Remarks

by Richard H. Stanley, President, The Stanley Foundation

Welcome to the Stanley Foundation’s twenty-ninth annual United Nations Issues Conference. We appreciate your presence here and hope that your discussions this weekend will contribute to the creation of a strong and effective international criminal court. Ever since its formation in 1956, the Stanley Foundation has worked to advance the rule of law in our troubled world and to promote a secure peace with freedom and justice. Establishing a permanent international criminal court, a significant step toward the rule of law, now seems achievable. Yet, issues remain to be resolved in the final meeting of the United Nations Preparatory Committee next month and in the Rome conference in June. We are here to explore one of those issues, the relationship between the UN Security Council and the International Criminal Court (ICC). This is a difficult matter, but it is central to the creation of the court.

The Negotiating Climate

As we all know, a permanent international criminal court has been a dream for many for over half a century. Only recently, however, have political conditions placed that dream within reach. This is encouraging and heartening. A few years ago there was great skepticism that such a court could ever become a reality. By themselves, the legal challenges of melding the world’s diverse criminal justice traditions seemed overwhelming. But slowly, almost imperceptibly, talk changed from whether an international criminal court was possible to how to make it fair, efficient, and effective. No doubt a large part of this renewed commitment to a permanent international criminal court is due to mounting determination not to let future atrocities of the kind we have witnessed in the former Yugoslavia and Rwanda go unpunished—the butchery and savagery of both the Rwandan genocide and the “ethnic cleansing” of Bosnia shock the conscience. Although it would be premature to say the ICC is a
foregone conclusion, the vast majority of UN member states have come to fully embrace it.

Lessons learned from the successes and setbacks of the ad hoc war crimes tribunals for the former Yugoslavia and Rwanda have also fueled the drive for a permanent court. With the media coverage they have received, the tribunals have focused public attention on bringing war criminals to justice and have taught the international community hard but valuable lessons about what it takes to create an effective international criminal tribunal. Despite some missteps and inadequate political and financial backing, the two tribunals have performed fairly well, issuing indictments and conducting trials at a steady pace. In the process they have contributed significantly to international criminal law and procedure—no small feat as this requires judges of different nationalities to synthesize common law, civil law, and military justice systems. In the end, the tribunals have succeeded in showing the world community that a criminal court can indeed operate on an international level.

Yet another driving force in the movement to create this court has been civil society. The role of nongovernmental organizations (NGOs) has been centrally important. NGOs have worked tirelessly to raise awareness and support, literally across the globe. Their ranks include a vast array of organizations from the human rights, international law, women’s rights, and humanitarian aid communities, as well as from religious and peace groups. Without their involvement, the level of public awareness and support for the court would be a fraction of what it is today.

**Why an International Criminal Court Is Needed**

The reasons for an international criminal court are compelling. By upholding the international rule of law, the court would help establish within war-torn nations the foundation for an enduring peace. There is a delicate relationship between peace and justice. For those who have suffered brutality and humiliation, and have seen their loved ones die violent deaths, some degree of justice is increasingly a precondition of peace and reconciliation. As has been witnessed time and again throughout history, impunity for heinous crimes can corrode and eventually destroy the fabric of society. It poisons collective memories. It breeds hatred and
vengeance and perpetuates ethnic tensions. Most disturbing, impunity sows the seeds for future violence. Without justice, national reconciliation—already an elusive and vulnerable process—is severely undermined. Although justice alone cannot bring peace, durable peace is not possible without it.

A permanent international criminal court would also serve as a fundamental building block for an emerging system of international criminal justice. An elaborate body of law proscribing genocide, war crimes, and crimes against humanity has existed since the end of the World War II, and it continues to evolve and develop. But the world community has lacked a means to enforce such laws at the international level. The post-World War II Nuremberg and Tokyo war crimes tribunals and, more recently, the ad hoc tribunals for the former Yugoslavia and Rwanda were, and are, merely temporary forums with limited jurisdiction and limited life spans. Without a permanent mechanism to bring criminals to justice, these laws will remain relatively lifeless.

Thus the ICC would fill the void where national justice systems have become casualties of violent armed conflict. In the aftermath of war, many judges, prosecutors, and criminal defense attorneys have either fled or been killed and the physical infrastructure of a court system is decimated. National economies are often in ruin, and there are minimal financial resources to begin reconstruction. Conducting national criminal prosecutions within any reasonable time frame is impossible under such circumstances. Additionally, there are often serious, perhaps insurmountable, political obstacles to prosecution. Responsible domestic authorities shirk their duties out of fear or indifference. The reappearance of Pol Pot last year clearly illustrated the need for a permanent criminal court. Pol Pot might have been surrendered to the international community by his former political friends had there been a credible forum to prosecute him for the state-sponsored atrocities of the 1970s whose death toll reached an estimated one million Cambodians. As it was, his disaffected cronies staged a show trial that did nothing to advance the rule of law either in Cambodia or internationally. Under these scenarios, prosecution at the international level by the ICC would provide a credible alternative to national prosecution, particularly in the most egregious and difficult-to-prosecute cases. Perhaps, too, the prospect of having fellow citizens brought before
an international tribunal would encourage governments that are capable of doing so to strengthen their national judicial system.

A permanent court would eliminate the need for the United Nations and national governments to create and fund separate ad hoc tribunals. A tremendous amount of time and energy were expended to collect resources, muster political and financial commitment, and amass the technical expertise, even build courtrooms, for the two tribunals; yet there were still significant delays and unpredictability. It is unrealistic to expect the United Nations to repeatedly retrace these steps in response to recurring episodes of international criminality. And it is uncertain whether this would consistently be done in all cases.

The permanency of the ICC would greatly strengthen the rule of law by providing a certainty and a consistency to the investigation and prosecution of those who commit genocide, war crimes, and crimes against humanity. A certainty of justice strengthens shared values of acceptable and unacceptable behavior. A consistency of process reduces doubt, frustration, and discouragement. Just as military aggression by one nation against another has become increasingly unacceptable and more likely to precipitate action by the international community, so the permanent presence of the ICC will, over time, tend to reduce the incidence of the egregious acts within its jurisdiction.

