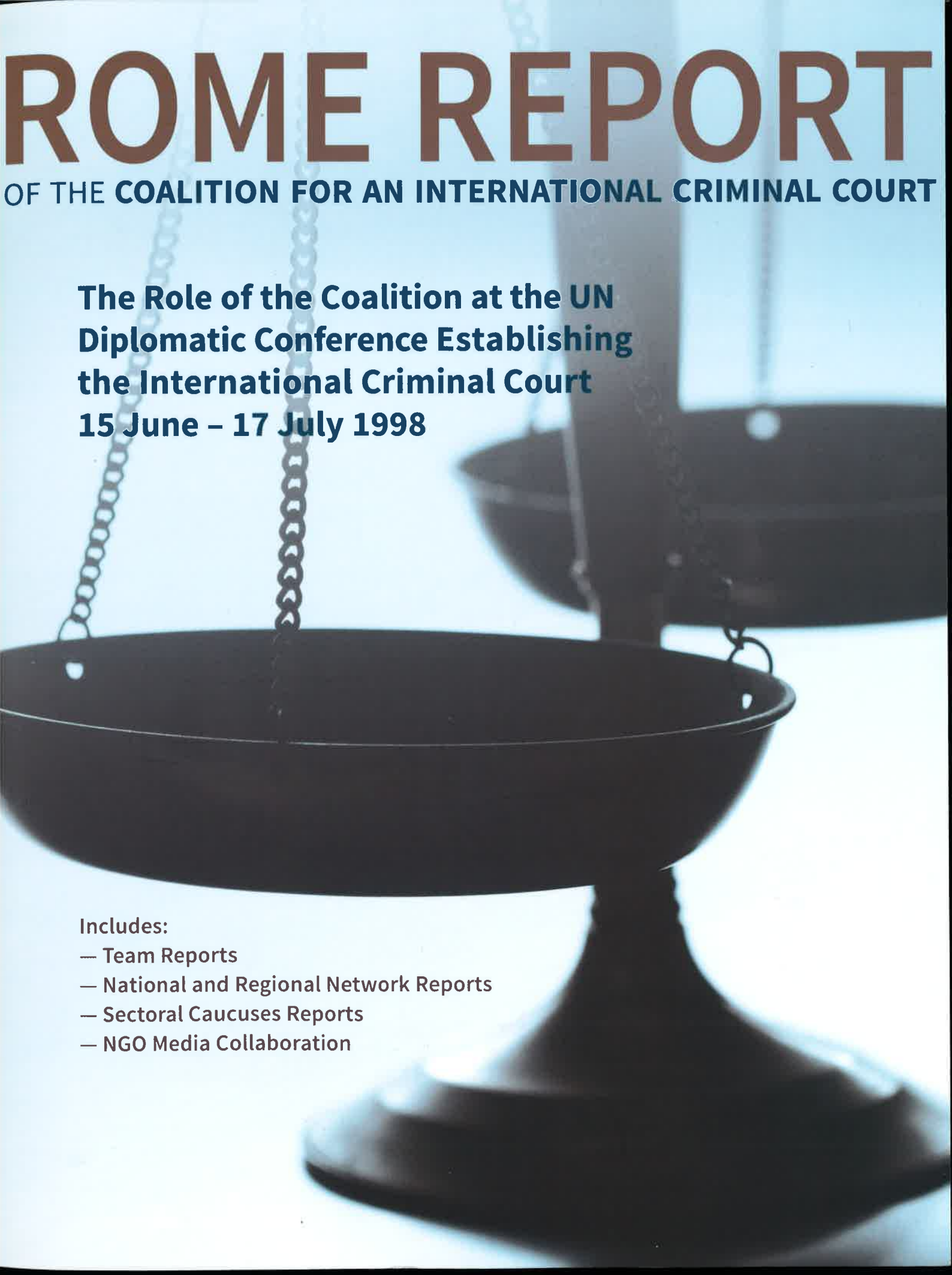
ROME REPORT

OF THE **COALITION FOR AN INTERNATIONAL CRIMINAL COURT**

The Role of the Coalition at the UN Diplomatic Conference Establishing the International Criminal Court 15 June – 17 July 1998



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— Team Reports
— National and Regional Network Reports
— Sectoral Caucuses Reports
— NGO Media Collaboration

UNITED NATIONS NATIONS UNIES

NON-GOVERNMENTAL ORGANIZATIONS AND THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

On 17 July 1998, Governments, with the encouragement, assistance and unstinting support of civil society, took an irreversible step towards ending the culture of impunity which had characterized so many abhorrent events in the twentieth century. The United Nations finally realized a goal that, although pursued in the aftermath of the horrors of the Second World War, remained elusive for more than fifty years. The Rome Statute establishes a permanent international criminal court to try individuals for the most serious crimes of concern to the international community as a whole and seeks to establish a fair international criminal justice system.

Among those who worked to make the Rome Statute a reality, non-governmental organizations played a significant – and, for civil society, a historic – role in the quest for peace and justice and in championing the cause for humanity. The participation of civil society in the Rome Conference revealed that with resolve, unity of purpose and deliberation, a partnership between Governments and civil society may yield positive results for humanity. The activities of non-governmental organizations in the process leading to the adoption of the Rome Statue were manifold. Their role is a clear example of the coming of age of the partnership between the United Nations and civil society.

An examination of the Statute shows that the content of many of its provisions coincides with ideas for an international criminal court put forward by non-governmental organizations. From its inception in 1995, the Coalition for an International Criminal Court advocated the establishment of an independent, effective and just international criminal court, and many of its specific proposals have been incorporated in the statute. During the preparatory process, the Coalition lobbied persistently for the inclusion of certain specific crimes in the Statute. The eventual inclusion of a variety of crimes – including those relating to sexual and gender violence, conscripting or enlisting children under the age of 15, and attacks against United Nations and humanitarian personnel – in the Statute are all successful examples of advocacy by non-governmental organizations.

