

1. INTRODUCTION: THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS

William R. Pace⁵

Convenor, Coalition for the International Criminal Court

No doubt, many of us would have liked a Court vested with even more far reaching powers, but that should not lead us to minimize the breakthrough you have achieved. The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law. It is an achievement which, only a few years ago, nobody would have thought possible.

Kofi Annan

*United Nations Secretary General
Rome, 18 July 1998*

The Rome Statute of the International Criminal Court (Rome Statute)⁶ is extraordinary for many reasons, only one of which is the new permanent legal institution that resulted from its entry into force on 1 July 2002. The potential legacy of the Rome Statute and of the diplomatic process that fostered it is much broader. "Make no mistake about it," wrote *The Times of India* in an editorial on 1 August 1998 of the process that produced the Rome Statute, "this [was] international lawmaking of historic proportions."

For example, the Rome Statute continues to contribute to the clarification and expansion of many fields of international law, including humanitarian, human rights, administrative, criminal and comparative law. It is designed to address the lack of enforcement of international law, a dilemma that has undermined the international community's credibility because of the high human cost of the absence of enforcement. Perhaps most importantly, due to the principle of complementarity at the heart of the Statute, it has demonstrated the potential to galvanize national criminal justice systems to take seriously their responsibility to prosecute the crimes which fall under the International Criminal Court's (ICC) jurisdiction. National efforts to draft and pass domestic implementing legislation for the ICC raised questions locally and internationally both about the role of universal jurisdiction and about the effectiveness of current mutual legal assistance and extradition regimes, especially between different regions of the world. These discussions have led to greater consistency among national approaches to criminal justice and ultimately to more effective cooperation between States, opening the door to more national prosecutions of international crimes. Increasing vigilance at both the national and international level could effectively create a net from which those committing the most serious crimes would find it much harder to escape.

Beyond all of these reasons, there is one more that deserves mention. The Rome Statute does not serve as testament to the power and political will of a single State or even a handful of influential States. Rather the opposite is true: the contributors to the creation of the ICC are almost innumerable. From the renewed call for the Court, following World War II, through the campaign to ratify and implement the Rome Statute, literally thousands of individuals have

⁵ This introduction is a third updated and revised version of chapter 2.4. written by William R. Pace and Jennifer Schense in *The Rome Statute for an International Criminal Court: A Commentary*, edited by Antonio Cassese *et al*, Oxford University Press, 2002.

⁶ For a final and corrected version, see *Official Records: A/CONF.183/13(Vol.I)*

brought their own personal and professional skills to this effort.⁷ The constructive evolution of coordination among governments, and between governments, civil society and international organizations, and the influence of their cumulative contributions to the Court signal a significant success for this new approach to international diplomacy.

These developments could provide a compelling and effective methodology for addressing issues of peace and security in the post-Cold War international order, where inter-State conflict is no longer the norm, but instead where internal conflicts and massive peacetime violations take their highest toll on civilians, particularly women and children. The development of the Rome Statute reflects the increasing centrality of the individual in international law, and in particular an international consensus about the accountability of individuals as perpetrators and the need to address the suffering of individual victims. The placement of the individual at the center of the enforcement of international law and the creation of institutions, including the ICC, which can actually carry out that enforcement are vital aspects of what has been described as "human security."⁸

In this Chapter, we will examine the contributions of civil society to the development of the Rome Statute, in the context of the coordination between governments, civil society and international organizations, which has been described as "the new diplomacy."⁹

1.1. Civil Society Contributions to the Rome Statute

Non-governmental organizations (NGOs) made substantive contributions to efforts to create the International Criminal Court even before the establishment of the Coalition for an International Criminal Court (Coalition) in February 1995. These contributions were fostered by a working environment at the United Nations that suddenly evolved from one of obstruction to one of growing consensus and momentum.

⁷ The first formal proposal for an international criminal court came from Gustave Moynier, one of the founders of the International Committee of the Red Cross, in 1872. He was appalled by the atrocities committed by both sides in the Franco-Prussian war two years earlier in violation of their obligations under the first Geneva Convention of 1864 to protect wounded soldiers and the failure of both governments to punish those responsible. The court he proposed would have been called into being each time there was a war and it would try persons accused of violating the 1864 treaty. See Gustav Moynier, *Note sur la création d'une Institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève*, Comité International de la Croix Rouge, Bulletin international des Sociétés de secours aux militaires blessés, No. 11, April 1872. For a history and appraisal of the proposal, see Christopher Keith Hall, *The first proposal for a permanent international criminal court*, Int'l Rev. Red Cross, No. 322, 57 (1998). Unfortunately, Moynier's proposal was criticized by leading international scholars of the day and the idea of a permanent international court was not revived until after the First World War. There were numerous proposals by NGOs and academics, such as Vespasian Pella and Henri Donnedieu de Vabres, for a permanent international criminal court during the inter-war period, including two linked treaties proposed by France and adopted by the League of Nations which would have established a permanent international criminal court to try terrorist offenses, but they never entered into force. For the history and texts of all of these proposals, see Memorandum by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/7/Rev. 1 (1949).

⁸ Human security is the central theme of the foreign policies of the governments of Canada and Norway and has grown in prominence as a concept in multilateral fora as well. Canadian Foreign Minister Lloyd Axworthy defined human security in the following terms: "It is, in essence, an effort to construct a global society where the safety of the individual is at the centre of international priorities and a motivating force for international action; where international humanitarian standards and the rule of law are advanced and woven into a coherent web protecting the individual; where those who violate these standards are held fully accountable; and where our global, regional and bilateral institutions—present and future—are built and equipped to enhance and enforce these standards." *Interview with Minister Axworthy*, Canada World View, Special edition (Fall 1999).

⁹ The term "new diplomacy" is one also credited to Lloyd Axworthy, who used it in a statement in support of the International Criminal Court in April 1998 during a conference at Harvard University. "The New Diplomacy: The UN, the International Criminal Court and the Human Security Agenda," Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to a conference on UN Reform at the Kennedy School, Harvard University (April 25, 1998).

The General Assembly first authorized the UN International Law Commission (ILC) in 1947 to develop a Code of Offenses Against the Peace and Security of Mankind and, as a result of an initiative by France, a statute for international criminal jurisdiction.¹⁰ However, work on an international criminal court lacked momentum during much of the Cold War. In particular, it did not progress significantly because of later division of this work among three separate tasks: development of a definition of the crime of aggression, a code of crimes, and a statute for a court to enforce that code.¹¹

Throughout the 1980s, representatives of the German government and others repeatedly called at the General Assembly for the UN to set up such a court. In 1987, Soviet Premier Mikhail Gorbachev raised the need for an international criminal court to address crimes of terrorism both in a speech to the UN General Assembly, the UN body which regularly reviews the work of the ILC, and in a letter to the UN Secretary General.¹² However, an earthquake in Armenia forced President Gorbachev to focus his attention on domestic matters and the Soviet delegation did not follow through with the proposal. The explosion of Pan Am flight 103 over Lockerbie, Scotland in 1988 heightened the interest in international prosecution of terrorism. However, the tide toward an international criminal court only began to turn in 1989, when A.N.R. Robinson, then Prime Minister of Trinidad and Tobago, led 17 States in calling for an international court to prosecute major drug traffickers. These Caribbean, Latin American and Small Island States sponsored a resolution through the Sixth (legal) Committee of the General Assembly, mandating the ILC to draft a statute for a court for review by the General Assembly.¹³ The General Assembly resolution which resulted in December 1989 requested the ILC, "when considering at its forty-second session the item entitled 'Draft Code of Crimes against the Peace and Security of Mankind', to address the question of establishing an international criminal court or other international criminal trial mechanism" to address a range of crimes, including trafficking in narcotic drugs. The General Assembly committed itself to readdressing the question of an international criminal court in its forty-fifth session, when examining the report of the ILC.¹⁴

A number of international NGOs and independent experts followed the deliberations of the Sixth Committee, promoting the idea of an international criminal court through publications and interactions with government delegates. These included the Nuclear Age Peace Foundation, the American Bar Association,¹⁵ the World Federalist Movement, the International Commission of

¹⁰ On May 13, 1947, Henri Donnedieu de Vabres, one of the judges of the Nuremberg Tribunal and one of the authors of several proposals for a permanent international criminal court in the period before the Second World War, as France's representative on the UN General Assembly's Committee on the Progressive Development of International Law and its Codification, proposed the establishment of a permanent international criminal court, and submitted a memorandum on the subject two days later. Memorandum submitted by the delegate of France, Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction, UN Doc. A/AC/10.10/21 (1947).

¹¹ A decision had been taken to split the efforts into drafting a code of offenses first, before drafting a statute for a court. The International Law Commission submitted a draft code of offenses to the General Assembly in 1954, but it decided to take no further action until a definition of aggression could be agreed. This third avenue led two decades later to agreement on a definition in General Assembly Resolution 33/14 of 1974, but the International Law Commission did not return to work on a draft code until 1980 when it began a decade of inconclusive work on this instrument until 1991. For a fuller introduction to the work of the ILC, see M. Cherif Bassiouni, 'The Journey to a Permanent International Criminal Court,' in *International Criminal Court - Compilation of United Nations Documents and Draft ICC Statute Before the Diplomatic Conference* (M. Cherif Bassiouni ed., (1998), p. xvii.

¹² Amnesty International, *The International Criminal Court: Making the Right Choices-Part I*, January 1997, p. 5 (citing John Quigley, "Perestroika and International Law," 82 Am. J. Int'l L. 788 (1998).)

¹³ The resolution was sponsored by Antigua & Barbuda, Bahamas, Barbados, Belize, Comoros, Costa Rica, Grenada, Guyana, Jamaica, Libya, Papua New Guinea, St. Kitts and Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, Trinidad & Tobago, and Vanuatu. Bryan F. MacPherson, *An International Criminal Court: Applying World Law to Individuals*. (Center for U.N. Reform Education, 1992), p. 8.

¹⁴ General Assembly Resolution 44/39 (4 December 1989).

¹⁵ MacPherson, p. 8.