**The Months Ahead**

Much needs to be done before the long-awaited ICC becomes a reality. The next four months leading up to the treaty conference in Rome are critical. The more that can be resolved early on during this final phase of negotiations, the greater the likelihood that the diplomatic conference in Rome will be a resounding success. Although negotiating parties are on the homestretch, some of the most difficult stumbling blocks have yet to be overcome.

Perhaps the most difficult group of issues, which we will be exploring this weekend, is how the court is to initiate proceedings. How much power and autonomy should the court have? Should the prosecutor be independent? To what extent should the Security Council, a political body, have oversight authority? And if there is an oversight relationship, what should be its nature and its limits?
An inevitable tension exists between the ICC’s responsibility to uphold and enforce the international rule of law and the Security Council’s responsibility to maintain international peace and security. The Security Council is charged, under Chapter 7 of the UN Charter, to “maintain or restore international peace and security” and effects these goals through political pressure, economic sanctions, and, occasionally, armed intervention. These functions of the Security Council—to prevent conflict, secure cessation of hostilities once they have erupted, and prevent recurrence—are inherently political.

On the other hand, the responsibility of the ICC to enforce international law is, at least in theory, apolitical. As with any national court, its legitimacy and effectiveness depend on the extent to which it is, and is perceived to be, a neutral force for justice. The power it wields must be seen as belonging to an independent and impartial body. Arguably, the ultimate goal of both the Security Council and the ICC is to secure peace as well as justice. Must, then, justice be in competition for peace? What type of relationship between the Security Council and the ICC would prevent this?

The ICC must not only be fair and neutral, it must also be adequately financed. The court will need resources to be effective—to investigate, hire defense counsel, protect witnesses. I confess that I find it most difficult to urge the United Nations and its member states to fully fund a future international criminal court when my own country, the United States, ranks first on the UN delinquent dues list. This is a national embarrassment, but I am encouraged by President Clinton’s State of the Union statement that it is “high time for the United States to pay our dues.” I hope we will soon correct this delinquency. Member states need to honor their commitments and neither the United Nations nor the UN court should go begging.

**Conclusion**

We cannot, of course, tackle all the unresolved issues in the space of this weekend. Instead we will concentrate our efforts on the relationship between the ICC and the Security Council. We hope that open discussion of this key cluster of issues will advance the work of the Preparatory Committee and enhance the prospects of
creating a strong and effective international criminal court. By bringing you here, away from UN headquarters and your respective capitals, we hope you can build mutual understanding, work creatively toward consensus, and push the process along. The ICC holds much promise as an instrument of peace, justice, and national reconciliation. Now, at last, the possibility exists to combat impunity for those individuals who commit humanity’s worst crimes. Now, at last, the international community has a real opportunity to advance the rule of law by establishing a strong, effective, and permanent international criminal court. Let us not miss this opportunity. I am looking forward to stimulating and productive discussions.
Introduction
The year 1998 will be critical for the proposed International Criminal Court (ICC). After years of negotiations characterized by extensive debate, much creativity, and thoughtful compromise, the court is well on its way to becoming a reality. The eventual effectiveness of the court, however, depends on how states resolve a set of interrelated issues involving the relationship between the ICC and the UN Security Council, the independence of the prosecutor, and the court’s jurisdiction. The nature and extent of the Security Council oversight and the degree of prosecutorial independence will ultimately determine the court’s international credibility and effectiveness. Plaguing negotiations from the start, however, has been the tension between two objectives: honoring and effectuating the international rule of law through judicial means and preserving the Security Council’s obligation prescribed by the UN Charter to ensure international peace and security.

The purpose of this conference was to bring together key players from national delegations, the nongovernmental organization (NGO) community, and ICC experts to discuss the relationship between the ICC and the Security Council, the independence of the prosecutor, and other controversial issues with the hope of moving toward consensus. Participants assessed the strengths and weak-
nesses of the current draft statute and explored how to ensure the integrity and neutrality of the court while at the same time recognizing and accommodating the Security Council’s role in securing international peace and justice.

**Brief History of Negotiations**

In 1994 the UN International Law Commission issued a draft statute of a proposed international criminal court to be created by multilateral treaty. In December 1996 the UN General Assembly expressed its support for the creation of the court. It convened the Preparatory Committee (PrepCom) to establish an international criminal court and directed the committee to meet in a series of sessions at UN headquarters to prepare a “widely acceptable, consolidated text” of a draft statute. The text was to be presented at a treaty conference for its consideration and acceptance by states’ delegations and opened for signature. The diplomatic conference has since been scheduled to take place in Rome, Italy, in June and July of 1998.

Over the last two years, delegations have been working tirelessly during the PrepCom sessions to develop text to present at the Rome treaty conference. Given the complexity of the statute and the difficult legal and political issues involved in creating an international criminal court, negotiators have had difficulty reaching consensus on some critical issues, particularly the independence of the prosecutor and the role of the Security Council. Special working groups were formed within the PrepCom process to negotiate and forge consensus on these more thorny issues. As of this writing, the sixth (and final) PrepCom session is scheduled to meet in March 1998 to continue these negotiations and to prepare the consolidated text.

**What Is the Proper Relationship Between the ICC and the UN Security Council?**

A major stumbling block in the PrepCom negotiations is determining the relationship between the Security Council and the proposed ICC. Conference participants discussed the relative powers...
of the ICC and the Security Council and recognized the need to preserve their respective roles in international affairs. On one level, their functions are fundamentally different: by the authority of the UN Charter, the Security Council is entrusted by the member states with “maintenance of international peace and security,” an inherently political task. The ICC, on the other hand, will be a judicial mechanism designed to bring war criminals to justice and advance the international rule of law.

But their functions are also complementary. To the extent criminal prosecution is a deterrent to international criminal behavior and justice is essential to enduring peace, the ICC will play a critically important role in helping maintain international peace and justice. As such, the ICC can be considered part of a “constellation of international organizations” all of which promote peace and justice, manage conflicts, and engage in post-conflict reconstruction and reconciliation.

