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GOVERNANCE

Volume 5 Number 1 Jan.–Mar. 1999

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LYNNE RIENNER PUBLISHERS
1800 30th St., Suite 314
Boulder, CO 80301

Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference



Fanny Benedetti and John L. Washburn

Two Years to Rome

The UN Preparatory Committee on the Establishment of an International Criminal Court (known as the PrepCom) ended its last session on 3 April 1998 in Conference Room 1 of the UN headquarters building in New York. Some 130 government delegations were ranged in their long arcs of seats on the floor. Representatives of nongovernmental organizations (NGOs)—their advocating, advising, and remonstrating finished for now—completely filled three tiers of chairs against one wall of the room.

The chairman, Adriaan Bos of the Netherlands, told the PrepCom that it had achieved a draft text of a treaty to establish an international criminal court that, with luck, the forthcoming diplomatic conference in Rome might well be able to negotiate into final form. “You have done this,” he said to the delegates, “through your seriousness, your willingness to compromise, your hard work, and your expertise.”¹ In their responding speeches, the delegations agreed with him and went on to praise in detail his chairmanship, the work of the other officers of the PrepCom, and the skills and devotion of the UN Secretariat team supporting them. They thanked interpreters and conference personnel and—at length, for their help and contributions—NGOs. Such statements are routine at the end of any set of negotiations, but a great many of the statements made on this occasion were clearly heartfelt as well. Amid the predictable exhaustion, relief, and slight sadness at the end of any long common enterprise, these government officials, diplomats, and lawyers were confirming to each other that the PrepCom had been no ordinary negotiating experience. They were exhilarated at how much they had done together toward a purpose most of them shared. As the negotiations wore on, more and more of them had felt compelled to join in this common enterprise by its promise of partly redeeming the worst in the history of their times.

They were also afraid, however, that they had not done enough. The trust and confidence, the hard work and compromises gradually developed

in the sessions just ended had left behind a bulky draft about which there was wide disagreement. The PrepCom participants feared that the newcomers and politicians in Rome might indeed be unable to cope with it.

Much has been written about the issues dealt with by the PrepCom. Far less has been written to describe the intense and urgent shaping of its forms, practices, and organization by its officers, by governments, NGO representatives, and UN officials out of an inherited and confining model of treaty making.

Such a description follows, presented in the hope that it will contribute both to understanding, organizing, and conducting similar future negotiations and to the assessment of the nature and results of the diplomatic conference in Rome. In particular, this is a record of the nature and dynamics of a high act of international creativity. Whatever its ultimate outcome, the PrepCom should be remembered and learned from. The remarkable changes in its psychology, the strong if uneven rise of a sense of common purpose and effort within it, and the importance to these of the conduct and substance of its negotiations produced a surprising and compelling achievement for its participants and for the UN. The journey as well as the arrival can inspire, instruct, and reveal the future.

The Origins of the Preparatory Committee

The end of the PrepCom negotiations marked another new turn in the long history of efforts to achieve a permanent international criminal court.² Tribunals in Nuremberg and Tokyo revived those efforts after World War II, but the Cold War prevented actions by governments between 1954 and 1989. In the meantime, scholarly and expert work on the international criminal court continued, especially in the International Law Commission, a body of legal experts reporting to the UN General Assembly. During the same period, treaty law and other international law developed on genocide, war crimes, aggression, and crimes against humanity.³ Some of these treaties, such as those on genocide and apartheid, called for international penal tribunals to try their particular crimes. The results of both the scholarly and expert efforts and of the development of formal international criminal law strengthened initiatives toward an international criminal court undertaken in the General Assembly during the 1980s by Germany, the then U.S.S.R., and Trinidad and Tobago. These initiatives succeeded. A request went from the General Assembly to the law commission in 1991⁴ to draft an international criminal court treaty and then in 1992⁵ to complete this work urgently.