Jurists and the International Association for Penal Law, as well as a number of committed individuals, among them former Nuremberg prosecutor Benjamin Ferencz, M. Cherif Bassiouni,¹⁶ R.K.Woetzel, Gerhard Muller, Oscar Schachter and then European Commissioner Emma Bonino.¹⁷

In addition, NGOs which actively supported the establishment of *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) in 1993 and for Rwanda (ICTR) in 1994 found a natural extension of their work in the development of the draft statute for an international criminal court. After the formation of the ICTY, the General Assembly felt a renewed impetus for action, calling for a completed draft statute for a permanent court from the ILC by July 1994.¹⁸ The ILC submitted a draft statute to the Sixth Committee by July 1994 and recommended that the General Assembly convene a diplomatic conference to finalize and adopt the statute. A number of supportive States engaged in the debate proposed a resolution supporting the ILC recommendation for a diplomatic conference. However, in the face of opposition from three permanent members of the Security Council (France, the United Kingdom and the United States), these States agreed to call instead for an Ad Hoc Committee on the Establishment of an International Criminal Court at the UN to further study issues relating to an international criminal court. Despite last-minute efforts by the chair of the Sixth Committee to prevent this compromise, the resolution adopted did finally call for an Ad Hoc Committee.¹⁹

NGOs following the work of the Sixth Committee expressed considerable dismay at this development, fearing that the draft statute would be bogged down in endless discussion in the Ad Hoc Committee. They feared that a unique opportunity had been lost in part because of a lack of NGO coordination in advocating for the ILC's bolder approach. This recognition was one of the factors that led to the creation of the Coalition for an International Criminal Court.

1.2. Formation of the Coalition

The genesis of the Coalition actually dates back to early 1994, when the World Federalist Movement (WFM) arranged a conference call on March 23 of that year to brief NGOs following the UN discussions on the current status of the proposed court and to develop NGO strategy for crimes of aggression, human rights violations, and transborder crime. The participants on the call agreed that NGOs needed to work together at the Sixth Committee in the fall of 1994, when it would be examining the ILC's draft statute. During the Sixth Committee discussions, the author of this introduction arranged a small meeting of half a dozen NGOs, including Amnesty International, Parliamentarians for Global Action, Lawyers Committee for Human Rights, and Lawyers Committee on Nuclear Policy, under the aegis of the International NGO Task Group on Legal and Institutional Matters,²⁰ to discuss how to coordinate strategy to ensure progress towards the establishment of a permanent international criminal court. In particular, the NGOs addressed the immediately pressing issue of whether the General Assembly should call for a diplomatic conference or establish a working group to study the question. The participants at the meeting agreed to recommend to their organizations to follow up on the author's suggestion to establish an informal global coalition of NGOs to work

¹⁶ Amnesty International, *supra* note 12, p. 5.

¹⁷ These individuals' contributions were acknowledged by President Robinson in a May 1998 statement. 'Statement by H.E. Arthur N.R. Robinson, the President of the Republic of Trinidad and Tobago,' in *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (M. Cherif Bassiouni ed., 1998).

¹⁸ General Assembly Resolution 48/31 (9 December 1993).

¹⁹ General Assembly Resolution 49/53 (9 December 1994). The chair, Ambassador George Lamptey of Ghana, took the likely unprecedented action of stepping down from the dias to speak on behalf of his own delegation to reintroduce the original proposal of the supportive States for a Diplomatic Conference. His action was opposed by a no-action motion by Norway and the 'compromise' resolution was passed instead.

²⁰ INTGLIM was formed by William R. Pace around the Earth Summit of 1992.

for the prompt establishment of the Court. In this, the participants were inspired by the success of the NGO coalitions that worked on the environment, the advancement of women, disarmament, and especially the International Campaign to Ban Landmines.

Further informal discussions between the author and Amnesty International (AI) concerning the mandate and working methods of the proposed coalition led AI to write to several dozen NGOs on 16 January 1995, encouraging them to attend an organizing meeting for the Coalition in the latter half of February. The letter stated that AI recognized "that each participant will have different perspectives on the draft statute, but we believe that it will be possible to find effective ways that non-governmental organizations can work together on shared goals." Above all, the interest was to avoid the tensions which so often led to the break-up of NGO coalitions by keeping the mandate of the coalition as simple as possible.

The Coalition was formed at that organizing meeting on 25 February 1995, before the start of the work of the Ad Hoc Committee, by a group of international NGOs which were planning to follow the Committee's work. By the end of the meeting, the thirty or more NGOs present agreed to form a coalition and asked WFM to serve as the secretariat, with the author as Convenor of the Coalition.²¹ Early Coalition members included Amnesty International, Fédération International des Ligues des Droits de l'Homme, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, and WFM.

What brought these NGOs together were three central conclusions that would prove to be critical to the work of the Coalition. The first was the conclusion reached by NGOs observing the Sixth Committee, that given the obstacles confronting the successful creation of a court, it might not happen at all if NGOs did not pool their political strength and expertise. Second, if the effort was to proceed, it was clear that it would quickly grow technical in nature and would expand to touch upon many areas of relevant international law. Therefore, following and contributing to every facet of work on the court would be beyond the reach of almost every individual NGO, no matter how large or influential. Third, these NGOs also recognized that many States would have to be integrally involved and would have to support consistently the effort to create the court, if the resulting institution were to be as strong and independent as possible. Establishing and maintaining working relationships with representatives of so many States would again stretch the resources and capacity of any single NGO. These three conclusions highlighted the need for NGOs to coordinate their efforts, prompting them to form the Coalition.

1.3. The Coalition at the Ad Hoc Committee

The Ad Hoc Committee met twice in 1995, from 3-13 April and from 14-25 August. The Ad Hoc Committee has often been praised for its success in sparking the momentum that led to the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) and eventually to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). Despite the initial fears of NGOs that the Ad Hoc Committee would flounder without a focused mandate, the Committee proved to be a forum in which many government delegations could become familiar with the concept of an international criminal court and issues relating to its creation, even though they did not engage in substantive negotiations to resolve differences of opinion amongst

²¹ William Pace, *Third Session: The organization of the Court. The International Campaign in support of an ICC*, in *Mediterranean Journal of Human Rights (Towards the Establishment of a Permanent International Criminal Court)*, vol. 2, no. 1, p. 153 (1998).

themselves.²² Many delegations came with few formal instructions and with an open mind, and were quickly infused with a strong sense of historic opportunity, which they came to share with their NGO counterparts.²³ This sense of optimism and camaraderie was important in the face of two expectations on the part of a number of influential States (most prominently including the permanent members of the Security Council or P-5): that delegates would back away from the court when they recognized the potential for loss of national sovereignty to a new institution, and that they would be overwhelmed by the tremendous amount of work that completing a statute would require.

The small group of supportive States that had acted in concert during the sixth committee deliberations continued to work together. This group of approximately six or seven States at the start of the Ad Hoc Committee grew to include close to twenty like-minded States by the end of the year, including Argentina, Australia, Austria, Canada, Denmark, Egypt, Finland, Germany, Greece, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Singapore, South Africa, Sweden, Switzerland and Trinidad and Tobago. These States coalesced around a very specific initial goal: to advance the negotiations in the face of P-5 and other efforts to sidetrack the process by obtaining a recommendation of the Ad Hoc Committee that the General Assembly create a preparatory committee, with a view towards establishing a date as soon as possible for a diplomatic conference. The purpose of the Ad Hoc Committee was to examine the feasibility of a formal negotiation process and these States were determined to encourage the conclusion that a formal negotiation process leading to a diplomatic conference should indeed follow the Ad Hoc Committee. This was a view shared by the Coalition.

The core membership of what came to be called the Like-Minded Group of States (LMG) emerged as early debates revealed similarities among delegations on key issues, including the court's jurisdiction and how that jurisdiction would be triggered, and what should constitute the statute's core crimes. This process was facilitated by the decision of the Ad Hoc Committee Chair Adriaan Bos (the Netherlands) to organize the work of the Committee so that delegations were asked to comment on each individual issue in the draft ILC statute. This process helped the LMG to identify those delegations that were taking common approaches to issues in the statute. It should be noted that Mr. Bos is one of the individuals whose contributions were indispensable to the final achievement. He was uniquely able to maintain the trust and support of the P-5, the LMG, and other governments for three and a half years.

The original LMG members, coordinated by Canada, informally recruited new members, inviting delegations to meetings at the Canadian mission to discuss the substance of the statute, based on the interventions of those delegations at the Ad Hoc Committee. Other interested delegations approached the LMG directly and asked to be included. While the format of the Ad Hoc Committee's work did not require this group to develop agreed principles or minimum positions on the substance of the statute, the growing sense of consensus within the Ad Hoc Committee fostered development of the LMG and laid the foundation for future networking and joint action among delegations and with NGOs.

²² M. Cherif Bassiouni, 'Observations Concerning the 1997-1998 Preparatory Committee's Work,' in *The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee and Administrative and Financial Implications* (M. Cherif Bassiouni ed., 1997), p. 5, 9.

²³ A number of factors have been cited by Coalition members as having been critical to the productivity of the Ad Hoc Committee, as well as to the rest of the ICC process. Among them are: the composition of the delegations themselves; the optimism and fresh viewpoints of the younger delegates who were often sent to participate in lieu of more senior representatives; the desire of the more senior representatives present to cap their careers with a substantive contribution to the development of international law; the familiarity of many representatives of defense ministries with international humanitarian law through their contacts with the Red Cross Movement; and the practical rather than political outlook of justice ministry representatives, who borrowed from the frameworks guiding their own legal systems as models for the ICC. All of these factors highlight the crucial and to some degree unquantifiable human element which came to affect the process.

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

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

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.

follow, let alone contribute to work on the draft.³³ To a certain degree, this also proved to be true for work conducted between PrepCom sessions, at informal intersessional meetings for the review and consolidation of the PrepCom's work.³⁴ NGOs, the United Nations, and many governments shared concerns about encouraging more universal participation in the ICC process and undertook serious efforts to ensure that smaller countries would be not only present but active in the PrepCom and the Rome Conference.

Members of the Coalition set about addressing the need for universal participation in three ways in particular. First, the Coalition through its members around the world engaged in direct dialogue with governments in capitals, encouraging them to participate actively in the ICC process. This dialogue included the provision by the Coalition of summary reports of ongoing work at the PrepCom, summaries that also proved useful to delegates in attendance at the PrepCom, when returning or reporting back to their capitals and when seeking support and instructions from their governments.