In theory, no conflict should exist between the ICC and the role of the Security Council. To foster both justice and peace, a strategy to use both the Security Council and the ICC would be desirable. The Security Council’s creation of the ad hoc war crimes tribunals for the former Yugoslavia and Rwanda under the authority of Chapter VII of the UN Charter illustrates the symbiosis. In practice, sustained cooperation between the Security Council and the ICC will be needed for the court to remain effective. Without the Security Council’s political and financial backing, the ICC could very well experience severe obstacles to enforcing its rulings, subpoenas, and arrest warrants within recalcitrant states and to funding its operations.

In reality, how the Security Council maintains peace and security may either complement or frustrate the workings of the proposed court. Similarly, external judicial intervention, a few acknowledged, could potentially compromise or foster peace and national reconciliation, depending on the circumstances. These real dichotomies must be dealt with sensibly.

Regardless of how the formal Security Council-ICC relationship is defined in the statute, the
two institutions will affect each other because ICC criminal prosecutions do have political dimension. The Security Council will take the existence of the ICC into account when acting on problems and would probably heed its rulings. Nevertheless, it is important to note that in this exercise to create the ICC, the UN Charter is not being amended; instead, a new international body is being created. The Security Council will always be bound by its Charter authority, and nothing in the ICC statute will alter the Charter responsibilities of the Security Council or modify its procedures, which are determined solely by the Security Council. Statutory references to the Security Council would probably not be viewed by the latter as binding. For some participants, questions about whether and how the ICC will be institutionally connected with the Security Council are academic; the ICC will need the Security Council’s help.

The UN Security Council’s Right to Refer Situations

Under Article 23(1)\(^1\), the current draft, either individual state parties or the Security Council may refer a “situation” or a “matter” to the ICC, triggering the court’s jurisdiction. Only then would the prosecutor be able to investigate a matter and determine whether criminal behavior may have occurred. Neither state parties nor the Security Council may refer a particular case for investigation; the discretion to pursue individuals is left to the prosecutor. For a state party or the Security Council to identify individuals for prosecution would be exceedingly prejudicial.

Most participants agreed that the Security Council should retain the right to refer and that this right should be clearly written into

\(^1\) In January 1998 the chairs of the PrepCom working groups met in Zutphen, Netherlands, to consolidate into one working draft the various texts produced over the years during the PrepCom sessions. The “Zutphen Draft” renumbered most of the draft articles. For example, Article 23(1) is now Article 10(1). Copies of the Zutphen Draft were made available at the conference, and it was hoped it would become the working draft for the sixth PrepCom session. For purposes of this report, however, references are to pre-Zutphen articles.
Working out the relationship between the Security Council and the proposed International Criminal Court is one of the major hurdles to be cleared in reaching agreement to establish the court.
the statute. Participants forwarded the following reasons why Article 23(1) should be retained in the statute:

• **To Acknowledge the Proper Role of the UN Security Council.** Some participants argued that the Security Council is the preeminent international body entrusted with the responsibility of maintaining peace and security and that this responsibility must be accepted and recognized by the ICC. The Security Council therefore has standing, like a prosecutor, to initiate judicial intervention or, as one participant described it, to refer the “judicial content” of disputes for the ICC’s consideration. As such, the Security Council’s right to refer matters should be clearly spelled out in the ICC statute.

• **To Provide Political Support for the Prosecution.** By referring a situation, the Security Council would shoulder part of the political pressure of pursuing sensitive investigations and prosecutions springing from that referral. The Security Council would be signaling to the ICC and the international community its political support for that investigation and potential prosecution. Any subsequent indictment would carry more political weight than would an indictment resulting from a situation referred merely by one or more state parties. Moreover, with the Security Council’s backing, states would feel additional pressure to cooperate with the tribunals in collecting evidence, turning over the indicted, and otherwise enforcing ICC decisions.

• **To Foster Harmony by Avoiding Ambiguities.** A few participants argued that Article 23(1) would enhance ICC-Security Council relations by eliminating statutory ambiguities that often spark turf battles. A clear right of referral would help foster cooperation and harmony. (In this vein, it was noted that the UN Charter already gives the Security Council power to refer cases to the International Court of Justice.) One participant warned that if the ICC statute does not contain language giving the Security Council right of referral, there will be a “major con-
frontation” between the two. The power to refer cases would also enhance the Security Council’s willingness to enforce ICC decisions since the Security Council would have some investment in the court proceeding.

- **To Eliminate Incentive for the Security Council to Create Ad Hoc Tribunals.** One participant noted that if the Security Council did not have clear authority to refer situations to the ICC, it might be tempted to create ad hoc tribunals where it would control who is to be prosecuted.

- **To Expand Access to the Court.** One participant lamented that many delegations opposed to Article 23(1) also opposed an independent prosecutor. This is misguided; if the Security Council has no power to refer cases, the participant wondered, what would be left on the ICC’s docket? The ICC would be able to exercise jurisdiction only upon receiving a state party complaint and that process itself is burdened by a demanding consent regime (see discussion below on consent regime). Without the Security Council’s power to refer situations, the ICC would be reduced to merely an instrument of states.

- **To Secure UN Funding of Court.** On a practical level, there is the possibility that the Security Council would fund at least those investigations and prosecutions undertaken as a result of its referrals.

- **To Safeguard Against State Party Reluctance to Refer Situations.** An Article 23(1) referral would allow the ICC to bypass the elaborate state party consent requirements where jurisdiction over a person can be exercised only if the ICC received consent of both the state that has custody of the suspect and the state on whose territory the crime was committed. This would enable the Security Council to step in where state parties are reluctant to push the ICC for indictments. In essence, the Security Council would have residual power to deal with international criminality when state parties turn a blind eye.

Although a clear majority of participants supported inclusion of Article 23(1) in the statute, there was less certainty regarding the legal basis upon which the Security Council could make referrals.
The current draft requires that the referral be based exclusively on the Security Council’s Chapter VII authority which grants the Security Council powers of enforcement (e.g., economic embargoes or use of armed forces). A Chapter VII referral arguably makes it a more powerful referral, as the Security Council would be more likely to enforce rulings.