The urgency arose from accelerating efforts to create an ad hoc tribunal for the former Yugoslavia. The Security Council established this tribunal in 1993 and another for Rwanda in 1994. These Security Council actions constituted a psychological, political, and legal breakthrough for the

international criminal court proposal and for the concept of the international accountability of individuals for gross and massive crimes. Atrocities in Yugoslavia, Rwanda, Cambodia, and elsewhere demonstrated to international public opinion that military and political responses to genocide, war crimes, and crimes against humanity were insufficient. Such responses were, and would be, rarely adequate in themselves. Even when they did succeed in stopping violence and conflict, they offered no satisfactory way to deal with leaders and their closest followers who gained and kept power by manipulating peoples through deep but often half-forgotten mutual hatreds into atrocities against each other.

In the forty years since the Nuremberg and Tokyo courts, there had stayed stubbornly alive the hope and conviction that international criminal trials could concurrently express outrage, affirm the moral and legal foundations of human society, tell the story of a crime as fully as it could be uncovered, determine those most responsible for it, and punish them. Experience with the reactions of victims and survivors to domestic trials even gave hope that international criminal justice could lead to the renewal of forbearance in nations and societies and thus perhaps ultimately to permanent peace. Now the ad hoc tribunals were concrete proof that international criminal courts could exist and function.

Under the heavy pressure of these events and emotions, the International Law Commission produced a draft international criminal court statute in 1993 and a final version incorporating comments from governments in 1994. The General Assembly responded to the commission's recommendation of a diplomatic conference for an international criminal court treaty in 1994 by convening an ad hoc committee to review the commission's final draft.⁶ Member states and specialized agencies officially participated in the ad hoc committee's sessions; NGOs were active in many of them. In 1995, the General Assembly considered the final report of the ad hoc committee and established the PrepCom with authority to draft a "widely acceptable consolidated text of a convention, to be submitted to a diplomatic conference of plenipotentiaries."⁷ A 1997 General Assembly resolution authorized the diplomatic conference in Rome from 15 June to 17 July 1998 to complete and adopt the international criminal court treaty.⁸ Meanwhile, the PrepCom held six sessions in New York, the last between 16 March and 3 April 1998.

The quickening pace of the action took some observers and participants by surprise. Countries that hoped to bog down the drive toward an international criminal court with more studies or in the ad hoc committee found instead that this momentum had extraordinary power. The court's supporters were deterred neither by the difficulty of drafting a long and complicated statute nor by conventional concerns about sovereignty and the unknown. The outrage and the hope that had spurred the International Law Commission into action continued. As the ad hoc tribunals slowly

began to indict and try and as the quality of some of their judges and staff became evident, confidence rose that at least part of the promise of international criminal trials would be fulfilled. At the same time, creating more and more ad hoc tribunals was clearly impractical. The Security Council did not want to do this anyway, and a majority of countries in the UN distrusted the council as an instrument of its permanent members. Hope, anger, and this distrust combined to reinforce the demand for a strong, independent, representative, and permanent international criminal court. As we note, the power and emotion of this impetus carried over into the PrepCom and sustained it through moments of confusion, obstruction, incoherence, and procrastination to the threshold of the Rome conference.

Within the General Assembly, this force was particularly expressed and implemented in its sixth (legal) committee.⁹ Again, the vigor and speed of the action on the international criminal court in this usually very deliberate committee surprised many and upset the plans for delay of others. As it had for the International Law Commission, the sixth committee also gave the PrepCom political recognition for progress made and encouraged it to carry on and speed up. The sixth committee was the scene of the main General Assembly debate and decision in 1996 to call for a diplomatic conference and, in 1997, to set its date. The political weight and seriousness of these actions had a marked transforming effect on the psychology and behavior of the negotiations in the PrepCom.