Second, NGOs produced expert analyses of various aspects of the Draft Statute for every session of the PrepCom and throughout the Rome Diplomatic Conference.³⁵ Among the Coalition members who consistently produced papers were Amnesty International, the European Law Students Association (ELSA), FIDH, Human Rights Watch, ICJ, the Lawyers Committee for Human Rights, Redress, No Peace Without Justice, Equality Now, WFM and the International Association for Penal Law. The Coalition Secretariat also produced a regular newsletter, the *International Criminal Court Monitor* (hereafter *Monitor*), which included articles by NGO representatives and government delegates, examining issues pertinent to the work of the Preparatory Committee. Government delegates and UN Secretariat officials and specialists gradually came to expect that NGOs would produce papers on issues within their own areas of expertise and that they would make these papers widely available both to NGOs and to delegates. For all delegations but especially for smaller delegations, which often did not have sufficient members to cover all aspects of the Preparatory Committee's work, it was tremendously helpful to have additional sources of information, summarizing relevant international law and practice, clarifying different government positions on issues, and setting forth, in a succinct way, the options from which delegates had to choose. NGOs thereby provided a vital service to participants in and observers of the Preparatory Committee and this work was the basis for all other activities in which NGOs engaged.

This work was supported by the division of labor among Coalition members, who participated in caucuses organized in cooperation with the Coalition Secretariat to address specific issues in greater depth. These caucuses included the Women's Caucus, which eventually became a member of the Coalition's Steering Committee; the children's caucus, which has more recently taken on a life of its own as the Children's Issues Steering Committee; the faith caucus, the peace caucus and the Victims Rights Working Group. Another group, the International Criminal Defence Attorney's Association, resulted from a call in May 1997 for the creation of a network of lawyers to address the needs of the accused and of criminal defense attorneys, in particular in light of experiences at the ICTY and the ICTR.³⁶ The caucuses utilized the *International Criminal Court Monitor*, as well as their own papers, to transmit their concerns about

³³ "Many of the drafting meetings and informal meetings took place early in the morning or late at night, outside the time allocated for formal PrepCom meetings. As these successfully progressed, delegates of smaller countries, together with many representatives of civil society, were left wandering the corridors, unable even to follow the constantly changing schedule of meetings." Benedetti and Washburn (1999), p.12.

³⁴ Intersessional meetings were held from July 10-14, 1996 in Siracusa, Italy; and from May 29-June 4, 1997 in Siracusa; from November 16-22. In addition, the Preparatory Committee Bureau met from January 19-30, 1998 in Zutphen, the Netherlands to consolidate the various draft texts produced during two years of PrepCom meetings. A final meeting took place in Courmayeur, Italy from May 6-9, 1998 to allow the newly nominated Bureau of the diplomatic conference and the Bureau of the Preparatory Committee to prepare for the diplomatic conference.

³⁵ Many of these contributions are listed in the *Timeline* section before this chapter.

³⁶ Elise Groulx, *Call for an International Criminal Defence Attorney's Association*, *ICC Monitor*, May 1997, p. 4.

particular issues to other NGOs and to government delegations and to suggest possible approaches to addressing those concerns. With separate caucuses taking the lead in their areas of specialization, the Coalition as a whole was capable of contributing to the work of the Preparatory Committee along a greater range of subjects and with a greater degree of expertise.

Third, a number of NGO experts who were interested were eventually invited to join their own governments' delegations. This was true for the delegations of Canada, Australia and Switzerland, among others. In addition, some NGOs and foundations, and governments through a UN trust fund established in 1997, provided critical financial support to enhance participation of smaller countries in the process.³⁷ For example, the John D. and Catherine T. MacArthur Foundation financed a project of the International Criminal Justice and Weapons Control Center of DePaul University, which funded delegates' participation in the Preparatory Committee and the Rome Conference.³⁸ Another Coalition member, No Peace Without Justice, eventually organized a technical assistance program which provided experts for the delegations of Bosnia and Herzegovina, Trinidad and Tobago, Sierra Leone, Senegal, Burundi, Republic of Congo, and Dominica to the Rome Conference and for the delegations of Bosnia and Herzegovina, Trinidad and Tobago, Benin, Burundi, Thailand, Sierra Leone and Senegal for the Preparatory Commission.³⁹

1.4.2. Practicing Diplomacy at the United Nations

The increased scope of the Coalition's activities also reflected a growingly sophisticated understanding of the political and diplomatic atmosphere of the UN negotiations. The evolution of the Coalition in this respect paralleled the development of the LMG and both could to some degree attribute their increasing cohesiveness to each other's influence. The LMG grew throughout the Preparatory Committee, from close to 20 States at the start to forty-two in December 1997.⁴⁰ By the time of the Rome Conference, the LMG included nearly sixty States.⁴¹

The Coalition continued to meet with governments in a room at the UN generally secured on their behalf by a member of the LMG. Work with the LMG became much more focused and more regular, as the LMG began to confer closely on the production of proposals and on their strategies for plenary debates, and as the Coalition and the like-minded used their meetings together to consult on specific technical developments in the draft statute.⁴² The demand by delegations for this technical expertise was met by Coalition members eager to have a voice in the drafting process. At the same time, the Coalition pushed the LMG to examine critically its role in drafting and to reach for the greater cohesiveness that would strengthen the LMG's hand at the Preparatory Committee and beyond. The result of this interaction was the informal

³⁷ The United Nations trust fund was established as requested in General Assembly Resolution 51/207 (December 17, 1996) and acknowledged in General Assembly Resolution 52/160 (December 15, 1997).

³⁸ For the Rome Diplomatic Conference, this project funded the participation of delegates from Bangladesh, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Comoros, Djibouti, Ethiopia, Gabon, Guinea, Guinea-Bissau, Haiti, Lesotho, Malawi, Mozambique, Nepal, Niger, South Africa, Tanzania and Yemen. M. Cherif Bassiouni, 'Author's Preface,' in *The Statute of the International Criminal Court: A Documentary History*, v, vii (M. Cherif Bassiouni ed., 1998).

³⁹ Thanks to Marco Perduca of No Peace Without Justice for providing this data.

⁴⁰ According to one government source, the LMG in December 1997 consisted of the following States: Argentina, Australia, Austria, Belgium, Brazil, Brunei, Canada, Chile, Costa Rica, Croatia, the Czech Republic, Denmark, Egypt, Finland, France, Ghana, Greece, Hungary, Ireland, Italy, Latvia, Lesotho, Liechtenstein, Malawi, the Netherlands, New Zealand, Norway, the Philippines, Portugal, the Republic of Korea, Samoa, Singapore, Slovenia, the Solomon Islands, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, the United Kingdom, Uruguay and Venezuela.

⁴¹ The evolution of the LMG from a few states at the Ad Hoc Committee to the nearly sixty members in Rome was gradual and the structure of the group remained informal, so therefore the membership list cannot be taken as official. *Like-Minded A to Z*, *Rome Monitor*, July 3, 1998, at 1. Sweden was erroneously omitted in this list.

⁴² In addition to more formal meetings at the UN, Germany, Finland or Denmark began a tradition of hosting a luncheon meeting for the Coalition, a tradition which evolved into a LMG-Coalition meeting and which continued through the Rome Diplomatic Conference and the Preparatory Commission. The Coalition and the LMG take this opportunity to jointly evaluate the meeting's progress and to share their concerns with each other.

adoption at the end of 1997 by the LMG of six principles to guide the LMG's work. These principles were to ensure the independence of the prosecutor and to secure the independence of the Court generally and from the Security Council in particular, to extend the inherent jurisdiction of the Court to cover all core crimes, to guarantee the full cooperation of States with the Court, to give the Court the final decision about the ability of national judicial systems to proceed with potential cases, and to achieve the successful completion of the expected diplomatic conference.⁴³

In this respect, it is interesting to note that NGOs have sometimes been able to contribute to the effectiveness of the LMG in ways that would have been more politically difficult for its members. As the Rome Conference approached, Coalition Steering Committee members expressed concern about the need to ensure that the LMG committed the strongest possible diplomatic leadership to the process. It was, after all, essential for the successful conclusion of the conference that the LMG remain true to its principles, especially in the face of consistent high-level pressure from the US President and Secretaries of State and Defense, as well as from other governments which essentially opposed the court.

In March 1998, Kenneth Roth (HRW) and the author met with Canadian Foreign Minister Lloyd Axworthy (as the titular leader of the LMG) to raise this concern. Coalition intervention was likely a factor contributing to the Canadian government's decision to send Ambassador Philippe Kirsch to the Rome Conference as the head of the Canadian delegation. Kirsch brought singular diplomatic skills to the Rome Conference, based on a wealth of experience leading multilateral negotiations, including his previous chairmanship of the UN General Assembly's Sixth Committee; the UN Committee that drafted the 1994 Convention for the Safety of UN and Associated Personnel; the UN Committee that prepared the 1997 Terrorist Bombings Convention, the 1999 Terrorism Financing Convention and a Nuclear Terrorism draft agenda and the Drafting Committee of the 26th International Conference of the Red Cross and the Red Crescent in 1995. Only Preparatory Committee Chair Adriaan Bos's sudden illness prevented Ambassador Kirsch from leading the LMG, as he was instead chosen to take Adriaan Bos's place and chair the Committee of the Whole at the Rome Conference.

It is also important to note two other important relationships that the Coalition established during the Preparatory Committee: one with the UN Secretariat and in particular with the Office of Legal Affairs (OLA), and the other with the Bureau of the Preparatory Committee. OLA played a central role in the ICC process, providing technical assistance and conference support to the Bureaus of the Preparatory Committee and of the Rome Conference, and continued to play that role for the Preparatory Commission's Bureau. At the start of the second Preparatory Committee session, a few delegations challenged the presence of NGOs. The UN Secretariat and the Preparatory Committee Bureau addressed this question in a closed plenary session, which decided to confirm the right of NGOs to have access to the Preparatory Committee. This included access to plenary and formal working group sessions and the right to distribute NGO materials and to meet with delegates on the floor of the conference room before and after meetings. This experience established the Coalition as a legitimate participant and established a conduit for communications and the development of mutual trust between the Coalition and the OLA, a section of the UN Secretariat that did not have much previous experience working with NGOs. This breakthrough was to be the basis for future consultations between the Coalition and the UN Secretariat, especially at the Rome Conference.