A number of participants objected to that limitation. One argued the Security Council should be able to refer a situation to the ICC under any authority; it would be inappropriate, if not a violation of the UN Charter, for the ICC statute to restrict the basis upon which the Security Council makes referrals. Moreover, there is no legal reason dictating that referrals be made only under Chapter VII. If the basis for referrals is to be in the statute, it was suggested that referrals should be possible under Chapter VI as well. Under Chapter VI the Security Council would only be able to recommend that the ICC look into a dispute or situation. Although referral would not be as “powerful,” it could be advantageous if the Security Council does not wish to unduly antagonize contesting factions in a dispute. It was also suggested that the basis of referral be under either Chapter VI or VII or that the statute could remain silent with respect to the authority.

Should the Security Council Be Able to Prevent or Halt ICC Proceedings?

Under Article 23(3)\(^2\) of the draft statute, prosecution is precluded if it is related to or arises from a dispute or situation that “is being dealt with” by the Security Council unless the Security Council specifically authorizes it. The draft statute reads: “No prosecution may be commenced under this statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII unless the Security Council otherwise decides.” On a fundamental level, Article 23(3) clearly implies that prosecution can disrupt a peace process. A few participants supported this, arguing that as

\(^2\) Article 10(3), Zutphen Draft.
long as the Security Council was taking action on a situation, it would not be appropriate for the court to commence or continue proceedings in a case related to that situation.

Most, however, disagreed. As a policy statement, Article 23(3) rolls back much of the experience of recent years that demonstrates to the international community that justice is necessary for a lasting peace. Certainly, the Security Council’s role as the paramount institution preserving peace and security should be maintained, but it is far from clear whether investigation or prosecution by an international tribunal would always threaten the peaceful resolution of conflict. Can it honestly be said, one participant asked, that investigation or prosecution by an international criminal court would have prevented resolution of the Iran-Iraq war? While the roles of the Security Council and the ICC need to be carefully calibrated and balanced to avoid potential negative consequences of judicial intervention in ongoing peace negotiations, Article 23(3) is too blunt an instrument and leaves too much discretion to the Security Council.

Other participants questioned whether a political body should be able to exert control over investigations or prosecutions. They argued that to create a court beholden to a political body that must authorize proceedings would politicize the court and undermine its independence and legitimacy. This type of control does not exist within national criminal justice systems, and the same should apply at the international level. If the Security Council has power to stop an investigation or prosecution, justice would become a bargaining chip to be used in Security Council-sponsored peace negotiations.

The language itself is ambiguous. What does it mean for the Security Council to be “dealing with” a matter? Would informal consultations trigger application of the language, automatically removing a case from the ICC’s docket? With such vague language, one participant speculated, conceivably up to 90 percent of issues that are before the Security Council would be prevented from going to the ICC. And it is not uncommon for the
Security Council to have on its agenda, and arguably be “dealing with,” situations for upward of thirty years.

For most participants, the disadvantages of Article 23(3) far outweigh its advantages; it seriously compromises the court’s independence without much practical value. Among PrepCom delegations, opposition to Article 23(3) was quite strong. According to one participant, the sentiment of most, if not all, African and Latin American countries was that neither Article 23(3) nor the Singapore proposal, discussed below, should remain in the statute. This participant claimed that for many countries, acceptance of ICC statute depends on the absence of Article 23(3).

**Singapore Proposal.** Last year the Singapore delegation to the PrepCom proposed a change to Article 23(3) that is increasingly gaining adherents. The proposal states that “no investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.” The Canadian delegation further refined the Singapore proposal, adding that the Security Council’s prohibition on investigation or prosecution is to last only twelve months after which the Security Council would have to renew it, if it chose to, through another vote. The Security Council may continue renewing every twelve months thereafter.

Several participants noted that a truly independent court would contain neither Article 23(3) nor the Singapore proposal language in its statute. But since some such language seems inevitable, the Singapore proposal is preferable over Article 23(3). Like Article 23(3), the Singapore proposal contains the presumption that the Security Council has jurisdiction, but, unlike Article 23(3), it requires the Security Council to make the politically sensitive finding that continuation of an investigation or prosecution would be detrimental to international peace and security. It requires the Security Council to publicly state its reasons for voting to halt an ICC proceeding.

Despite general support for the Singapore proposal as an alternative to Article 23(3), many participants expressed reservations due to significant ambiguities in the text. For example, at what stage in
the criminal process can the Security Council intervene? Should the Security Council have the authority to suspend a prosecution or investigation? Can the Security Council stop the court before an indictment is handed down? After indictment? Should the Security Council be allowed to stop or suspend trials? Exactly what Security Council action stops the proceedings—the Security Council’s putting an item on the agenda? If the Security Council were to act under the Singapore proposal, should it be required to make a finding that the situation in question constitutes a breach of the peace?

Some participants argued that the ability to suspend an ongoing trial is going too far; it would clearly signal the degree of political control over the court and severely undermine its credibility. This authority should be limited. Perhaps the statute should specify which kind of trials could be stopped. In addition, it is not clear whether the Singapore proposal also envisions that Security Council action must be done pursuant to Chapter VII. If the Singapore proposal or similar language is adopted, these questions must be answered. For many participants, the Singapore proposal is better than Article 23(3), but more precision is needed.

**Independence of the Prosecutor**

Under the current draft, only state parties and the Security Council may initiate proceedings by referring situations to the court. Delegations are debating whether the prosecutor should also be able to initiate proceedings independently. The prosecutor already has unfettered *ex officio* power to investigate a particular case subsumed in a “dispute or situation” after the dispute or situation has been referred to it. The issue here is whether the prosecutor will have the authority to target a situation, *on her or his own initiative*, for purposes of investigating individual wrongdoing and bringing criminal cases to trial.