The adoption of the Rome Statute was an important milestone in international law and a victory for humanity. Its realization marked a significant step towards the aim of the UN's founders to "establish conditions under which justice and respect for the obligations arising from treaties" can be maintained. That civil society representatives of the peoples of the world – in whose name the Charter was written – were parties to this accomplishment shows what can be achieved when governments and their citizens join forces. Their combined efforts have given all peoples hope for the future, and a gift of justice for future generations.

Kofi Annan
Secretary-General
1999

December 2018

c/o WFM

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ROME REPORT
OF THE COALITION FOR AN INTERNATIONAL COURT

FOREWORD

I am extremely grateful to the ICC Coalition for having asked me to add a few words to this volume on NGOs' participation in the ICC project and especially in the Rome Conference which adopted the Statute of the International Criminal Court. Like many others, I am convinced that the success of the Conference, and also the progress made in the Statute's ratifications, are the result of numerous efforts including, first and foremost, those of non-governmental organizations and other representatives of civil society. Never before, in the history of multilateral negotiations, was the active presence of NGOs so widespread and effective in ensuring that a concrete response be given to the demand for justice stemming from world public opinion. Never before have action by States' delegations found so much support and encouragement by non-governmental actors in pursuing the goal of putting an end to impunity for crimes that offend the very conscience of mankind. It is not an exaggeration to say that the adoption of the Rome Statute also marks an era from the viewpoint of the involvement of civil society in the development of international legislation with respect to fundamental human rights and humanitarian law.

As President of the Rome Conference, I had the privilege of witnessing directly the extraordinary impact that NGOs and their coalition had on the ICC process. This volume represents an important testimony of the events that accompanied such a critical role played by non-governmental organizations. It serves as a testimony for present and future generations, and a reminder that no objective is impossible to achieve when sustained by a strong belief in good principles and the collective determination of the people.

By Giovanni Conso
President, United Nations Diplomatic Conference of Plenipotentiaries
on the Establishment of an International Criminal Court
August 2001

PREFACE

By William R. Pace
Convenor, Coalition for the International Criminal Court

History says, Don't Hope
On this side of the grave.
But then, once in a lifetime,
The long-for tidal wave
Of justice can rise up
And Hope and history rhyme.
Seamus Heaney, Nobel Laureate
from "Chorus: The Cure at Troy."

It is a great pleasure to present the *Rome Report of the Coalition for an International Criminal Court* in December 2018, near the conclusion of a year of commemorating the 1998 adoption of the Rome Statute of the International Criminal Court (ICC). On 15 February 2018, the Coalition's inaugural celebration was launched and a stock-taking exercise was presided over by ICC President Silvia Fernández de Gurmendi at the still new premises of the permanent Court in The Hague, the Netherlands. A second day of panels and presentations of papers were held at the Peace Palace.

A gratifying number of 20th anniversary events held throughout the world have all underscored the historic significance of the Rome Statute. "Make no mistake about it," wrote *The Times of India* in an editorial of 1 August 1998, "this is international lawmaking of historic proportions. Not since the establishment of the United Nations itself have so many countries voluntarily yielded ground on such a fundamental aspect of state sovereignty."

Whether a supporter or opponent of the statute, there is near universal agreement that the participation and contributions of the Coalition's NGOs were indispensable to achieving the adoption of the treaty late in the evening of the last day of the conference. The Coalition was equally vital in the ratification of the Rome Statute by more than 60 governments within a relatively short period of time: three years and eight months. In countless publications, the Coalition and its members' efforts have been summarized as creating significant momentum, providing substantial expertise, promoting the highest principles for the Court, enhancing transparency, and stimulating extraordinary levels of collaboration among key players. To be part of these achievements has been a tremendous honor.

The writing of this report began in 1999, and another effort was made during the tenth anniversary of the Coalition in 2005.[1] Limited human resources and the natural flow of staff turnover, besides all the continuing priorities and unrelenting new demands on the Coalition, delayed this publication. But now—approaching the end of my nearly 25-year term as Convenor—I am very pleased to provide this record of unique NGO collaboration. The report covers the

[1] This publication was first announced in the *Monitor* (Coalition's Newsletter) in November 1998, to be finished that year and to be called *The Construction of Justice*. Later it was referred to as the *Rome Report: A Documentary History of the Negotiations at the ICC Diplomatic Conference in Rome*. It remained unpublished in print or online, although much of this material has been made available for the purpose of research by the Coaliton's secretariat over the years. Indeed the first references to this material emerge from articles and books published in 2002.

period 1994-1998, from when the negotiations really gained momentum in the Sixth (legal) Committee of the UN General Assembly up through the Rome Conference.

Chapter 1, the introduction of this publication, provides a brief history and analysis of the negotiations and describes the genesis of the Coalition and the rationale and challenges behind its many multi-facetted efforts.

Much of the information provided in the other chapters is not elsewhere available in great detail, such as the work of the Coalition's Teams in Rome (See Chapter 2), national and regional networks for an ICC (Chapter 3), and Sectoral Caucuses (Chapter 4).[2] In Part 5, a summary of media efforts can be found. The report concludes with copies of all 26 issues of *Terra Viva*, the Coalition's Rome edition of the *Monitor*, and selected articles of *On the Record*, which were jointly published and distributed in Rome.

At the beginning of this report, we provide a timeline summarizing key events in the negotiations and a sample of the multitude of NGO activities. It contains, among other efforts, important references to the solid research and well-argued recommendations that NGOs produced for the negotiating process from 1995-1998. For those readers who are not familiar with UN proceedings, we also include a section on key terms. Throughout this publication, references are made to UN documentation (draft statutes, resolutions, official records, and proposals in L-documents) that can easily be found online thanks to the index numbers provided.

It is my hope that as the Coalition's archive project gets underway, other essential information that should have been included in this report will be added so that we can prepare an improved and final version of this report. In this light, we encourage all participants of the Rome Conference to send us material they believe should be added to this publication—or to our archives—and alert us about necessary corrections.[3] In the meantime, this report should be seen as a provisional document, to be revised in future print or online editions.