The Coalition also met regularly on a formal basis with the Bureau of the Preparatory Committee and consulted informally with Bureau members throughout all of the sessions.

⁴³ Benedetti and Washburn (1999), p.21. Some sources, including the Benedetti/Washburn article, list seven principles, including and then to create promptly an independent and effective court. This may perhaps be assumed to be implicit in those lists that include only six, as it is the desired result of the ICC process.

Coalition materials were made available to Bureau members as well as to the delegates, facilitating substantive interchanges between Coalition members and the Bureau. Bureau members generally came to view NGO representatives as additional resources upon which the Bureau could rely in encouraging cooperation among delegations and international organizations and in addressing procedural matters at the Preparatory Committee. These exchanges of views opened the door to a constructive relationship between the Coalition and the Bureau of the Committee of the Whole at the Rome Conference.

1.4.3. Reaping the Benefits of Increased Global Participation

As both the LMG and the Coalition continued to grow, membership in both groups from countries of the Global South grew as well.⁴⁴ This was important to members of both the LMG and the Coalition who feared that any perception of the court as a project of northern countries and international NGOs would diminish the universality of the court. For the LMG, inclusion of more States meant addressing issues that were important to new members and to a large degree this was accommodated. However, some delegates from the Global South, especially those involved from early on, expressed frustration with the evolution of the LMG's focus. For example, it seemed clear to most from as early as 1997 that the court's jurisdiction would likely not include crimes relating to drug trafficking, even though this was the impetus for Trinidad and Tobago to raise the idea of the court at the General Assembly in 1989. There simply was not the broad-based consensus among participating States necessary to keep these crimes on the agenda. This was an issue that Trinidad and Tobago was to raise at the Rome Conference in a bid to draw attention to a serious problem for many smaller States, whose criminal judicial systems were simply overwhelmed by the financial and political resources of organized crime.⁴⁵ Other delegations expressed similar sentiments about crimes of terrorism.⁴⁶

For its part, the Coalition included a tremendous number of NGOs from the Global South through outreach at the national and regional level around the world. The activities of the Coalition in this regard are amply documented in the *International Criminal Court Monitor*: Work in this two-year period of time was conducted in Argentina, Australia, Bangladesh, Belgium, Botswana, Costa Rica, Croatia, Denmark, Ethiopia, France, Guatemala, Hungary, Iceland, India, Kenya, Morocco, Nepal, Nigeria, the Pacific, Peru, Russia, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Turkey, Uganda, Uruguay and the US--to name a few of the sites of major initiatives. In effect, Coalition members were active in every region, in over 80 countries of the world. The activities they undertook were as wide-ranging and diverse as public seminars and debates, street action, petitions to members of parliament, work with media, book fairs, meetings with embassy officials and with representatives of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and letters to governments. Coalition members produced publications in Arabic, Croatian, Dutch, English, French, Hindi, Italian, Nepali, Polish, Romanian, Spanish and Turkish, to mention a few languages.

⁴⁴ The term "Global South" is used primarily to refer to countries of Latin America, Africa, Asia and the Pacific. It is partially but not completely interchangeable with the term "developing countries."

⁴⁵ Statement delivered by the Honorable Ramesh Lawrence Maharaj, Attorney General of the Republic of Trinidad and Tobago to the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, June 15, 1998.

⁴⁶ The head of the delegation of Mozambique noted publicly during the Rome Conference that the Southern African Development Community supported the inclusion of terrorism crimes and could not understand why they were not included. *Southern Africa Wants Terrorism in Statute*, in the Rome edition of the *Monitor*, June 29, 1998, see Appendix. States did agree to the inclusion of a resolution in the Rome Conference's Final Act, which recommends that a future Review Conference "consider the crimes of terrorism and drugs crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court." Resolution E, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, UN Doc. A/CONF.183/10, p. 7 (reissued for technical reasons).

Just as important as the work at the national level were the efforts of the Coalition to bring the influence of these civil society groups to bear upon the PrepCom process. The Coalition Secretariat provided financial assistance to as many groups as possible to ensure a fair representation of the Coalition's membership at the Preparatory Committee. These NGO representatives met regularly with delegates from their own countries as well as from their regions. These interactions allowed all Coalition members to clarify their understanding of substantive positions taken by many different delegations, and to raise alternate viewpoints with them. The Coalition as a whole was thus able to gain a more nuanced view of the Preparatory Committee proceedings, based on constructive exchanges with more delegates. At the same time, government delegates from the Global South, some of whom felt that their voices were not being heard at the Preparatory Committee, appreciated that their views were being taken into account.⁴⁷ For Coalition members, the concurrent sense of solidarity and momentum which they experienced through these opportunities to engage with their fellow members from around the world was also a sign to the Coalition Secretariat that its efforts to help ensure universal participation were succeeding.

Legally and financially, it should be noted, the Coalition and its Secretariat is a project of WFM. Most of the funding for the work of members of the Coalition come from each organization. The Secretariat's funding for its work and for subsidizing participation of groups and experts from all regions and sectors has been very diverse. Initially, WFM provided most of those funds. Later, Coalition funding came from in-kind support from members, from private foundations, including the Ford and MacArthur Foundations, from the European Union, and from like-minded governments.⁴⁸ CICC staff, mostly young lawyers and interns, grew along with the budget, which reached hundreds of thousands of dollars in 1997 and more than a million in 1998. The funding enabled Coalition activities worldwide. These grants, government grants included, were provided to the Coalition with no conditionalities or strings attached and the Coalition has never been the subject of undue influence from government donors.

1.4.4. Establishing Principles for the Treaty Conference

The mechanisms for cooperation described above allowed the LMG and the Coalition to focus on a number of substantive issues of shared concern. The first and most obvious was the need to set a date for the diplomatic conference, since the resolution establishing the Preparatory Committee did not. For like-minded delegations and NGOs concerned about the possibility of foot-dragging by hostile States, it was clear that setting a date for the diplomatic conference as a deadline for the Preparatory Committee would greatly help to accelerate the momentum of the Preparatory Committee's work. Coalition members in New York and in capitals encouraged delegations to press for dates for additional Preparatory Committee meetings and for the diplomatic conference. This process has been described by one Coalition member as "calendarizing" international decision making.⁴⁹ In fact, deciding upon the date for the conference in 1996 proved to be an additional catalyst for members both of the LMG and of the Coalition in their own organization and in their growing partnership.⁵⁰

⁴⁷ For two examples of this type of interaction, see Daniel Nsereko's and Arturo Carillo Suarez's articles in the sixth issue of the *Monitor*. Prof. Nsereko is a Ugandan national working in Botswana and Mr. Suarez is from Colombia.

⁴⁸ Bettina Pruckmayr was likely the only person working full-time on the ICC in 1995, paid by WFM.

⁴⁹ Marco Perduca, *Calendarizing International Decision Making*, in *Monitor*, June 1998.

⁵⁰ Benedetti and Washburn (1999), p. 20. See also *Setting a Date for the ICC Conference: What is at Stake in the Sixth Committee and the General Assembly*, in *Monitor*, October 1996. The General Assembly resolution adopted in 1996 reflects this progress in "expressing deep appreciation for the renewed offer of the Government of Italy to host a conference on the establishment of an international criminal court in June 1998." General Assembly Resolution 51/207 (December 17, 1996). The exact dates are set forth in the following year's resolution, which "welcomes...the proposal to hold the conference during the period from 15 June to 17 July 1998..." General Assembly Resolution 52/160 (December 15, 1997).

Other key issues which arose in the work of the Preparatory Committee and upon which the LMC and the Coalition frequently consulted proved to be some of the most painfully difficult to resolve in Rome. These included the role of the Security Council in relation to the court, the independence of the prosecutor, the question of which crimes would be included as core crimes and whether the court's jurisdiction would be automatic or *ad hoc*, the need to address gender issues, including gender-related crimes and gender considerations in the staffing of the court, and the court's financing. By the start of the Rome Conference, the Coalition's position was clearly enunciated in eleven principles, developed in consultation with the LMG and with the Coalition's members, and informally agreed upon by members of the Coalition's Steering Committee. These were to secure:

1. The broadest possible jurisdiction for the Court, including crimes against humanity and crimes committed in non-international armed conflicts.
2. Automatic jurisdiction for the court over genocide, war crimes and crimes against humanity.
3. Universal jurisdiction for the court over these crimes.
4. A system of complementarity by which national courts held primary responsibility for prosecutions.
5. An independent prosecutor.
6. An independent court free from the interference of any political body, including the Security Council.
7. An obligation on the part of States Parties to cooperate with the court.
8. The highest international standards of fair trial and due process for accused;
9. provisions for victims, including women and children and incorporation of gender concerns.
10. No reservations to the treaty.
11. A mechanism for long-term and secure funding for the Court.⁵¹

The development of these eleven principles and those of the LMG clearly signaled that the Coalition and the LMG were prepared to tackle the challenges of Rome together.

1.5. The Coalition at the Rome Diplomatic Conference

The Coalition's visibility and effectiveness at the Rome Diplomatic Conference have certainly set a high standard for NGO involvement in diplomatic negotiations. As former UN Secretary-General Kofi Annan noted: "The NGO Coalition for an International Criminal Court brought together a broad-based network of NGOs and international law experts to develop strategies and foster awareness. Hundreds of non-governmental organizations took part in the conference itself--an unprecedented level of participation by civil society in a law-making conference."⁵² Or as Alan Baker, chief counsel to the Israeli delegation, described it, "In all my years of international work, I've never seen the NGOs play a more powerful role...They were in on nearly every meeting. They were in on everything."⁵³

⁵¹ It would have been impossible for all 800 members to draft a common statement of position, given the informal nature of the Coalition and the time available. Instead, the individual members of the informal Steering Committee agreed on a text which they believed accurately reflected the views of Coalition members. In this respect they were successful, given that not a single Coalition member has disagreed with the statement. *Basic Principles for an Independent, Effective and Fair International Criminal Court*, Rome edition of the *Monitor*, 16 June 1998 in Appendix.

⁵² Kofi Annan, 'Preface: Statute of the International Criminal Court: A Documentary History' (October 1998), in *The Statute of the International Criminal Court: A Documentary History* (M. Cherif Bassiouni ed., 1998).