A few participants opposed granting the prosecutor this authority. Given the political sensitivity and magnitude of international criminal cases the ICC would handle, the prosecutor would need the firm political backing that could only come from the Security Council or a
state party referral. An effective investigation or prosecution may depend on it. Moreover, they argued, an independent prosecutor may be politically too difficult to achieve in Rome; there is a distinct possibility that if the prosecutor is allowed to proceed independently, some states, fearing a “run-away” or overzealous prosecutor unfairly targeting their citizens, will insist on additional statutory protections. For example, state parties could insist on retaining the right to withhold consent to the ICC’s exercising jurisdiction over a national where the investigation leading to the indictment was initiated solely by the prosecutor.

For most participants, the advantages of an independent prosecutor far outweigh the disadvantages. Tactically, an independent prosecutor would be useful for situations where, for political reasons, neither the Security Council nor state parties will refer a situation to the ICC, even though it may be manifestly clear to the international community that an investigation is warranted. National governments’ response to Iraqi genocide of the Kurds in 1988 is an excellent example. An international human rights organization conducted an exhaustive investigation of the genocide and much documentation was obtained from Iraqi secret police. The organization attempted to persuade various governments to prosecute for genocide, but no one state felt comfortable assuming that responsibility. Some states attempted to encourage a prosecution, but the coalition was never strong enough.

Several participants rejected as unrealistic fears that an independent prosecutor would “run wild” or otherwise act in bad faith. Procedural safeguards would prevent this. First, it should be assumed that state parties will secure a skilled professional prosecutor with much integrity and experience. The record of ad hoc tribunals for the former Yugoslavia and Rwanda supports this.

Second, state parties, NGOs, and other actors will undoubtedly pressure the prosecutor to investigate and prosecute, or to refrain from investigating or prosecuting in particular situations. While nothing will completely insulate the prosecutor, these are the same
sorts of pressures that prosecutors regularly handle successfully. In addition, safeguards in the statute will help insulate the prosecutor, at least to some extent, and would be welcomed by the prosecutor. Participants assessed the statute’s current set of safeguards and discussed additions. Most supported the internal indictment review in the current draft that calls for a pretrial chamber that would, among other things, examine the prosecutor’s indictment and any supporting material and determine whether there is sufficient evidence against the accused to merit a trial. The chamber may confirm the indictment, reject it, or order additional investigations. If the indictment is confirmed, the prosecutor can proceed with the case. This process is in place and is working well at the ad hoc war crimes tribunals for the former Yugoslavia and Rwanda. An additional internal safeguard might be to require permission from a special chamber to begin an investigation and to place an extendible time limit on exercise of that authority.

The draft statute has established several means of checking an overzealous or politically motivated prosecutor. A prosecutor that oversteps authority or acts inappropriately can be impeached. (Rigorous rules of appointment would also be in order.) Once the prosecutor has authority to pursue a case and initiate an investigation, complementarity is a significant jurisdictional hurdle. The prosecutor must conclude that the national court system is unable or unwilling to prosecute effectively and be able to defend that determination. Third, the prosecutor may be checked by the Security Council itself should the Security Council decide to weigh in per Article 23(3). Moreover, limited resources and the reliability of the evidence would also work to force prioritization by the prosecutor. In short, the prosecutor will not be acting alone. One participant encouraged those who believed these safeguards were not sufficient to consider carefully each safeguard in the current draft and determine how to either strengthen it or reject it.

Participants discussed the need to formalize access to the prosecutor and systematize communication between the prosecutor and the Security Council. A few recommended that

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The draft statute has established several means of checking an overzealous or politically motivated prosecutor.
Another approach to enhancing the prosecutor’s accountability might be to require the prosecutor to issue annual reports to the Security Council. Annual reports could provide valuable history and allow the ICC to better evaluate its own performance. Again, there were doubts. One participant feared the reports would be used as a way to justify politically controversial decisions of the court. Another believed that reporting requirements would amount to another layer of political control and the information divulged in the report could compromise the prosecutor’s confidentiality. Still another participant recalled an earlier stage in ICC negotiations where a proposal was made, and eventually dropped, for the prosecutor to make periodic confidential reports as a way to alert state parties and/or the Security Council to potential international criminality and prompt either filing a complaint with the ICC or authorizing an investigation. It was feared too much confidential information could be leaked.
Many participants believed current safeguards within the statute are adequate, although they were open to considering further additions.

Acceptance of the Court’s Jurisdiction
To hear a criminal case, the ICC will need jurisdiction over both the type of crime and over the individual defendant. The types of crimes (subject matter jurisdiction) that the ICC will be authorized to hear are genocide, crimes against humanity, and serious violations of the laws and customs of war. These are the three core crimes of the court, although there is some argument to include aggression, terrorism, and various treaty-based crimes in the court’s subject matter jurisdiction as well. Whether the court may exercise jurisdiction in any given case will depend on it satisfying various jurisdictional requirements, some of which are controversial.

...different crimes have different jurisdictional requirements in the draft statute.

Inherent Jurisdiction and the “Opt-in” Regime
As of this writing, different crimes have different jurisdictional requirements in the draft statute. The ICC has inherent, or “automatic,” jurisdiction to hear cases alleging genocide. Any state that becomes a party to the ICC statute can bring complaints alleging genocide. The state is also automatically accepting the court’s jurisdiction over its own citizens (and resident aliens) suspected of committing acts of

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3 The widely accepted Genocide Convention of 1948 defines genocide as the commission of prohibited acts with the specific intent to destroy “in whole or in part, a national, ethnic, racial, or religious group[].” Crimes against humanity have evolved to encompass serious inhumane acts such as willful killing, torture, or rape, committed as part of a widespread or systematic attack against a civilian population. This category of crimes also includes persecution based on national, political, ethnic, racial, or religious grounds. “Serious violations of the laws and customs of war,” or war crimes, are based on a number of sources: The treaties that emerged from diplomatic conferences held at the Hague in 1899 and 1907; the Nuremberg Tribunal’s Charter and Judgment; and the Geneva Conventions of 1949, including Protocol I. The Geneva Conventions contain the prohibition against “grave breaches” or international law which are particularly heinous offenses committed against categories of persons during wartime such as civilians, the wounded and sick, shipwrecked, and prisoners of war.
genocide. A state that accepts the ICC statute need not, however, automatically submit to the court’s subject matter jurisdiction with respect to crimes against humanity and war crimes. Instead, states can take advantage of an “opt-in” feature whereby it may specify whether or not it accepts the court’s jurisdiction over either or both crimes. The choice is theirs. Moreover, the jurisdiction of the ICC over war crimes or crimes against humanity must be accepted not only by the state making the complaint to the court but by the state that has custody of the accused (the “custodial state”) as well as the state on whose territory the alleged crime occurred (the “territorial state”). In practice, for example, a state that has “opted out” of war crimes may not lodge a complaint with the ICC alleging war crimes—nor can the ICC exercise jurisdiction over a war crime suspect in custody in that state or over any war crime which occurred in that state.