Subsequent publications are to delve into the ratification campaign, the UN Preparatory Commission, the review conference, adding the crime of aggression to the Statute, and the Court's establishment and early developments. This report focuses on the Rome conference, where States (such as the Like-Minded Group and countries that proposed key compromise proposals), an inspiring Secretary-General, an excellent team from the UN Office of Legal Affairs, besides NGOs and academics, were able to make a strong push to end impunity for the world's worst criminals.

As we publish this report in 2018, the Rome Statute and the ICC are confronting the most serious political attacks since 1998. The attacks are part of widespread retreat from many of the most important pillars, organizations, and multilateral institutions created in the ashes of World War II. Experts in the international arena agree that almost all of the historic elements of the Rome Statute could not be achieved in a treaty negotiation if it were held today. Human rights and humanitarian law defenders worldwide are under severe threat. Thus, the lessons from this historic treaty negotiation in 1998 may be very important going forward, reflecting how a unique partnership between global civil society and almost all the world's small and middle power democracies prevailed over the world's biggest powers and authoritarian governments in advancing peace, justice and the rule of law. Hopefully, this publication will remind and inspire governments, leaders of international organizations, and global civil society alike to protect and enhance the historic achievements made in Rome.

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[2] It should be noted that many of the reports in this publication were not written with publication in mind.

[3] Please email romereport1@yahoo.com.

ACKNOWLEDGEMENTS

The Coalition for an International Criminal Court (hereafter Coalition or CICC) owes its existence and its members' collaborative strengths to the informal Steering Committee that was established in 1995. In the 1995-1998 period, this committee consisted of: Amnesty International, European Law Students Association, Fédération International des Ligues des Droits de l'Homme, Human Rights Watch, International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, Women's Caucus for Gender Justice, and the World Federalist Movement (WFM).

The staff, consultants, interns, and volunteers of WFM (the legal and fiscal agent of the Coalition) who worked for the Coalition's Secretariat in the period from the Ad Hoc Committee through the Rome Conference were inspired and tireless: Bettina Pruckmayr, Rik Panganiban, Lydia Swart, Donna Axel, Mark Thieroff, Tanya Karanasios, Daniel MacSweeney, Maria Verheij, Laura Jisun Lee, Tina Margellis, Jessica Greenberg, Sang Chun, Fanny Benedetti, Denise Lifton, Pascale Norris, Shelly Cryer, Eduardo Gonzalez Cueva, Anbereen Hasan, and Fabrice Pierre.

Contributors to this report are legion. Spread throughout this publication are messages to the Coalition from key leaders and experts including Kofi Annan, Adriaan Bos, Philippe Kirsch, Silvia Fernández de Gurmendi, and Valerie Oosterveld. For this publication, Roy S. Lee wrote a section on the unique NGO relationship with the UN Secretariat. To the best of our knowledge, we have added the names of Coordinators/Chairs of the Working Groups and various *ad hoc* bodies in the section *Key Terms*. Without their remarkable leadership, and that of the Like-Minded Group in general, the Rome Statute would not have been adopted on 17 July 1998.

The momentum and impact that the Coalition was able to create in the 1995-1998 timeframe would not have been possible without funding from some of its member organizations, the European Union, the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, the Lannung Foundation, the Daisy and Paul Soros Foundation, Denmark, Finland, Italy, Liechtenstein, the Netherlands, Norway, Sweden, and the United Kingdom.

In Chapters 2-5, the NGO collaborators on the Team Reports are all listed, as are the main individuals and organizations behind the national and regional networks, the sectoral caucuses, and media efforts of the Coalition. Undoubtedly, many who deserve to be mentioned may have been left out. It is our hope that in a next print or electronic edition, additions and corrections can be made and a full list of more than 400 NGO participants in Rome (now somewhere buried in our archives) will be added.

Many helped compile and introduce the reports in chapters 2-5 shortly after the Rome Conference ended. Among them, Maria Fariello, Eduardo Gonzalez Cueva, Thomas Henquet, Denise Lifton, Pascale Norris, Mark Thieroff, and Lindsay Zelniker deserve special gratitude.

But this publication would not be available at this time without Lydia Swart's hard work from September through November 2018. To complement the other chapters, she added the sections *Key Terms* and the *Timeline,* the latter showing much of the momentum, expertise, and collaborative contributions originating from the Coalition and its member organizations. She edited and expanded—or sometimes abridged—earlier drafts of introductions to chapters 2-5. Together, Lydia and I truly enjoyed going back twenty years in time, when—in what now appears to have been a golden moment of leadership—the international community demonstrated its capacity to significantly advance peace, justice, human rights, and the rule of law.

William R. Pace

NGO ARRANGEMENTS WITH THE UN

Roy S. Lee
Executive Secretary of the Rome Conference

The UN Charter opens with the words "We the peoples of the United Nations..." Working through non-governmental organizations is perhaps the closest resemblance of direct participation by "peoples' in the UN Organization. As "like-minded peoples," NGOs have played a significant role in the promotion of human rights, protection of environment and prohibition of landmines. The contribution that the NGO Coalition for an International Criminal Court has made in enhancing the establishment of the International Criminal Court (ICC) is another sterling example of civil society.

In 1996, a suggestion was made to me that NGO participation in the newly formed Preparatory Committee on the Establishment of an International Criminal Court should be supervised by a committee of governmental representatives. At that time, the creation of such a court was still very controversial and States held very different views on the subject. Understandably, not all States would want to be surrounded by active members of civil society. The leadership of the Preparatory Committee (PrepCom) was, however, not interested in this matter. Tackling issues of complementarities, jurisdiction and definitions of crimes were more to their liking. Relationship with NGOs was thus largely left to the Secretariat which tried to resolve problems on a case by case basis. My colleagues and I thought it best to work through the CICC rather than to address all NGOs individually. On the whole, the arrangement worked well and we faced no serious problems, except an occasional complaint about NGOs appearing in governmental consultations.