⁵³ Wall Street Journal, July 24-25, 1998.

The Coalition could honestly be described as having been everywhere in Rome. The Coalition Secretariat advanced its close relationship with the UN Secretariat through the Coalition's agreement to facilitate preparation of a list of NGOs for the General Assembly to approve for participation in the Rome Conference. The system which the Coalition Secretariat established and maintained for accreditation relieved the UN of that particular burden and reinforced the Coalition's status as a legitimate participant in the conference from the start.

Indeed, it is important to emphasize that more than 90% of the CICC Secretariat's work focused on the provision of vital services to Coalition members, the UN and governments, as opposed to issue-oriented advocacy. In this, the work of the Coalition Secretariat and the activities of Coalition's members should be distinguished. The Coalition Secretariat maintained a much more neutral stance towards the negotiations, not taking positions on the resolution of any particular issue. This was possible because the Secretariat was managed by WFM, a relatively small international NGO whose broad and general mandate allowed it to maintain neutrality on many specific issues. Many Coalition members, including the human rights and victims and women's NGOs, had strong and detailed positions on literally hundreds of issues.

WFM's and the Secretariat's neutrality were necessary to maintain the Coalition's cohesiveness, as many members disagreed on the specifics of the statute and needed the freedom to stake out their own positions without having to seek out consensus among all Coalition members on each issue. Instead, the Coalition Secretariat worked to identify and expand areas of commonality among its members and encouraged them to develop joint positions and strategies where possible. To further this role, the Coalition Secretariat organized daily strategy meetings in the dedicated Sudan Room at the FAO to keep all Coalition members updated. These were essential, since the conference covered a variety of technical issues which were constantly evolving as delegates attempted to craft language which could be adopted by consensus.

In addition to maintaining the Coalition's relationship with the UN Secretariat, the Coalition Secretariat also took steps to solidify the Coalition's working relationship with the Bureau of the Committee of the Whole. The Bureau Chair agreed to meet with NGOs formally once a week and Coalition members informally consulted with Bureau members even more frequently. These interchanges allowed Coalition members to see the unfolding process through the eyes of the Bureau and to better understand how NGOs could contribute to the successful conclusion of the Rome conference. The Bureau also benefited from NGO materials, which helped to confirm delegates' positions on outstanding issues throughout the Conference. (See Chapter 2.)

Strengthening the Coalition's Teamwork in Rome

As was the case with the Preparatory Committee, further specialization of the work of the Coalition proved to be necessary because of the increasing complexity of the negotiations. The Coalition developed issue-oriented caucuses for this reason during the Preparatory Committee and encouraged and facilitated the participation of members from the Global South. In Rome, the conference Bureau divided its work among formal working groups, with an even greater proliferation of informal and *ad hoc* working groups.⁵⁴ In response, the Coalition Secretariat oversaw the creation and maintenance of twelve NGO teams to follow and provide input to delegates participating in these conference working groups. These teams focused on definitions; state consent; the trigger mechanism and admissibility of cases; general principles; composition of the court; investigation and prosecution; the trial, appeal and review; penalties; cooperation

⁵⁴ See *Key Terms* for a list of Coordinators.

and national security; enforcement; financing and the assembly of States parties; and the statute's final clauses.⁵⁵ (See Chapter 2 of this publication.)

Teams were composed of one or more team leaders, who were chosen on the basis of their expertise, their contacts with government delegates and their presence in Rome throughout the conference. Teams also included deputies, who were responsible for keeping team members informed about relevant meetings of the conference's working groups, for liaising with other teams, for organizing team meetings and developing Team Reports. The Coalition Secretariat coordinated the scheduling of various team meetings, scheduled oral reports from team leaders or deputies to the daily Coalition strategy meetings, and disseminated Team Reports to NGOs and interested government delegates.⁵⁶ Teams were strengthened by the presence of approximately 80 NGO experts from the Global South, whose participation was financed in part by the Coalition Secretariat.⁵⁷

Teamwork in Rome played a number of key functions. First, teams played a documentary role at the conference. Team members kept notes from those daily working group sessions that were open to NGOs and produced regular Team Reports. In some cases, there were few open working group sessions because the working group coordinators preferred to conduct their work through smaller ad hoc groups and through informal bilateral dialogue with other delegates. In these cases, Coalition members met daily with like-minded delegates, and sometimes several times a day, to evaluate progress on issues under negotiation, and to crosscheck data for Team Reports. The need to continuously approach individual delegates highlighted a strength of the Coalition as a whole which even its larger members lacked. No single NGO could have maintained this intensity and pace of relations with delegations, but the Coalition attained it by having its members divide this task among themselves. For smaller NGOs, this approach demonstrated that they had as much to contribute as the larger NGOs and this was an equalizing factor in NGO relations with one another. The materials produced by Coalition members are an important source of institutional memory for the ICC process and reflect the Coalition's status as a primary source of information on the ICC before, during and after the Rome Conference.

Second, the team approach to observation and interaction with delegates allowed Coalition members to stay abreast of all relevant developments at the conference without having to attend meetings of all of the conference's working groups. It further assisted them in finding the most constructive way to contribute to the process, given their own mandates and areas of expertise.

Third, it is relevant to note that government delegations at the conference also came to rely on the production of conference-related materials by Coalition members, as most delegations were not large enough to follow all of the conference's overlapping working groups and informal sessions. This aspect of the Coalition's work will be explored again later in this chapter and in Chapter 2.

Finally, the division of labor among teams allowed Coalition members to continue to play a number of roles at the conference: as expert advisers to the government delegates, as advocates for a strong, effective and independent court, and as publicists of the achievements of the conference around the world. These different roles, often taken up simultaneously, reflect the complexity of the Coalition's relationship with delegations, participating international organizations, and the UN Secretariat at the conference.

⁵⁵ *NGOs Face Daunting Agenda by Organizing into Teams* in *Monitor*, 26 June 1998, in Appendix.

⁵⁶ See Chapter 2.

⁵⁷ William R. Pace, 'The Relationship Between the International Criminal Court and Non-Governmental Organizations,' in *Reflections on the International Criminal Court*, 189, 202 (Herman A.M. von Hebel, Johan G. Lammers, Jolien Schukking eds., T.M.C. Asser Press (1999)).

The role of Coalition members as expert advisers has already been explored in this chapter, in particular the constructive contribution of expert papers produced independently and in the Coalition newsletter; the importance of bilateral and regional meetings with government delegates, as well as daily informal dialogue; and the role of issues-oriented caucuses. Many Coalition members brought to Rome a strong knowledge of international humanitarian and human rights law and practice, as well as the history of the ICTR and the ICTY and the history of efforts to establish a permanent international criminal court. This base of knowledge legitimized the presence of NGOs at the conference and also signaled to government delegations that NGOs were prepared to engage with them in a professional, technical manner in pursuit of their shared goal, the completion and adoption of the court's statute.

The role of Coalition members as advocates was equally central. This is the role with which NGOs are commonly associated and it is one with which governments can be less comfortable because it is sometimes confrontational. In conducting advocacy, Coalition members relied on the quick production of materials by teams, which were of high quality and reliability, summarizing debates and working sessions and reflecting the evolution of consensus among delegations on different issues. Other advocacy activities took a more traditional approach, including candlelight marches and other demonstrations of support for the court.⁵⁸

This aspect of the Coalition's work was the most political because it had to be the most responsive to the positions of government delegations regarding certain issues and to the evolution of ad hoc alliances among delegates in the course of movement towards consensus. Coalition members had to be able to respond to changes in delegates' positions and to new informal agreements among delegates to ensure that NGO input remained relevant and presented a realistically achievable path towards what were acceptable if not ideal compromises for NGOs. The impact of these interventions relied upon the degree to which they addressed political pressure on delegates to compromise as well as more straightforward legal and technical issues. This more sophisticated recognition on the part of NGOs of the difficulties which government delegations faced in their work also contributed to a more constructive working relationship between delegates and NGOs.

The Coalition also provided an essential function in publicizing the ICC process. The Coalition has rightly been described as a primary source of information on the ICC, before, during and after the Rome Conference. The Coalition circulated new information on the court by e-mail and fax to interested NGOs and governments, establishing an English language electronic *listserv* in 1995 and a website in 1996, the *International Criminal Court Monitor* in 1996 (many published in French and Spanish as well as English, with occasional issues in Russian and Arabic), as well as Spanish and French language electronic *listservs*. During Rome, the Coalition participated in the production of daily publications and an online bulletin, and held regular briefings for international and regional press. These efforts helped to ensure that what was achieved in Rome was recognized around the world, almost as soon as work there had been completed.

The net result of the Coalition's coordination efforts was clear: the Coalition essentially became the largest and one of the most powerful delegations to the Rome Conference. This was how they could be, in the words of Alan Baker, "in on everything."

Narrowing the Options...

As the work of the Rome Conference progressed, it became clear fairly early on that the primary issues remaining to be resolved were highly political in nature and that they were

⁵⁸ The Transnational Radical Party/No Peace Without Justice and Amnesty International were two Coalition members which organized such events.

interlinked. In fact, the expectation during the Preparatory Committee was that only the Rome Conference could settle the major political questions and that therefore, the Preparatory Committee should address itself to the clarification of options addressing those political questions and the resolution of more technical matters. This approach allowed for the quick resolution of many of the more technical matters already informally agreed upon at the Preparatory Committee, during the first two weeks of the Rome Conference.⁵⁹ The issues that remained to be resolved included the independence of the prosecutor, the role of the Security Council, the scope and nature of the court's jurisdiction (automatic or ad hoc), and the specifics of the core crimes. These issues and their resolutions were fundamentally inseparable for many delegates, who held in reserve their positions on some issues until others were resolved to their satisfaction. What resulted was a near halt in progress on the statute by the third week.⁶⁰ As Spanish chief delegate Juan Antonio Yañez-Barnuevo noted, "This third week is probably a crucial one if we want to see a statute adopted and signed at the end of the conference."⁶¹ Some Coalition members and government delegates even contemplated the possible need for a second treaty conference.⁶² Others sounded a more positive note, such as UN Under-Secretary-General Hans Corell, who argued: "Every negotiation has its own dynamics, and it is natural that the most difficult issues will not be solved [yet]. But I have a positive impression of the whole process...I think we will have a statute by the end of this conference."⁶³

To overcome this deadlock, it was necessary to clearly narrow the options from which delegations had to choose. This process was carried forward in three important ways.