This triple consent requirement has invited substantial criticism from various delegations and the NGO community. Some participants defended it, arguing that the consent requirements will make it politically easier for states to participate in the ICC. But most participants strongly opposed this complex and demanding consent regime. They argued that the ICC’s inherent jurisdiction should be extended to all three core crimes. If the ICC were to have inherent jurisdiction over all crimes, no state-consent regime would be needed. By becoming party to the ICC statute, a state would be consenting to jurisdiction of the ICC over all types of crimes. States should not be able to pick and choose—it would be duplicitous for a state to claim to be ratifying the ICC statute when it is in fact “opting out” of some types of crimes. Moreover, the “opt-in” regime is arguably illegal. Can a state “opt out” of jurisdiction over crimes that are now considered part of international customary law? What if, in the end, this treaty is ratified by only a few primarily democratic states (becoming a “Nordic court” in the words of one participant)? What will the ICC have to do? The international community could find itself with a court used against democratic states by states that abuse human rights. If the consent regime is to be retained, some said, it should at least be
restructured. It would be more logical if state consent were required for the one treaty-based crime (genocide) and not for those crimes that are considered international customary law since the genocide treaty was ratified long before the anticipated creation of the ICC. At a minimum, no one but the custodial state should be required to give consent.

Inherent Jurisdiction Versus Complementarity
Several participants cautioned against confusing inherent jurisdiction—with either primary or exclusive jurisdiction. The public needs to understand that the ICC is not replacing prosecution by national courts; it is not claiming for itself the right to hear all cases where the core crimes are alleged. Under the principle of complementarity, a central element of the statute, the ICC is designed to step in only where national trial procedures are either unavailable or ineffective, i.e., where there is no prospect that an alleged war criminal will be duly tried nationally. Regardless of the type of crime involved, the court must determine that national prosecution was insufficient before proceeding. In this respect, the ICC merely “complements” national jurisdiction. The complementarity regime is designed to protect nationalities while ensuring criminals are prosecuted. If a state party does not want the ICC to investigate, the state party itself had better do it and do it effectively.

Expanding Jurisdiction to Aggression, Terrorism, and Treaty-Based Crimes

Aggression. Under Article 23(2), a complaint alleging aggression could not be brought to the court unless the Security Council first makes a determination that a state has committed aggression. Because the ICC would not be able to rule on individual responsibility for acts of aggression without the Security Council first passing its judgment on the matter, the relationship between the ICC and the Security Council would become much more political and delicate if aggression were included in the ICC’s jurisdiction. Some participants argued that referral by the Security Council of suspect-

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4 Article 10(2), Zutphen Draft.
ed crimes of aggression would have no impact on the ICC’s decision, but participants questioned that assumption. They doubted the court would feel free to find an individual not guilty if the Security Council had previously determined an act of aggression occurred. Even if, in theory, their spheres are separate, political pressure to validate the Security Council would be immense.

Other Treaty Crimes and Terrorism. There was no consensus on the extent to which treaty crimes should be included in the ICC’s statute. One participant advocated the inclusion of crimes embodied in the Convention on the Rights of the Child. A few participants supported expanding jurisdiction to other treaty-based crimes as it would bring more countries into fold. Most countries view the convention as binding. High-level delegations from state parties meet annually to access compliance, and NGOs “act as spies” monitoring the treaty’s implementation. One participant noted there were no enforcement provisions within the treaty and its inclusion in the ICC would be problematic as the treaty is merely hortatory.

Overall, nearly all participants were wary of extending the jurisdiction of the court at this late stage. Delegations would have to choose which treaties to include—which would necessitate identifying those that have reached the status of international customary law. It would be too complicated to include them now: An entirely new consent regime parallel to what is already in the statute would need to be created to accommodate them because the treaties were ratified long before the creation of the ICC. It was felt that extending the court’s jurisdiction would jeopardize its acceptance at this stage. State parties may always revisit jurisdiction during a future treaty review conference.

Other Outstanding Issues
Participants were of varying opinions with respect to what can reasonably be accomplished before the Rome treaty conference. Some believed issues related to the Security Council powers, the independent prosecutor, jurisdiction, and the consent regime will not be resolved until the last hour as part of the package deal. Others were more hopeful that the toughest issues could be decided before the eleventh hour and reminded the group that resolution of many other issues depends on it.
The Zutphen Draft still has much bracketed language. To go into a diplomatic conference with so much bracketed language would be, one participant lamented, “embarrassing.” Participants identified the following outstanding issues as ripe for discussion and resolution before the convening of the Rome treaty conference:

• **Criminal Procedure.** Negotiators will need to reconcile diverse traditions. They cannot hope to impose or transfer systems but should take the most important elements of each.

• **Procedure to Accompany Complementarity.** A way for the ICC to be informed of investigations taking place at national and local levels needs to be devised.

• **Relationship of the ICC to the United Nations.** Should the ICC be a treaty body of the United Nations, an independent international organization, or a principal or subsidiary organ of the United Nations?

• **Rules of the Court.** What language should be in the statute and what is best left in the rules of the court that are more easily amended? Many participants urged that procedural details not be included in the statute so they can be adjusted more easily as the court gains experience.