The CICC however, expressed their concerns over two main points. Due to budgetary constraints resulting from non-payment of membership dues, only limited copies of UN documents were allowed to be distributed to the CICC. Unfortunately, this was perceived in the beginning as a means to restrict NGO participation. After having understood the problem, the Coalition agreed to make the necessary copies at their own costs for distribution to their members. The CICC's gesture won the good will of people all around and helped to solve the second problem of finding a meeting room for the CICC's use. Although the Secretariat could not formally assign a room for the NGOs, a group of delegations could request a room for meetings with NGOs. This was done without much difficulty and has continued thereafter.

The question of an oversight body for NGOs resurfaced when the General Assembly decided to convene a diplomatic conference of plenipotentiaries in Rome in July 1998. Due to serious problems connected to NGO credentials and their methods of advocacy which had arisen in previous UN major conferences, it had been a practice to set up an intergovernmental committee as part of the conference structure to examine NGO credentials and to approve the list in the Plenary and committees, and to determine their access to meetings. Experience showed that the work of such a committee had been highly political and controversial when it came to examination of credentials and decisions to accept or exclude certain groups. Membership of such a committee might also be contentious and time-consuming.

It was recognized that many of those issues would have to be tackled by the Preparatory Committee. Since it had been fully occupied by the substantive issues, the Committee had really no time for setting up an oversight committee. After careful consideration, the leadership of the Preparatory Committee decided in the circumstances not to handle the NGO question through the formal structure of an intergovernmental body. As a result, the draft rules of procedure of the Conference simply provided for NGO participation in the Rome Conference in the same

manner that it had enjoyed during the PrepCom. But the Secretariat was to deal with the problems consequent on implementing the provision.

The main issue faced by the Secretariat was how to decide which of the eight hundred NGOs should be admitted to attend the Conference. The Codification Division of the Office of Legal Affairs had been the secretariat for the Prep Com and for the Conference in addition to its duties for the Sixth Committee, the International Law Commission and four other law-making bodies. It would be impossible for a small Division to handle so many NGOs individually. The best way for it to proceed was first to lay down the ground rules and to channel the management through the CICC and to rely on the CICC itself to enforce the rules. This plan was proposed on the basis of our working experience with the CICC and the CICC's ability to manage effectively its large membership. The CICC was willing to assist. As it turned out, the plan worked well and the confidence was not misplaced.

An example of this successful partnership may best be illustrated in preparing the NGO list of participants in the Conference. Instead of inviting and reviewing applications directly from the individual groups, the CICC was requested to compile a list of their members that intended to attend the conference. For that purpose, the CICC would form a committee of its own to screen the applications on the basis of applicants' performance in the PrepCom and stated objectives. A recommended list was duly produced. To facilitate the process, many smaller organizations joined together and as a result the total number of organizations was reduced to less than one hundred sixty, slightly lower than the total number of governments envisaged to participate in the Conference. Delegations were impressed and the Secretariat was able to present this greatly reduced list to the PrepCom as an indication of NGOs' willingness to cooperate. Anticipating that some States might still have difficulty accepting the entire list, informal meetings were organized to clarify the credentials of particular groups. Delegations were also given full opportunity to review the files compiled by the CICC. This informal but open process ran smoothly and resulted in approval of the recommended list. After having worked out the total time and number of speakers that could be accommodated for States and NGOs at the Plenary, 20 speaking spots were given to the NGOs. The Coalition was requested to work out amongst themselves when statements would be made and by whom in the Plenary. The Coalition was also relied upon to work out amongst themselves how the large space assigned for their use during the Conference would be shared. Any problems of presentation and distribution of documents were to be resolved first by the CICC pursuant to the rules, before referring to the conference Secretariat. The CICC would have been held responsible for any violation of the rules. A liaison officer was assigned for this purpose who reported to the executive secretary of the conference. This successful partnership was largely due to the CICC leadership and members' willingness to regulate themselves.

Over the past six years from the Preparatory Committee, though the Rome Conference, to the Preparatory Commission, these "like-minded peoples" have been devoted to the creation of a permanent International Criminal Court. They have offered expert advice on almost all of the key issues addressed in the Rome Statute. They have naturally advocated strongly matters of their special concern but they have not failed to moderate their preferred solution in the interest of the overall objective to create the Court. They were quick in endorsing the "delicate balance" reached at Rome. In an outpouring of emotion, their applause and cheering filled the conference room. Since then, they have devoted their efforts to the ratification and implementation of the Court. They have mobilized strong grass-root support for the world criminal court. Indeed, they have been the stable and continuous force in support of the Rome Statute.

February 2001

As for the Coalition, coordination was at an early stage of development, given the small number of NGOs observing the work of the Ad Hoc Committee, numbering around 30. Many of these NGOs, however, proved to be among the most active members of the Coalition through the Rome Conference and beyond. Further, working methods developed during the Ad Hoc Committee laid the foundations for the Coalition's unique approach to work at the UN, which contributed significantly to the successful conclusion of the Rome Conference and thereafter of the first stage of work of the Preparatory Commission for the ICC (PrepCom).

These working methods included NGO-government consultations and the conduct of expert dialogue between NGOs and governments; Coalition outreach at the national and regional level around the world to raise awareness of the ICC and build productive civil society networks; and the documentation and distribution of information related to the ICC. To this end, the Coalition Secretariat requested Canada, the Netherlands and New Zealand, on behalf of the LMG, to write letters to the UN Secretariat to secure a room at the UN for regular government-NGO meetings during the Ad Hoc Committee sessions.[24] The Coalition conducted general strategy sessions and met with individual delegations from around the world, including the permanent members of the Security Council, as well as with members of the LMG. Coalition members also maintained contact with LMG delegations between the sessions of the Ad Hoc Committee by phone and fax. At the same time, Coalition members began holding meetings in different regions of the world to raise awareness of the ICC and published expert papers for distribution at the Ad Hoc Committee, and the Coalition Secretariat established an electronic 'listserv' for distribution of these and other materials.