States Narrow the Options

First, a number of delegations introduced new proposals that helped to bridge the gap between otherwise divergent positions. This was the case for many of the key issues to be resolved, including composition of the core crimes, the role of the Security Council, the nature of the court's jurisdiction (automatic or ad hoc) and how the court's jurisdiction would be triggered, and the independence of the prosecutor.

For example, in relation to the definition of crimes against humanity, there were several issues which became contentious. A small number of States insisted that crimes against humanity could only take place in the context of international armed conflict. Another major point of contention was the threshold for application of crimes against humanity and whether they must have been committed on a "widespread *or* systematic scale" or on a "widespread *and* systematic scale."⁶⁴ Crimes against humanity were also controversial because of the political sensitivity of some of the crimes, such as enforced pregnancy. Crimes against humanity were fiercely debated until almost the end of the conference, when a compromise brokered by the Canadian delegation led to the inclusion of the lower threshold (widespread or systematic) and the delinking of crimes against humanity and armed conflict. Even this proposal came under serious criticism from Coalition members and some governments for being too restrictive; all the same, it served

⁵⁹ Iain Guest, *A Positive Mood, a Good Start, But Lots of Questions*, June 26, 1998; *On Second Week, Positive Signs Emerge*, June 23, 1998. (In Appendix.)

⁶⁰ This lack of progress is reflected in a number of NGO articles in the Appendix, including the following, to name a few: *Filibustering Tactics Stall Negotiations*, July 1, 1998; *Who's Obstructionist? Arabs Ask*, July 2, 1998; *Movement on Admissibility Comes Slowly*, July 2, 1998; *Statute Mired in Political Minefields: ICC Part 2 Shaping Up?*, July 3, 1998, at 1; *Time to End Inertia*, July 6, 1998.

⁶¹ *Spain: Time Running Out*, July 2, 1998, in Appendix.

⁶² As late as 2am on the final day of the conference, some Coalition members expressed misgivings about the shape of the final package and felt that postponement of finalization of the statute might be best. *Statute Mired in Political Minefields*, *supra* note 50, at 1. Alternatively, many Rome Statute experts are convinced that if the Treaty had not been adopted on 17 July, it would likely never have been concluded.

⁶³ *It's Crunch Time*, July 6, 1998, in Appendix.

⁶⁴ Maria Fariello, *Definitions Team Questionnaire*, see Chapter 2 of this report.

to narrow the options and to make inclusion of these crimes in the statute more feasible.⁶⁵ This was an important accomplishment because despite a history dating back to World War II, the definition of crimes against humanity was not clear. The exercise undertaken in Rome to define these crimes was therefore much more legislative than with genocide and war crimes because crimes against humanity varied among different sources of international law.⁶⁶

Another example was the scope of the court's jurisdiction, whether it would be automatic or *ad hoc* and how many and which States would have to consent to any given prosecution. The German delegation proposed universal jurisdiction for the court, indicating that it should automatically be able to prosecute any cases without seeking additional consent from specific States.⁶⁷ This position found general support from Coalition members and many like-minded delegations, who argued that the extreme crimes included in the statute were already subject to universal jurisdiction at the national level as a matter of conventional and customary international law. On the other hand, some of the permanent members of the Security Council, led by the United States, supported a much more restrictive regime which would require the explicit consent of the state of nationality of the accused for a case to go forward. The United Kingdom and South Korea both put forward proposals which sought out middle ground and paved the way for compromise: the UK proposed that the territorial State must give consent, while the South Korean proposal suggested that one of four States would be sufficient: the territorial State, the State of nationality of the victim, the State of nationality of the accused, or the custodial State.⁶⁸ The language in the Statute is a compromise, requiring either the consent of the State of nationality of the accused or of the territorial State for prosecutions to go forward, in the absence of a Security Council referral.⁶⁹

Shifts in alliances among States also helped to narrow the options available to delegations. Some notable shifts came earlier in the process, during the Preparatory Committee, in particular the decision of the United Kingdom to support a proposal from Singapore to require an affirmative decision of the UN Security Council to defer a court investigation or prosecution.⁷⁰ The "Singapore compromise" provided a novel solution to a very divisive political issue--namely how the Security Council as a political mechanism and the court as a judicial mechanism could work together, without compromising the integrity and independence of the court. The differences of opinion among permanent members of the Security Council (P-5) signaled to delegates that they could not assume that the P-5 would always think or act in concert. For example, the decision of the United Kingdom in December 1997 to join the LMG as well as the Russian Federation's indications of support for the court.⁷¹ In Rome, another permanent member of the Security Council, France, also moved away from the rest of the P-5 in supporting the idea of an independent prosecutor, modified by the proposal of Argentina and Germany to add a Pre-Trial Chamber to vet the work of the prosecutor.⁷² This shift, along with the temporary opt-out provision in Article 124, allowed France to support the court. It is noteworthy that national elections in 1997 in France and the United Kingdom brought to power

⁶⁵ *Canadian Compromise Proposal Severely Criticized*, On the Record, July 3, 1998.

⁶⁶ Fariello, in *Team Reports*, Chapter 2. Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court,' in *The International Criminal Court: The Making of the Rome Statute (Issues, Negotiations, Results)*, 79, 91 (Roy S. Lee ed., 1999).

⁶⁷ Hans-Peter Kaul, *Special Note: The Struggle for the International Criminal Court's Jurisdiction*, in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 4, p. 369 (1998); Otto Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 1999).

⁶⁸ *Battle Lines Form on States' Ability to Block ICC*, June 30, 1998, in Appendix.

⁶⁹ Article 12, Rome Statute of the International Criminal Court.

⁷⁰ Lionel Yee, *The International Criminal Court and The Security Council: Articles 15(b) and 16*, in *The International Criminal Court: The Making of the Rome Statute (Issues, Negotiations, Results)*, 143, 150-1 (Roy S. Lee ed., 1999).

⁷¹ Benedetti and Washburn (1999), p.21.

⁷² *Momentum Builds for Powerful Prosecutor*, June 23, 1998, in Appendix.

governments that were much more favorable to the court and surely opened the door to these crucial concessions.

In addition to cracks in the unity of the P-5, the Non-Aligned Movement (NAM) also experienced a lack of cohesiveness in Rome. Although the NAM favored the inclusion of nuclear weapons in the list of weapons prohibited by the Statute, the testing of nuclear weapons in May 1998 by Pakistan and India undermined the ability of the NAM to pressure the other nuclear powers to concede.⁷³ India proposed at the last moment that nuclear weapons be included in the final package, but the conference refused to consider this last ditch request.⁷⁴ The coordinator of the NAM in Rome—Iran—eventually conceded that not all the goals of the NAM could be fully achieved in the statute.⁷⁵ This recognition may have paved the way for the compromise on aggression, another issue of importance to the NAM. The final draft statute included the crime but indicated that no investigations or prosecutions could be contemplated until a suitable definition and procedure could be adopted by the Court's Assembly of States Parties and ratified by seven-eighths of States Parties to the Rome Statute.

The Coalition Narrows the Options

Coalition members contributed to the narrowing of options by facilitating open discussion of options at NGO-government meetings, by arguing for or against certain proposals through expert papers, by demonstrating regional solidarity behind the Coalition's eleven principles and proposals which supported those principles, and by recording and publicizing the positions of different delegations expressed in open working group sessions.

Coalition members continued to organize informative briefings on contested issues, such as the inclusion of internal armed conflicts in the statute.⁷⁶ Coalition members responded directly to new proposals from delegations, such as the United States proposal released on June 23, suggesting that an independent prosecutor would be overwhelmed with demands for investigations and would be unable to resist political pressure to prosecute certain cases. The Lawyers Committee for Human Rights responded with a paper of its own on June 24, answering point for point the concerns raised in the US proposal and reemphasizing the need for an independent prosecutor. In addition, the Coalition worked with representatives of the ICTY and ICTR, and the interventions of ICTY prosecutor Richard Goldstone at the conference were critical in persuading most delegates that in opting for an independent prosecutor, such risks would be minimal.⁷⁷

The Coalition also pressed forward with regional briefings as fora in which to engage with delegates on substantive issues. Contrary to concerns about the impact that the strenuous conference environment would have on Coalition solidarity, Coalition members pulled together to stand behind those principles that they believed were non-negotiable, encouraging the LMG and other regional groupings of States to do the same. The Joint Declaration of the Alliance of the Three Continents, a statement of support for a strong, effective and independent court, was signed by NGOs from Asia, Africa and Latin America. The Declaration and the coordination of the Alliance in general, were prime examples of this political cohesiveness.⁷⁸ The work of the

⁷³ *India Hits NATO, Gets Flak Itself*, July 14, 1998 in Appendix.

⁷⁴ *A Court is Born: Applause, Relief and Jubilation as US and Indian Amendments are Rejected*, In Appendix to Chapter 5, 18 July 18, 1998.

⁷⁵ *Iran: Rome Can't Achieve Everything*, July 14, 1998 in Appendix.

⁷⁶ The Coalition and the Italian Red Cross participated in a briefing on this subject on June 25. *Balance Sought in ICC's Power in Internal Conflict*, June 30, 1998, in Appendix.

⁷⁷ See Appendix, Issue #9, *On the Record*.

⁷⁸ *Three Continents Alliance Affirms Their Unity Behind a Strong and Effective Court*, July 10, 1998 in Appendix. See Chapter 3.22.

Women's Caucus for Gender Justice has often been cited as well in this context. The Women's Caucus demonstrated a remarkable capacity for keeping its diverse and talented delegation of women from around the world focused on the inclusion of the gender-related crimes in the Statute, even in the face of sustained opposition from a number of States. (See Chapter 4.)

Perhaps one of the most critical tools for narrowing options in Rome was the Team Reports. The Coalition's teams carefully monitored the daily discussions and working sessions and produced charts and reports which clearly reflected the stated positions of each delegation. These were particularly useful for many delegations, which simply did not have enough representatives to cover all the debates. The papers allowed delegates to quickly assess the variety of options proposed and the degree of support for each. The work of the teams culminated in the production of "virtual votes," published in the *Monitor* which registered cumulative support for each of the final options presented to the Rome Conference by the Bureau of the Committee of the Whole. This contribution of the Coalition is explored further below, in relation to the work of the Bureau, and in Chapter 2.