• **National Security Exception to Duty to Provide Tribunal With Documents.** Thus far discussion on this topic has been in general terms only. Inevitably, claims of protecting national security will be used as grounds for refusing to share critical information with the ICC. Delegations need to determine the scope of the exception and whether the court or a separate body should decide on the legitimacy of a claim of national security. New, creative proposals are needed to address these issues. One participant suggested the statute contain a balancing test whereby the court must weigh the following competing interests: deference to national courts, the need of victims for justice and compensation, the need of the international community to bring war criminals to justice, and the due process right of the accused to get exculpatory evidence. Another participant warned against any “grand canyon-sized” loophole.
• **State Cooperation, Judicial Assistance, and Enforcement.** States have neglected discussing the Security Council’s critical role in these issues. The ICC will not have its own police force. The prosecutor cannot “parachute” into national courts. Thus the court will need to work with national legal systems, particularly when dealing with issues of transfer, extradition, and surrender. The ICC needs language allowing it to approach various international organizations for help.

• **Final Clauses.** Should reservations be allowed? Some argue no state party should be allowed to modify its legal obligations with respect to the core crimes that have already gained acceptance as international customary law.

• **Residual Jurisdiction of Ad Hoc Tribunals.** What should the international community do with cases remaining on the docket of the ad hoc war crimes tribunals for the former Yugoslavia and Rwanda? Could the Security Council vote to transfer them?

• **Funding.** Participants discussed whether the ICC should be funded from the regular UN budget. Some criticized UN funding due to its slow, overly bureaucratic system. One participant suggested that UN control almost prevented investigations in the former Yugoslavia and Rwanda. For example, witnesses for the tribunal are treated as *independent contractors*, thus requiring them to navigate UN bureaucratic waters to get paid. Half of the prosecutor and investigator positions of the International Criminal Tribunal for Rwanda are still not filled because it is unclear at this late date who within the court has the authority to recruit staff.

There may be serious concerns given the irregularities of the two ad hoc war crimes tribunals, but the possibility of political manipulation of the court through UN funding is high, according to some. An alternative is funding from state parties, but this may be unstable. Unless groups of states are willing to assume a burden to pay, the ICC will not survive. Only a finite number of options are available to the international community, and the United Nations may be the best option. At a minimum, if the Security Council refers cases to the ICC, it should pay for it. Whatever the source, civil society will keep pressure on to fully
fund the ICC. It was noted that the ICC is relatively inexpensive. Even at $150 million per year (one participant’s informal estimate), the ICC is still much cheaper than peacekeeping; in two years the United States alone spent $6 billion to $7 billion in Bosnia. In comparison, the cost of the ICC would be negligible.

• **Number of Ratifications Needed for Treaty to Enter Into Force.** Thus far there has been little discussion of this issue. Some argued for keeping the number low. The Law of the Sea Treaty required ratification of sixty countries before entering into force—which may have been too many, delaying implementation. The Convention against Genocide and Torture, on the other hand, required the ratification of twenty-five countries before entering into force. But others believed a high number would be preferable. One participant cautioned the group that an institution is being created which is fragile. Treaties that establish standards such as the International Convention on Civil and Political Rights passed in 1976 or Protocol II of the Geneva Convention are more easily ratifiable than treaties establishing permanent institutions. To ensure its strength, a high number of ratifications is needed. If the court were supported only by small and middle-sized countries, there will be political and financial problems.

**The Road Ahead**

Participants expressed much concern with the slow pace of negotiations. Many believed the road to Rome will be smoother if issues such as the rules of the court, its composition and administration, criminal law, enforcement, funding, and relationship with the United Nations are successfully dealt with before the treaty conference.

**Resolution of the sensitive political issues is the largest obstacle.**

To facilitate negotiations during the last stages, efficient state consultations, perhaps with intermediaries, and more intersessional meetings will be required before June. Since the current draft statute can be difficult to work with, it would be helpful if there were a streamlined draft with annotations so all may know who proposed what and their rationale. Cleaning up the text will be “hard-headed work,” one participant said—it will not be a time for
“beautiful ideas.” A more coherent draft replete with clarifications and explanations will greatly assist those who will be dealing with this issue for the first time.

In the time left before the Rome conference, it was recommended that the sensitive political issues and the more technical issues be negotiated separately, with the later addressed first. Compromise is needed on the technical criminal provisions such as the procedure for challenging jurisdiction of the ICC, admission of guilt, confidentiality, and treatment of sensitive information. Alone, none can prevent a final agreement, but taken together, failure to reach agreement could present major obstacles to final passage. Resolving these technical aspects will be time-consuming.

Resolution of the sensitive political issues is the largest obstacle. Most participants agreed this will not happen before the Rome conference. There has been clarification recently on controversial issues including the role of the Security Council, jurisdiction, and the national security exception. But there is much more room for compromise. In the months leading up to the conference, the best delegations can do is continue clarifying options in the text through consultations among interested delegations. With respect to the independent prosecutor, great advances could be made before Rome if delegations were to agree on proper safeguards.

Goals of the Rome Conference: Is There a Bottom Line?
Participants discussed whether it would still be worthwhile to have an international criminal court, even if not all major issues are resolved by the end of the diplomatic conference. Opinions varied widely. Some felt delegations should not sacrifice efficacy of the court for the sake of having it ratified. “No white elephants, please.” The ICC will be with us for a long time and will not be easily changed once it is created. A weak court may not survive the inevitable changes that will occur in the international system in the near or far future. Delegations must take advantage of today’s window of opportunity and make every effort to create the best possi-
ble court, with enough flexibility to evolve over time. Essential points of principle should *not* be conceded simply to maximize the number of countries ratifying the treaty.

Other participants believed it would be better to accept a less-than-perfect court than to leave Rome with nothing. This is a rare window of opportunity. It would be preferable to achieve something now, even if it is less than optimal, before momentum withers. Another fifty years could pass before the international community is again this close to creating an international criminal court.

The third and largest group of participants was quite optimistic and hopeful that delegations could come away from Rome with a strong and effective court and do this in the time available. The international community is at the end of a long process, but delegations should still set their sights very high. Accepting a document that is less than adequate will undermine the court and hurt its most ardent advocates, and failure in Rome would be a huge stumbling block to a second try, no matter how far off in the future. The lack of time between now and the Rome conference should not concern delegations; many important international institutions (the World Bank, the International Monetary Fund, and the United Nations itself) were agreed upon in a relatively short time frame.