1.4. The Coalition at the Preparatory Committee (PrepCom)

Reflecting the increasing political support for an ICC, the General Assembly creates the UN Preparatory Committee on the Establishment of an ICC (PrepCom) on 11 December 1995. The work of the Coalition evolved further in response to the new environment presented by the PrepCom, which met six times between March 1996 and April 1998.[25] The mandate of the PrepCom was much more focused than that of the Ad Hoc Committee: "with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries."[26] The Chair of the Preparatory Committee, Adriaan Bos, recognized the need for the delegates to move from discussion to drafting and adjusted the organization of the PrepCom's work accordingly.[27] In particular, Bos decided to appoint coordinators to lead discussions and drafting on different issues, and many of these coordinators were drawn from LMG delegations. While some NGOs were concerned that the effectiveness of these coordinators as representatives of the LMG would be compromised by the demands of coordination, in fact the commitment of these coordinators

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[24] The Coalition worked with members of the LMG to secure rooms for government-NGO meetings because NGOs were unable to secure these rooms on their own. It is relevant to note that NGOs have limited access to the proceedings of the General Assembly and therefore ensuring NGO access to the Ad Hoc and Preparatory Committees, to the Rome Conference, and to the Preparatory Commission, which are subordinate bodies of the General Assembly, has been an additional challenge the Coalition has had to face. By early 1998, the Coalition benefited from a more direct relationship with the UN Office of Legal Affairs.

[25] The Preparatory Committee held six sessions, from March 25-April 12, 1996; from August 12-30, 1996; from February 11-21, 1997; from August 4-15, 1997, from December 1-12, 1997; and from March 16-April 3, 1998. In addition to the official reports of the Preparatory Committee, accounts of its work can be found in the following series of articles by Christopher Keith Hall: *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 Am.J.Int'l L. 177 (1997); *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 Am.J.Int'l L. 124 (1998); *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 Am.J.Int'l L. 331 (1998); and *The Six Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 Am.J.Int'l L. 548 (1998).

[26] General Assembly resolution 50/46 (11 December 1995).

[27] For a fuller analysis of the work of the Preparatory Committee, see Fanny Benedetti and John L. Washburn, *The International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, in Global Governance, 5, No. 1 (January-March 1999).

to achieving a successful diplomatic conference helped to keep the process on track. This strategy was maintained through the Rome Conference and Preparatory Commission, with equally successful results. The Bureau of the Preparatory Committee, composed of its officers and their appointees, also decided from the start to focus on the disposition of technical issues and to leave some of the most controversial political issues to be settled in Rome.

While the Coalition's impact at the Rome Conference has been the subject of consistent high praise from governments, the UN, the media and others, this influence resulted from a lengthy process of evolution. The steady growth of the Coalition, both in numbers of members and in scope of activities; its increasingly sophisticated political and diplomatic approaches to the negotiations, coordinated by the Coalition Secretariat; and the strengthening sense of solidarity among Coalition members from all regions of the world can literally be measured from session to session of the PrepCom.

In terms of numbers, from the initial planning meetings in 1994, when the author first proposed the idea of an NGO coalition, the Coalition grew from approximately 30 organizations at its first meeting in 1995, to 46 at the first PrepCom session, 76 at the second session, 106 at the third session, 175 at the fourth session, and over 300 by the fifth session.[28] By the start of the Rome Conference in June 1998, Coalition membership had exploded to over 800 organizations, with 236 of them accredited to participate in the conference.[29]

The scope of the Coalition's activities likewise broadened dramatically, both at the UN and around the world. Indeed, as the original group of NGOs had envisioned, the work of the Preparatory Committee became very technical. The Bureau started the first session by encouraging an in-depth discussion of the core issues of the proposed court, such as how the court would relate to national judiciary systems and how States would cooperate with the court, as well as how cases would be brought before the court. In response to the Bureau's call to begin drafting, delegations produced more than fifty formal proposals.[30] Starting with the second session, the Preparatory Committee broke into working groups, with as many as seven such working groups operating in any given session, and oftentimes more.[31]

1.4.1. Addressing the Question of Universality

The number of governments involved in the ICC process increased dramatically with the start of the PrepCom, jumping from 60 to over 120 delegations.[32] However, for smaller delegations, as well as for NGOs, the proliferation of small, *ad hoc* meetings made it difficult to

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[28] Numbers of Coalition members have been obtained from issues of the *Monitor*, which was published in July/August 1996 (Issue 1); October 1996 (Issue 2); January 1997 (Issue 3); May 1997 (Issue 4); August 1997 (Issue 5); November 1997 (Issue 6); Special Edition for the 52nd General Assembly; February 1998 (Issue 7); and April 1998 (PrepCom Six Special Edition). The dates of publication do not correspond directly with the dates of Preparatory Committee sessions, so the numbers reflected in the Monitors may not reflect exactly but do fairly approximate the size of the Coalition at the time of the Preparatory Committee sessions.

[29] William R. Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations,' in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results.* (Roy S. Lee ed., 1999).

[30] Mark Thieroff, *Setting a Date for the ICC Conference*, in *Monitor*, October 1996, p.1.

[31] The report of the Preparatory Committee notes the establishment of seven working groups: procedural matters, chaired by Silvia Fernández de Gurmendi (Argentina); composition and administration of the Court, chaired by Lionel Yee (Singapore); establishment of the court and its relationship with the United Nations, chaired by Sankurathripati Rama Rao (India); applicable law, chaired by Per Saland (Sweden); *ne bis in idem*, chaired by John Holmes (Canada); jurisdictional issues, chaired by Erkki Kourula (Finland); and enforcement, chaired by Molly Warlow (United States). Introduction & Draft Organization of Work, Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2, 1998). However, as time constraints became more of an issue, the Bureau encouraged the formation of small, *ad hoc* groups to revise texts for specific articles of the court's statute. Benedetti and Washburn, (1999), p. 8.