The PrepCom was therefore created and supervised directly and exclusively by the General Assembly to achieve a court independent of (although closely related to) the UN. This court would punish acts that the broad UN community, including nations, the Secretariat, and NGOs, has usually perceived simultaneously as threats to peace, as particularly serious crimes, and as violations of human rights. However, neither the Security Council (responsible for dealing with threats to peace and creator of the ad hoc tribunals) nor the Economic and Social Council (ECOSOC—responsible for the principal human rights bodies of the UN) had any role whatsoever in the process of creating the international criminal court. This situation, obvious as it may seem, had important substantive, psychological, and operational consequences. The permanent members of the Security Council had to get used to dealing on a more nearly equal footing with other countries on the substance of a peace and security issue. NGOs dedicated to human rights discovered that their consultative status with ECOSOC gave them no formal rights to participate in PrepCom proceedings. Moreover, they found themselves seeking alliance with other NGOs concerned with international law, conflict resolution, and nation building. The part of the Secretariat responsible for the PrepCom was the Office of the Legal Counsel, not the offices that usually handle human rights matters.

For all participants, the General Assembly's complete and direct responsibility for the PrepCom represented and imposed the reality that their

work was fundamentally not to create new international criminal or human rights norms but rather to devise an institution to apply them to acts of individuals. Also, and most important for the organization and structure of the work of the PrepCom as a subordinate deliberative body of the General Assembly, it automatically took its parent as its beginning model.

The General Assembly had clearly directed the PrepCom to achieve a draft treaty that a diplomatic conference would be able to negotiate into an agreed final text, ready for signature and ratification. At diplomatic conferences, most delegations are led by politicians or senior civil servants. They are especially determined to protect or advance national interests. Agreement among them in the few weeks available would require, as the General Assembly specified, a complete and well-organized single draft treaty. Most of its text should already be agreed.

The PrepCom soon refined and elaborated these requirements. The middle-level diplomats, experts, and lawyers who composed most of its delegations should settle as many *technical* questions as possible. There would also be fundamental *political* issues on which only the diplomatic conference could agree. To make that agreement possible, the PrepCom should simplify, define, and clearly present these issues. In practice, of course, the technical matters proved to be troublesomely political as well. Moreover, most of one kind soon proved inseparable from most of the other.

As the formal and informal leaders within the PrepCom realized from the beginning, the creation of a single "consolidated" text would be an excruciatingly complicated technical, conceptual, intellectual, and logistical challenge. In fact, the length of the final product—with its 116 articles, some very long—exceeded that of the UN Charter. The PrepCom's struggle to organize and manage itself to meet this challenge thus began at once and ended only with the committee itself. The challenge unfolded throughout the six sessions of the PrepCom. Table 1 provides a brief, selective chronology.

On the opening day of the PrepCom's first session, Chairman Bos had to maneuver a delicate change in the style of the discussion. It was now the time to draft and consider texts alternative to the International Law Commission draft rather than to express general views.

He chose to devote this first session to discussing in more depth the same core issues covered by the ad hoc committee. The core issues of the proposed international criminal court were political and sensitive and included the court's relation to national courts, how a case would come before the court, the subject matter jurisdiction of the court, and state cooperation with the court. Although the discussion, conducted in plenary sessions, appeared to progress slowly to some observers, main positions and political views did materialize.

The chair's insistence that drafting begin was rewarded when a good number of delegations submitted papers to chosen officers of the PrepCom, who had been elected from among government delegates. These officers,

Table 1 Selective Chronology of Events in Drafting the International Criminal Court Treaty, 1996–1998

| 1996 | |
|-------------------------|--|
| 25 March–12 April | First session of the United Nations Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) convenes. |
| 10 July–14 July | Informal intersessional meeting convenes in Siracusa, Italy, to discuss general principles of criminal law, rules of evidence and procedure, and states cooperation with the international criminal court. |
| 12 August–30 August | Second session of the PrepCom convenes. |
| 17 December | UN General Assembly adopts a resolution setting forth the dates for third, fourth, fifth, sixth, and seventh PrepCom sessions and welcoming Italy's offer to host the treaty conference in 1998. |
| 1997 | |
| 11 February–21 February | Third session of the PrepCom convenes. |
| 29 May–4 June | Informal intersessional group of experts meets in Siracusa, Italy, to discuss rules of procedure and evidence. |
| 11 August–15 August | Fourth session of the PrepCom convenes. |
| 14 September | The fourteen nations of the Southern African Development Community set out ten basic principles as benchmarks for an independent and effective international criminal court. |
| 16 November–22 November | Informal intersessional meeting convenes to discuss state cooperation. |
| 1 December–12 December | Fifth session of the PrepCom convenes. |
| 1998 | |
| 19 January–30 January | Extended bureau of the PrepCom (including chairs and coordinators of the working groups) meets in Zutphen, the Netherlands. The Zutphen Report consolidates the various draft texts produced during two years of PrepCom meetings. |
| 5 February–6 February | Representatives of twenty-five African governments meet in Dakar, Senegal, to discuss the establishment of an international criminal court. They adopt the Dakar Declaration, which calls for an effective, independent court. |
| 16 March–3 April | Sixth session of the PrepCom convenes. |
| 6 May–9 May | Bureau of PrepCom and newly nominated bureau of the diplomatic conference meet in Courmayeur, Italy, to prepare for the Rome conference. |
| 15 June–17 July | United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convenes in Rome, Italy. |