**Parliamentary Considerations**

Participants discussed the challenge for delegations and NGOs to persuade government officials, legislatures, and parliaments of the wisdom of this court. Much of this focused on the US administration and Congress. The United States has a long history of not accepting international instruments, and this tendency goes beyond the politics of the day.

The ICC will be a tough sell. Although there are members within the House and Senate who are sympathetic to the ICC, a vast majority has no interest—either because foreign affairs do not interest them or because they oppose international organizations generally due to a perceived threat to US sovereignty. Sovereignty
and national security will be the paramount concern. It was anticipated that most congressional debate will focus on complementarity, the process of selecting judges and jurisdiction, and trigger mechanisms and due process protections—particularly rights to remain silent, to counsel, and the right not to incriminate oneself. The relationship between the Security Council and the ICC and the independent prosecutor issue will be considered esoteric. There will be fear of unwarranted, politically motivated prosecution of US peacekeeping forces putting thousands of US troops at risk. Administration officials will want strong assurances that this will not happen.

A strong complementarity regime would go a long way in garnering US support and assuaging many congressional fears. But it will be tough getting this ratified by the Senate, and the House of Representatives’ approval will also be needed for implementing legislation. Between 1985 and 1993, the Senate passed seven resolutions, six of which were introduced by Senator Arlen Specter, expressing support for the creation of an international criminal court. All passed without debate. However, the last time the Senate considered a pro-ICC resolution, in 1993, it was defeated. Since 1993 there has been no discussion of the court within the Senate. This is unfortunate since the draft statute is relatively complicated and members of Congress and their staff need more exposure and understanding of the issues. Next year will be the window of opportunity because the year 2000 is an election year with a short legislative calendar during which those who oppose the treaty will drag their feet.

**Promoting the Court**

Some participants believed proponents of the court need to dedicate much more time educating the public and legislators on the need for and operation of a future international criminal court. The ICC must be made understandable. Misconceptions such as confusing inherent jurisdiction with primary jurisdiction and inherent jurisdiction with complementarity could undermine support for the court. A public education and lobbying campaign would do best to focus on what the ICC is for—to enable the international community dedicate itself to the creation of a strong and effective international court....
community to prosecute humanity’s most heinous and egregious crimes. It will be a deterrent and, as one participant said, “will make the Karadics of the world pause.”

Problems experienced in Congress will plague other legislatures as well. NGOs play a crucial role in the NGO process. Of course, NGO support would depend on what is produced in Rome. Opponents notwithstanding, the international community must push hard to remind people and the court of public opinion that the ICC is designed to hold responsible those who are accused of the most serious crimes ever committed. The public will likely be receptive to this. Countries with rigorous ratification processes “will need to put on a road show” to educate the electorates and allow full public and political consultation.

**Conclusion**

It is time the international community dedicate itself to the creation of a strong and effective international court that will investigate and prosecute those who commit the most reprehensible and heinous of crimes. This century has witnessed the most bloody and violent wars in world history. Impunity can no longer be tolerated. The ICC will help replace the rule of force with the rule of law and foster greater democracy at the international level.

There is a feeling that this project is different from others, that there is an urgency and seriousness unlike other treaty-making endeavors. A “healthy nervousness” is in the air and momentum is building. In the time that remains before the Rome conference, delegations and NGOs will need to be imaginative problem solvers and work hard to bridge opposing concepts and proposals in a satisfactory way to all. Contributions of individuals can make a crucial difference.

The objective now should be to get as good a court as possible and not to allow political consideration to play too much of a role in shaping the contours of the important international institution. In the long run, a well-functioning court will garner the most support. Once the credibility, prestige, and strength of the court are established, it is anticipated that the court will be universally accepted.
Chairman’s Observations

I came away from Arden House encouraged by the attention being given to International Criminal Court (ICC) negotiations and optimistic that the Rome conference will produce an effective ICC statute. Arden House participants wrestled to find workable accommodation and consensus on several critical issues. Clearly, the process is serious and has moved well beyond posturing and rhetoric.

As negotiations continue through the final meeting of the Preparatory Committee and the June diplomatic conference, and as national governments undertake ratification, it is important that all concerned keep several factors in mind.

First, the ICC is intended to deal only with the most heinous of human rights crimes—genocide, war crimes, and crimes against humanity. And, it will do so only when national courts and prosecutors are unable or unwilling to exercise jurisdiction. The ICC is in no way a world supreme court, accepting appeals from national justice systems. Rather, it fills a gap, bringing justice to individuals guilty of heinous crimes when national courts fail to act.

Because this is the ICC role, the statute should include a strong complementarity regime. Nations with effective justice systems appropriately insist that the ICC not interfere with fair and responsible national justice.

Third, with a strong complementarity regime, there is no need in the statute for nation-state "opt-in" procedures on specific crimes or investigations. Ratification of the statute should include acceptance of ICC jurisdiction over all crimes included—genocide, war crimes, and crimes against humanity. It should include acceptance of ICC jurisdiction over any of these crimes occurring in the ratifying state and over war crime suspects in the custody of that state, unless its national court system has and exercises jurisdiction to provide justice.

Finally, with appropriate checks and safeguards included in the statute, the ICC prosecutor should have independent authority to
investigate individual wrongdoing and bring criminal cases to trial. Subject to complementarity, there should be three channels for bringing cases to the ICC: referral by the Security Council, complaint by a state party, and independent investigation by the prosecutor—always subject to statutory safeguards.

This year, 1998, marks the fiftieth anniversary of the Universal Declaration of Human Rights. How fitting it is for this to be the year for a permanent international criminal court to be established, advancing the rule of law in this strife-filled world, and ending impunity for perhaps the most grievous violations of human rights—genocide, war crimes, and crimes against humanity. May we grasp this unprecedented opportunity to create a strong and effective international criminal court.
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