[32] William R. Pace, *Serious Progress Achieved at April ICC 'PrepCom,'* Coalition's *Monitor*, July/August 1996, p.1.

international court. Two opposite positions arose during the discussions. France was of the view that this problem could not be left to the national authorities. The only role of national courts is subscribed in and limited to article 58(2). This position was supported by Belgium, Italy, Japan and Malawi.

- Australia, Singapore and the United States, on the other hand, pointed out that if a person is arrested by national authorities, he should be able to apply for interim release to national courts. Furthermore, these States argued that some countries might encounter constitutional obstacles if there would be no role for national courts under article 59(3).
- Canada proposed article 59(3) could allow for two options, the first would require a state party to choose upon ratification: (i) that the application for interim release should be made to the pre-trial chamber or (ii) that applications for interim release should be made to a national court.
- Another solution, proposed by delegates from Canada and South Africa, would allow for dual jurisdiction over applications for provisional release, possibly with a conflict resolution mechanism and strengthening of the last sentence between brackets in 59(3).
- The Chair asked the United Kingdom to coordinate further informal consultations on 59 (3) and left the article pending.

- *Article 59(4) (determination of lawfulness of arrest warrant)*
  - Some delegations, including Australia, Belgium and Portugal, thought that Article 59(4) is superfluous and, therefore, can be deleted.
  - The U.S. agreed to be flexible regarding article 59(4).
  - The chair suggested that article 59(4) be discussed again in the session of Monday, June 22.

Article 60 (2)
Malawi was in favor of deleting the whole second sentence. The Chairperson stressed the similarity to article 58(l)(b) and suggested that the same wording be used. Austria mentioned that the obligation of periodical review is already stated in paragraph 3. A solution has not been reached.

2.6.2. Investigation and Prosecution Team Report dated 22 June 1998

Contents: Report on articles, 60, 61 and 54 held on 22 June 1998

Chairperson Silvia Fernández opened the morning session of the WG by discussing article 60 included in the section entitled Further Options for Articles 58-61 on page 95 of the Draft Statute.

Article 60
The main substance of the debate regarding this article is based on paragraphs 2, 3, 4, and 5, which include the Pre-Trial Chamber's power to review and rule on the release or detention of an accused person. The length of time in which the accused may be detained pre-trial was the main subject of debate.

Article 60 (1)
There where no further comments on paragraph (1) at this stage of the process.

Article 60(2)

- Malawi was in favour of deleting the entire second sentence. The chairperson stressed the similarity to article 58(l)(b) and proposed the same wording. Austria mentioned that the obligation of periodical review is already stated in paragraph 3 and along with Argentina made a proposal regarding the second sentence in paragraph 2. "If the PTC is satisfied that the conditions set forth in article 58(l)(b) are present the person shall be detained. Otherwise the PTC shall release the person, with or without conditions including conditions restricting the persons liberty." France was in favor of referring to paragraph 1 as a whole. Australia was of the view that it was more appropriate to refer only to (b) because this is the basis for the arrest warrant.
- Certain States including Spain were of the view that a specific maximum time limit needs to be set in order to protect the defendant from prolonged, unreasonable detention. Other States, such as France and Argentina argued that it is impossible to set such a limit for every case. The delegate of Japan, who also favored a specific time limit, proposed a compromise which allowed for some flexibility by placing a maximum limit in a footnote in the Rules of Procedure.

Following this intervention, the chairperson closed the discussion and will forward article 60 (3), (4) and (5) to the Committee of the Whole as they stand in the draft statute with the added footnote.

Article 61

This article deals with the confirmation of the charges before trial. Sweden introduced the article by explaining that the statute should include the main principles of this issue, and that the more detailed issues should be included in the Rules and Procedure. The Pre-Trial Chamber is obligated to hold a confirmation hearing in the presence of the accused within a reasonable period of time. The main question, as explained by Sweden, is whether there should be any exceptions regarding the requirement of the defendant's presence during such a hearing or during trial. This question of proceedings in absentia was the basis of the debate, discussed mainly in Paragraph lib). The bracketed section states: "unless the person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held in which case the person shall not be represented by council." Three major arguments ensued:

1. whether an in absentia proceeding was warranted under any circumstance;
2. how to identify when reasonable steps have been taken;
3. whether a defendant should be represented by counsel during an in absentia proceeding.

Most States agreed that there were extenuating circumstances which may warrant a trial in absentia. However, this brought about the question of how to define an accused person who has fled: one who has never come before the court at all, or one who has disappeared after the commencement of proceedings against him/her.

Article 54

Austria explained the new draft. The former version of article 54 is now divided in three different provisions (articles 54, 54 bis and 54 ter) without any substantial changes. The delegates were aware that the "free space" in paragraph 1 has to be left open. It will be completed with the results from the discussions of the team dealing with trigger mechanism and the ex officio power of the prosecutor.

- There was no discussion on *paragraph 1(a)*. Paragraphs 1(b) and 3(b) refer to article 15 which contains the principle of complementarity. Malawi was of the view that there is a contradiction between the responsibilities of the court and the prosecutor. In article 15 the

8. Right of the Prosecutor to Appeal Judgment of the Acquittal

3.16. Polish Network Report

Author: Malgorzata Tarasiewicz
Date Submitted: 4 September 1998

Organization

Founding organization
Amnesty International.

Commencement of Activities
Network activities began in February 1998.