The Bureau Narrows the Options

Throughout the negotiations, the Bureau worked to narrow the issues still under negotiation, with the hope of developing a statute that could be adopted by consensus. To this end, the Bureau promoted formal and informal consultation sessions of the working groups, advised the coordinators of the working groups on procedural questions, and oversaw the piecing together of the statute, forwarding sections of text as the working groups completed them to the Drafting Committee to add to the statute.⁷⁹

By the fourth week, though, the Bureau of the Committee of the Whole recognized the impasse which the negotiations had reached on certain issues and that this impasse would likely make consensus on the statute as a whole difficult, if not impossible, to achieve. With this in mind, the Bureau stepped in with a plan to clarify the position of the majority of delegations on all the outstanding issues and to encourage delegations to focus on the choices they would have to make in the last few days of the conference.

With the assistance of some of the issue coordinators, the Bureau prepared a discussion paper that attempted to narrow down the options, based on positions expressed in bilateral and group consultations over the previous three weeks. The paper was presented first to a select but representative group of delegations, then subjected to broader "orientation" debates to elicit views from all delegations in the Committee of the Whole. In between and as a result of the debates, the paper twice underwent revision and reintroduction.⁸⁰ At each debate, the Chair of the Committee of the Whole called upon States to respond to a series of questions relating to the paper, an exercise meant to set forth the Bureau's understanding of which options had the majority's support and to determine whether that understanding was correct. The aim, as one delegate noted, was "to achieve an appropriate empirical basis for the Conference Bureau to make a package proposal which had good chances of being accepted."⁸¹

The Coalition's teams responded by jointly producing a series of statistical "numbers" papers on July 10, July 13 and July 15, which served as records of country statements in the Committee of the Whole. These papers set forth in percentages the support of delegations for different options relating to the role of the Security Council, the independence of the prosecutor,

⁷⁹ See *Key Terms*.

⁸⁰ The Bureau Discussion Paper was first introduced on July 6, following an evaluation meeting with approximately thirty delegations in attendance on July 5. A point-by-point discussion in the Committee of the Whole followed on July 8, with each delegation asked to respond to a specific set of questions regarding the paper. A new draft, the Bureau Proposal, was released on July 10 and discussed again on July 13.

⁸¹ Kaul (1998) p. 370.

the inclusion of internal armed conflict in the statute, and the question of State consent and the court's jurisdiction, among others.⁸² These papers served an important political purpose in establishing the depth of agreement on crucial issues. The same high percentages following each orientation debate reflected an unchanging level of support by the majority of delegations for key elements of the evolving package and gave the majority a greater awareness of their collective strength. This information emboldened the Bureau of the Committee of the Whole to put forward a final package for a single up-or-down vote.⁸³ After a final series of consultations and analysis, the Bureau labored through the night of July 16 to produce a final package, releasing it to delegates to review at 2am the morning of July 17, on the last day of a conference that could not be extended.

While the Bureau would have preferred for delegations to reach this stage of the negotiations on their own,⁸⁴ the failure of delegations to achieve this meant that the Bureau's package approach was essential. Many delegations found flaws in the package, but the debates demonstrated that delegations were taking the package approach seriously.⁸⁵ The Bureau's package refocused the conference on its ultimate goal: completion of the statute. Delegations came to realize that the time for negotiations was past and that choices had to be made. In particular, delegations that found themselves in the minority had to decide whether to join the majority or to hold out over provisions on which they did not agree with the others. Most of those States chose to join the majority or to abstain, with a few notable exceptions.

The final package introduced on July 17 was subject to two calls for amendments from India and the United States, to which Norway, in a carefully prepared response, proposed "no action" motions that were accepted by 114 States in the case of the Indian amendment with 16 opposed and 20 abstentions, and by 113 in the case of the US amendment, with 17 opposed and 25 abstentions.⁸⁶ The Statute was adopted late in the evening of July 17 by the final plenary session of the conference, in an unrecorded vote at the request of the United States. The final vote was 120 States in favor and 7 opposed, with 21 abstentions.

Addressing Concerns About Transparency

Even before the final day of the conference, some delegations and NGOs voiced concerns about the transparency of the process by which the statute was finalized and adopted. This was an issue, in part, for smaller delegations that did not have sufficient resources or personnel to be involved in all key aspects of the process. Coalition members, other governments and the UN recognized that this was an inevitable consequence of the tremendous tasks the conference had set for itself. The grueling pace of negotiations which ensued, described by some as a "marathon," resulted in as many as 12 to 15 informal consultations daily, many going on at the

⁸² *The Numbers: NGO Coalition Special Report on Country Positions*, July 10, 1998; *The Numbers: NGO Coalition Special Report on Country Positions*, July 13, 1998; *NGO Coalition Special Report on Country Positions on L.59: The Virtual Vote*, July 15, 1998. See Rome edition of the *Monitor* in Appendix.

⁸³ Bartram S. Brown, 'The Statute of the ICC: Past, Present and Future,' *The United States and the International Criminal Court*, p. 61, 64-5 (Sarah B. Sewell and Carl Kaysen eds., 2000).

⁸⁴ Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, *American Society of International Law Newsletter*, November-December 1998.

⁸⁵ NGOs found flaws in the package as well. For example, this author, after a meeting of the Coalition, consulted with government delegates to clarify Article 124. As written, the article could have been interpreted to provide States Parties seven years to decide whether to opt out of the Court's war crimes jurisdiction permanently, instead of the arrangement which had been agreed upon, which allowed States to decide at the time of ratification whether to opt out for seven years. Government delegates with whom the author spoke agreed that this language was misleading and even though the conference was quickly coming to a close, delegates secured a technical correction to the article, clarifying its purpose. This interchange was another example of the extraordinary level of cooperation between NGOs and governments.

⁸⁶ See *Timeline* and Brown (2000), p. 66.

same time, and many new documents to study and respond to every day.⁸⁷ It was also the result of the efforts of a number of delegations to move substantive negotiations behind closed doors and to keep them at an extraordinarily high level, even engaging senior members of the executive branches of government in the intensive lobbying effort. The P-5 package developed in the last week of the conference was promoted in this manner, as were proposals of some members of the Non-Aligned Movement designed to ensure that the conference would result in failure.⁸⁸ As has been described throughout this chapter, the Coalition, the LMG and the UN Secretariat worked together in exploring solutions to the challenge of accessibility and fair play.⁸⁹ In fact, much of the work of the Coalition was dedicated to leveling the playing field between large and small delegations, whether they were government or NGO delegations. The Bureau of the Committee of the Whole also paid close attention to concerns voiced by delegations, working early in the conference, for example, to ensure that all informal meetings would be posted in advance.⁹⁰

The Bureau was also criticized by a few delegations for its approach to shaping the final package. Although the Bureau was careful to select a representative group of delegations to examine the first discussion paper, delegates who were not invited protested what they saw as unnecessary exclusivity.⁹¹ The US delegation was present for the first examination, but protested that the meeting was a set-up for the LMG and questioned Ambassador Kirsch's impartiality as Bureau Chair.⁹² In a subsequent publication, Ambassador Scheffer, the head of the US delegation, argued again that "a small group of countries, in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the court and risks deterring responsible international action to promote peace and security."⁹³

In a letter to the same publication, Ambassador Kirsch responded to Ambassador Scheffer's claims, describing the process by which the package was produced, in consultation with working group coordinators and with all delegations through open debates in the Committee of the Whole and through continuous informal contact with most delegations, including that of the US. As for the final verdict regarding the Bureau's fairness, "The Conference was the final judge," Ambassador Kirsch concluded. "Its judgment was clear."⁹⁴

1.6. The Coalition on the Road to The Hague

The Coalition grew steadily in size after the Rome Conference. At the start of the Rome Conference, the Coalition comprised more than eight hundred organizations.⁹⁵ By June 2000, the Coalition included well over one thousand organizations and continued to grow, and at the

⁸⁷ The pace of the negotiations was reflected humorously as well as seriously, in an article in *Terra Viva* in which informals were described as "fairly important meetings that all diplomats would like to attend, if only they didn't occur at the same time in different places," and informal informals were described as "extremely important meetings that all diplomats desperately want to attend--if only they knew where the right room was." *Glossary of Tricky Terms*, July 6, 1998, in Appendix.

⁸⁸ This aspect of the negotiations is more fully explored in two earlier footnoted articles by Kaul, p. 369 (1998); and Brown, p. 61, 64-5.

⁸⁹ *Yes, Size Does Matter*, June 25, 1998 and *Where are decisions being made?* July 15, 1998 in Appendix.

⁹⁰ *Non-Aligned Nations Target Nukes*, in *Terra Viva*, June 26, 1998 in Appendix.

⁹¹ In this case, the Spanish delegation expressed concern about not having been invited to participate in the July 5 meeting. *Where are decisions being made?* July 15, 1998 in Appendix.

⁹² Benedetti and Washburn (1999), p. 29.

⁹³ David Scheffer, *America's Stake in Peace, Security and Justice*, in *American Society of International Law Newsletter*, September/October 1998. These doubts have been expressed by another supporter of the American delegation's approach, Ruth Wedgwood, who argued that in the future, "Negotiating vital matters should not be left to the last minute, to the chaos of open conferences and the mystery of working groups from which Americans may be excluded." Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, Foreign Affairs, November/December 1998.

⁹⁴ Kirsch (1998), p. 78.

⁹⁵ Pace, Thieroff (1996) p. 392.

time of this publication comprises more than 2,500 NGOs. These organizations represent every region of the world and many diverse sectors of civil society work, including human rights and the rights of women and children, victims, humanitarian and international law, disarmament, parliamentarians, peace and religion. The work of the Coalition is guided by an informal Steering Committee,⁹⁶ but the Coalition relies increasingly on its expanding circle of national and regional networks and coalitions to translate its goals into reality.⁹⁷

The Steering Committee of the Coalition met shortly after the conclusion of the Rome Conference, in October 1998. It was the ideal time for the Coalition to regroup, after members had taken the opportunity at the end of the summer to evaluate both the results of the Rome Conference and their own plans for continuing to work on the ICC. The goal of the Coalition leading into Rome had been the creation of a fair, just and independent permanent international criminal court. Despite the disappointment many NGOs expressed over the compromises built into the Rome Statute, especially the limits to the Court's jurisdiction,⁹⁸ members of the Coalition agreed that the Statute represented a significant step forward in international law and deserved the full support of the Coalition. Further, the Coalition maintained that the Statute should be preserved unchanged in letter and spirit. The Steering Committee also recognized that while the Statute laid the foundation for the Court, more demanding work lay ahead—securing the sixty ratifications of the Statute necessary for it to enter into force. Indeed, the Coalition continued to promote ratification of the Statute after entry into force, since the closer the Statute approaches universal ratification, the more universal the reach of the Court's jurisdiction will be.