Member organizations
- Stowarzyszenie na Rzecz Panstwa Neutralnego Swiatopogladowo, Neutrum, Warszawa,
- ELSA Poland, Europejskie Stowarzyszenie Studentow Prawa, Warszawa,
- Gdynia,
- ISNS Uniwersytet Warszawski,
- Katedra Praw Czlowieka i Prawa Europejskiego UMK,
- Sekeja Etyki P.T. Filozofieznej Pro-Femim, Warszawa,
- Instytut Progilaktyki Spolecznej i Resocjalizacji UW,
- Osrodek Praw Czlowieks Uniwersytctu Jagiellonskiego,
- Federacja na Rzecz Kobiet i Planowania Rodziny, Warszawa,
- Stowarzyszenic Sedziow Orzekajacych JUSTITIA,
- PSF Centrum Kobiet, Warszawa,
- Stowarzyszenic Euro-Atlantyckie, sekcja akademecka,
- Stowarzyszenic Mlodych Dziennikarzy POLIS, Warszawa,
- Warszawskie Stowarzyszenie PAX CHRISTI, Warszawa,
- Polski PEN CLUB, Warszawa,
- Lomza,
- Fundacja Centrum Praw Kobiet,
- UNHCR, Warszawa,
- La Strada - Fundacja Przeciwko Handlowi Kobietami, Warszawa,
- Warszawa,
- Stowarzyszenic "Profemina," Warszawa,
- Helsnska Fundacja Praw Czlowieka, Warszawa,
- Polskie Stowarzyzenie Edukacji Prawnej, Warszawa.

Organization that coordinates the Network
Amnesty International.

Primary responsibilities of the coordinator
- Reporting from PrepComs,
- Representing the Network (setting up and participating in meetings with government officials and members of the Polish delegation at the ICC Conference),
- Organizing and coordinating the Network meetings,
- Fundraising and contacts with the sponsors,

NGOs Call for the Recognition of the Primacy of the Judiciary

Statement to the Plenary Session by Patrick Baudouin, President of the International Federation of Human Rights (FIDH)

I have the honor, in my capacity as President of the International Federation of Human Rights (FIDH), to stand before you to present the opinion of the FIDH concerning the difficult question of the relationship between the Court and the Security Council.

In many developed and developing countries, and notable in France, the populations have expressed in many ways their desire to see the present processes of democratisation succeed and to see the rule of law and democracy re-enforced. Public opinions and civil societies have broadly demonstrated that they can no longer tolerate the judiciary being subjected to political control, and more generally can no longer tolerate State interventions, which destroy the independence of the judiciary, during investigations and prosecutions, which must be within the sole authority of the judiciary.

Patrick Baudouin, President of the International Federation of Human Rights (FIDH)

The Primacy of the Judiciary

While this movement for democracy is spreading widely, it would be contradictory to witness principles laid down here in Rome which would allow interference by the world's main powers, and namely the members of the Security Council, in the functioning of the proposed International Court. Consequently, we solemnly affirm that primacy of action must rest with the judiciary, in all of its functions, over political considerations. In other words, in conflict situations, the requirements of justice must be seen as absolute and fundamental conditions for the re-establishment of peace and reconciliation among people. The credibility, independence and legitimacy of the future Court would be destroyed if the Security Council could in each case, and upon the political decision of any government, paralyse the investigations undertaken by the Prosecutor or make impossible the continuation of any trial. In this regard, paragraph 3 of Article 10 of the current proposal (previously Article 23 of the ILC proposal) stated that, unless otherwise decided by the Security Council, the Court may not be seized with situations otherwise dealt with by the Council on the basis of Chapter VII of the Charter. We consider such a clause to be in total contradiction with the principles for the proper administration of international justice.

Credibility of the Court

Fortunately, it seems that such proposals, which would have allowed the permanent members of the Security Council to exercise their veto to oppose any investigations or trials which they might have considered contrary to their own interests, have been abandoned. Actually, where would be the credibility of the Court if a member of the Security Council had the power to control the Court's investigations? Such a situation would be catastrophic and unacceptable for an international civil society.

Nevertheless, the FIDH, as well as other international human rights NGOs, are far from being only unconstructive protesters. We do understand the political dimension of the exceptional discussions taking place here in Rome, and which might lead to a step forward for mankind. The requirement to repress the commission of universal crimes is based on non-derogatory moral imperatives; however we understand that this requirement may also have political and military repercussions, and are of direct concern to the people.

FIDH therefore considers it legitimate that your discussions include the complex dimension of diplomatic negotiations with the view to arriving at cease-fires or

IPS

NO PEACE WITHOUT JUSTICE

TERRA VIVA

ROME, JUNE 24, 1998 U.N. CONFERENCE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT N° 8

Big Fish Remain Free

Avoid Bosnia Tribunal's Pitfalls, UN Envoy Says

INSIDE

The International Criminal Court (ICC) must go beyond the efforts of the UN tribunals for the former Yugoslavia and Rwanda to prosecute top officials if it hopes to deter future atrocities, argued Bosnia's UN ambassador, Muhamed Sacirbey.

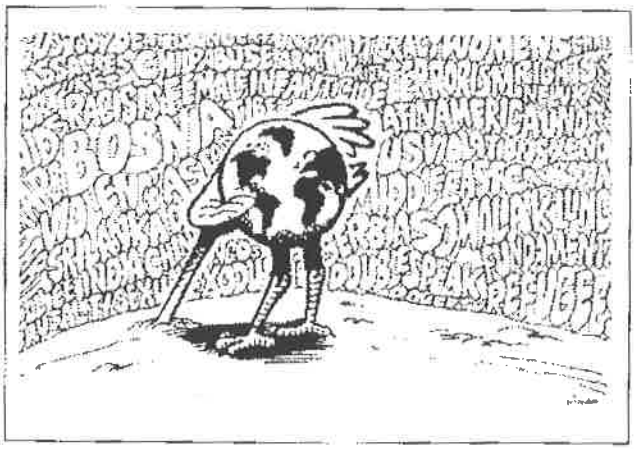
The Bosnian envoy told Terra Viva that, so far, the promise of the war crimes tribunal for the former Yugoslavia has not been realised because key indicted suspects are still at large. "The tribunal hasn't really succeeded in bringing to justice the highest political officials in the region responsible for genocide," Sacirbey argued.

"I'm not sure that the ICC would serve a useful deterrent function if it simply tries the lower-level suspects, and (tries) the highest-level suspects only when they are dead or out of power, like Pol Pot," he added.