The Steering Committee and the Secretariat therefore proposed a new set of guidelines for the work of the Coalition in support of entry into force of the Rome Statute: activities to raise awareness of the Statute and the role of the Court in the international system; encouragement of the signature, ratification and domestic implementation of the Statute in as many States as possible; support for the establishment of national and regional networks and coalitions to lead these activities; and support for the successful completion of the work of the Preparatory Commission for the ICC.⁹⁹ The right of Coalition members and NGOs in general to participate in the PrepCom was confirmed annually by the General Assembly through its resolutions on the ICC.¹⁰⁰

⁹⁶ In June 2000, the steering committee included the following organizations: Amnesty International, Asociación pro Derechos Humanos (APRODEH), the European Law Students Association, Fédération Internationale des Ligues des Droits de l'Homme (FIDH), Human Rights Watch, the International Center for Human Rights and Democratic Development (Rights and Democracy), the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, the Women's Caucus for Gender Justice, and the World Federalist Movement.

⁹⁷ In June 2000, the Coalition had national networks in the following countries: Argentina, Austria, Bangladesh, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, Colombia, Denmark, Egypt, France, Germany, Ghana, Japan, Kenya, Mexico, the Netherlands, Peru, Poland (focusing on Central and Eastern Europe), Portugal, Russia, Senegal, South Africa, Spain, Thailand, the United Kingdom, the United States and Venezuela.

⁹⁸ The Court's jurisdiction requires consent either from the State of the territory where the crime was allegedly committed or the State of the nationality of the accused; this consent is automatic for those States which have become party to the Statute and may be agreed to on an *ad hoc* basis by non-State parties. Many government delegates and NGOs hoped and expected that the Court would at least be able to exercise jurisdiction in addition where custodial States and States of the nationality of the victim consented.

⁹⁹ The mandate and the scope of work of the Preparatory Commission are set forth in the Final Act of the Rome Diplomatic Conference and the United Nations General Assembly resolutions which establish the Preparatory Commission, A/53/105 and A/54/105.

¹⁰⁰ Resolution A/53/105 and A/54/105 both "[note] that non-governmental organizations may participate in the work of the Preparatory Commission by attending its plenary and its other open meetings, in accordance with the rules of procedure to be adopted by the Commission, receiving copies of the official documents and making available their materials to delegates." This language will be included in the resolution of the 55th General Assembly, setting forth the parameters of the Preparatory Commission's work for 2001.

1.7. The Coalition at the Post Rome Conference Preparatory Commission

The work of the Coalition at the Preparatory Commission has been explored in greater detail elsewhere. The mandate of the Preparatory Commission, as established in Resolution F of the Rome Conference's Final Act,¹⁰¹ was to develop the Rules of Procedure and Evidence, the Elements of Crimes, and other supplementary agreements relating to financing of the court, privileges and immunities of its staff, its relationship with the UN and the structure of the Assembly of States Parties.

The Coalition continued to build upon its productive working relationship with the LMG and with the UN Secretariat, utilizing many of the same tools developed to meet the challenge of the Preparatory Committee and the Rome Conference. Within two years, the Coalition, the LMG, and the UN Secretariat met another important goal: the adoption by the Preparatory Commission by consensus of the Rules of Procedure and Evidence and the Elements of Crimes by the deadline of June 30, 2000, established in Resolution F.

The Coalition and the LMG also had to focus on maintaining the integrity of the Rome Statute in the course of the Preparatory Commission process. This was necessary because the United States delegation demonstrated a serious commitment to ensuring that Americans will never be subject to the jurisdiction of the Court. The US proposal in circulation at the time sought to "preclude the automatic surrender to the Court of official personnel of a non-party State that acts responsibly in the international community and is willing to exercise and capable of exercising complementarity with respect to its own personnel."¹⁰² This approach represents a fundamental retreat from the American position in Nuremberg that no nation could be above the law and that individuals could not escape liability by hiding behind the official nature of their governments' acts. Fortunately, despite U.S. efforts to the contrary, the Rules of Procedure and Evidence and Elements of Crimes were completed without the inclusion of any language which would fundamentally undermine the spirit or letter of the Rome Statute and delegates continued to express their commitment in writing and in formal statements that they would not allow the future work of the Preparatory Commission to undermine the Rome Statute.

The Coalition and the LMG continued to explore new methods of cooperation outside of the UN negotiation process, organizing conferences together to raise awareness of the ICC, and developing technical cooperation programs to share expertise in the process of implementing the Rome Statute. In addition, they met to consider how to ensure that the ICC would receive the resources and support its needs once it was established in order to be productive and successful in its formative years.

1.8. Summary

Like a massive labyrinth, there were literally thousands of ways the process leading to the Rome Statute could have gone astray, with only a few paths potentially leading to success. In an extraordinary example of fate and irony, the original path proposed by the supporters of the ICC would likely have failed, while the path proposed by the opponents led to an amazing rendezvous with history.

The original strategy of the P-5 was twofold. First, they wanted to indefinitely postpone the convening of a diplomatic conference to negotiate a permanent international criminal court. Other opponents of an ICC shared this goal. To achieve this, these governments thought, from

¹⁰¹ Resolution F, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998, UN Doc. A/CONF.183/10, p. 9 (reissued for technical reasons).

¹⁰² Statement of the United States of America, Delivered by David Scheffer, U.S. Ambassador at Large for War Crimes Issues, Before the Sixth Committee of the U.N. General Assembly (October 18, 2000).

years of experience in the Sixth (legal) Committee, that a lengthy and detailed discussion of the ILC draft would scare the nations away from a diplomatic process. They were certain the ICC statute would be viewed as too great a threat to national sovereignty and to the principle of non-interference. They believed the defenders of the world's major legal systems would never be able to agree to common general principles, let alone on jurisdiction, and definitions of crimes, including crimes occurring during internal conflict or during times of peace.

Second, the P-5 thought that the only acceptable option was a quasi-permanent *ad hoc* tribunal of the Security Council and while the other ICC detractors opposed the Security Council option, most if not all like-minded governments feared this might indeed be the only realistic option. This author, as Convenor of the Coalition, was reminded of this by key like-minded governments, who underlined the *realpolitik* reasons for this all the way to Rome.

The debate strategy backfired, however, for in mandating a lengthy and detailed discussion, like-minded governments from all regions and legal systems came to realize that they in fact agreed much more than they disagreed on general principles; that they did not support an ICC subordinate to the Security Council, and that their positions represented a plurality or majority of participating governments. The detailed discussions provided the NGO Coalition with public and written commitments by governments which were useful in encouraging like-minded government agreement on key issues, and also in shoring up government support for an independent and strong court when they were being pressured to sell out in Rome. The lengthy process allowed the NGOs three and a half years to organize and educate civil society, and to secure civil society, parliamentary and media support, for a permanent, fair, independent and effective international criminal court.

It is interesting to look back to the start of the process, to the 1994 decision of the UN General Assembly's Sixth Committee and to contemplate what might have happened if the Sixth Committee had agreed to immediately forward the ILC's draft statute to a diplomatic conference. The court that might have emerged from that statute, most likely a permanent *ad hoc* court dependent upon the Security Council for cases, would have been tremendously different from the one that exists today.

In hindsight, one now must conclude that the period after the end of the Cold War was an extraordinary and unique period for the advancement of multilateralism and the rule of law. Many of us hoped that this experience of negotiating the ICC would lead to a willingness to take greater risks in future diplomatic negotiations on important issues.¹⁰³ The role of key individual government and international organization leaders cannot be overstated. For example, the release of Nelson Mandela and his influence on the SADC group leadership in the ICC treaty process was pivotal and led to great support for the Rome Statute throughout Africa. UN Secretary-General Kofi Annan's support was crucial. Key individuals from governments of every region and legal system provided great leadership, as did NGOs.

We did not realize how turbulent the world would become in the first decades of the 21st century. The Coalition continued to focus on its main goals: to bring the Rome Statute into force and to strive for it to be as universal as possible, and to fulfill the promise of complementarity— to ensure that the world's judicial systems come to know and embrace the ICC as an indispensable instrument in their struggle to respond to the most atrocious crimes, wherever they occur or against whomever they are committed.

One member of a prominent LMG delegation wrote to the Secretariat about the pivotal role of the Coalition, noting: "After having been a member of a delegation to NY and Rome for some years, I know that the ICC would still be in the Fantasy section of the legal libraries without

¹⁰³ "The essence of the 'New Diplomacy' is how it represents a new model for international lawmaking, modifying the consensus process of treaty making with one determined by informal like-minded government coalitions." Pace (2002)

your commitment." If the ICC is to fulfill the promise for international justice that it represents, it will require the vigilance and the commitment of civil society in the years to come. UN Secretary-General Kofi Annan addressed this subject in May 1999 at the civil society peace conference organized by the Hague Appeal for Peace in 1999:

Let me acknowledge once again the magnificent contribution made by voluntary groups from all over the world...And I would want to thank you for the courage, the determination and all the work you did in getting the Statute of Rome adopted last year. Friends, we do all these things for the sake of the future and not the past...Civil society ought to let the leaders and the diplomats know what is expected of them. They have to know that in the eyes of their fellow citizens--that is you--that in the eyes of their fellow citizens, the ultimate crime is not to give away some real or imaginary national interest. The ultimate crime is to miss the chance for peace and so condemn your people to the unutterable misery of war. My friends, it is you and people like you all over the world who are slowly bringing about that deep and essential change.¹⁰⁴

¹⁰⁴ The text of this speech is available on the Hague Appeal website at www.haguepeace.org/archives/speeches/closing/KofiA.htm.