In Bosnia's case, the UN ambassador has insisted for years that nations have proof that regional leaders were complicit in the atrocities in the Bosnian war, in which more than 200,000 people are estimated to have been killed. Yet many of those leaders have been thought useful to future peace negotiations and countries have been unwilling to turn in evidence against them, Sacirbey said.

The Bosnian government has particularly accused Yugoslav President Slobodan Milosevic of orchestrating the war effort in Bosnia-Hercegovina, but other governments - including the United States - have relied on Milosevic as a diplomatic counterweight to extremist nationalist forces in Serbia.

Sacirbey contended that what he claims is the "selective" gathering of data by some nations could also



pose a potential problem for the ICC. "At least some UN Security Council members might not be state parties" to the statute that is to create the Court, Sacirbey said. "Some states that may have the greatest capacity to obtain evidence through intelligence-gathering facilities might therefore not be parties."

Nor is that the only problem the ICC could inherit from the Bosnia tribunal. The current ICC conference at Rome, which has debated whether to include aggression as one of the crimes the Court might prosecute, shows the complexity of the debate over how aggression is defined, Sacirbey said.

"There is a much broader definition of aggression that applies now than the one that appears might be codified in the statute," the ambassador argued. "We cannnot support the idea of a very narrow definition of aggression, so that it only applies to a situation analogous to the Nazi invasion of Poland."

In modern times, he argued, more savvy leaders have been able to foment aggression in neighbouring countries without resorting to obvious invasions.

The Bosnia war is a case in point, he said, with the fledgling republic attacked by soldiers who belonged to or were paid by foreign countries - such as Gen Ratko Mladic, a paid soldier of the Yugoslav National Army - but who would claim to be members of Bosnian armed forces.

more on page 2

On the Record

NEW PROPOSAL WOULD REQUIRE US CONSENT FOR THE ICC TO PROSECUTE AMERICAN NATIONALS

US Launches Preemptive Strike on ICC Statute

July 8, 1998 - The United States government has launched its long-awaited preemptive attack against the international court that is beginning to emerge from the Rome Conference.

With ten days of the conference still remaining, and key elements of the text still undecided, David Scheffer, the US Ambassador for war crimes and head of the US delegation, has reportedly rejected a first attempt by the conference bureau to identify the elements of a compromise statute.

The attempt was made by Philippe Kirsch, chairman of the chief negotiating committee following a select meeting of 28 delegations on Sunday. In an effort to represent the tone of the meeting, and also force the pace of negotiations, Kirsch and the Bureau issued a brief three page summary. A copy has been obtained by ***On the* Record**.

During a meeting with Kirsch, on Monday, Scheffer reportedly protested against both the thrust of the Sunday meeting and the Bureau's summary and asked that more be done to accommodate American concerns. Specifically, Scheffer is said to have asked for the inclusion of a new provision that would require the consent of a state before the ICC could prosecute one of its nationals. This would be additional to provisions – already broadly agreed to by the conference - which would allow states to challenge the admissibility of a case before the court takes it up.

Following his meeting with Scheffer and with other delegations Kirsch went back to the drawing board and issued his second draft, which now forms the basis for the current discussion.

This paper is public and appears to be significantly weaker and more accommodating to the US than the Bureau's summary of the Sunday meeting. It concentrates on the court's jurisdiction, admissibility, and applicable law. These will define the court's relationship with states, which will in turn determine its effectiveness and ability to deter crimes.

DANGEROUS LOOPHOLE

Crimes (applicable law)

The Sunday paper proposed to retain aggression as a core crime of the ICC, albeit in a qualified manner. The Tuesday redraft allows for aggression to be dropped altogether.

War Crimes

The Sunday discussion paper stipulated that the court would have jurisdiction over war crimes "in particular" when committed as part of a plan or policy. In addition, the new draft includes a second option with a higher threshold, by substituting "only" for "in particular."

In what is taken to be a concession to the United States, the new draft proposes to outlaw attacks that might be expected to lead to civilian casualties, unless they might be part of a broader military exercise that would yield a clear direct "overall" military advantage. One NGO representative described this as introducing a "highly dangerous" loophole.

The Use of Weapons as war crimes

There has been intense discussion whether to list the use of indiscriminate weapons, such as nuclear and landmines, as war crimes. The Sunday draft identified two options, one of which would outlaw both nuclear weapons and landmines. Monday's draft has widened this to three options. One (drafted by NATO) makes no reference to indiscriminate weaponry and would be limited to weapons systems that are already banned. The second is much broader. It would ban weapons that are indiscriminate and would include nuclear, blinding lasers, and landmines. In both cases, it would be left to the assembly of states parties – not the court's judges – to decide whether new weapons systems are included in the future as they develop. A third option would basically reaffirm existing international standards.

Internal Armed Conflict

In what appears to be a major concession to several nonaligned and Arab governments, the new draft leaves opens the possibility that war crimes committed in internal armed conflict could be excluded from the ICC statute. While this is still the subject of debate, this possibility was not mentioned in the Sunday discussion paper.

Prosecutor

The Sunday paper listed three ways in which cases could be referred to the ICC: through the UN Security Council; by states; or by a prosecutor acting on his or her own initiative (*ex officio*). The new draft reinserts the option to drop the ex officio prosecutor altogether. This may indicate a weaker of support for the idea, which is considered essential by some NGOs.

Jurisdiction

Both drafts propose a compromise on whether and how states would be allowed to consent before the Court could take up a case. The vast majority of delegations feel that if a state ratifies the ICC statute, it should be bound by it. On Sunday, however, France reportedly insisted that a state should be able to "opt in" on cases taken up by the court, even if it has ratified the statute. To the surprise and alarm of many, this would apparently even include genocide and crimes against humanity. Many feel that this too is reflected in the bureau's latest draft, which says that states should be able to opt in for "one or more core crimes" as well as crimes already covered by existing treaties.

Both the Sunday discussion paper, and the new draft, omit a major proposal by Germany, to the effect that crimes against humanity, war crimes and genocide are already subject to universal jurisdiction – so the ICC would have jurisdiction over states that