known as the bureau, incorporated both oral and written suggestions into separate composite papers that were later integrated in one single report. A noteworthy accomplishment of the first session was the development of draft definitions of the three core crimes: war crimes, crimes against humanity, and genocide.¹⁰

The second session of the preparatory committee, which convened 12–30 August 1996, addressed in open plenary session a set of less controversial and political issues that were nonetheless technical and complex. A group of representatives of governments had met informally during the intersessional period for the first time to prepare three working papers that included government proposals made at the first session. These papers served as a valuable basis for the work of three of the five newly established working groups. The working groups dealt with general principles of criminal law, rules of procedure, state cooperation with the international criminal court, composition and organization of the court, and penalties. The division of work among informal working groups improved working methods significantly. It made compilation of the text easier and favored consolidation when possible.¹¹

At the end of the second session, the PrepCom acknowledged that a substantial amount of further preparatory work was needed. Accordingly, the draft conclusions adopted by the committee called for an additional nine weeks of preparatory work to be conducted in three or four sessions through April 1998. The draft conclusions also made a tentative recommendation on a date for convening the diplomatic conference, stating that it is “realistic to regard the holding of a Diplomatic Conference in 1998 as feasible.”¹²

The third and fourth sessions were devoted to a first review of the core issues of the international criminal court. The PrepCom now had as a basis for discussion a three-hundred-page report listing hundreds of alternative proposals. The third session operated in two open working groups on definitions of crimes and general principles of criminal law, respectively. The session achieved—for the first time in the committee’s history—consolidation of substantial parts of the draft text: the definitions of genocide and crimes against humanity and a major part of the general principles of criminal law. However, similar consolidation proved impossible for other parts, such as the definition of war crimes. The fourth session dealt with the court as a complement to national courts and with the trigger mechanisms of the jurisdiction of the court. A much different method of work from the earlier open-ended sessions was adopted, with most activity conducted in informal and often closed drafting groups. Some of the issues dealt with—the role of the Security Council and inherent jurisdiction over core crimes—were indeed of a highly political nature.¹³

Moreover, another informal intersessional meeting had prepared a compilation of the texts on procedure. These sessions consolidated a number of the articles from this compilation.

The fifth session of the preparatory committee, which convened 1–12 December 1997, conducted its work in five open working groups that reviewed a number of core issues—definition of crimes and state cooperation—and also continued the lengthy technical discussion of procedural

matters, penalties, and general principles of criminal law. The methodology of work was further improved at this session when the chairpersons of some of the working groups chose to delegate the drafting of revised texts of specific articles to small and often self-formed groups under the leadership of one of the government delegations. Germany, which the chair had asked to prepare a revised text for the definition of war crimes, chose to call for this purpose a meeting of representatives from members of the North Atlantic Treaty Organization (NATO).¹⁴

The sixth session of the Preparatory Committee was greatly served by the introduction of a newly compiled draft statute. At the request of the chair, the extended bureau (including the coordinators of working and drafting groups) met beforehand in Zutphen, the Netherlands, to revise and reorganize the text in preparation for this ultimate preparatory session.¹⁵

The sixth session had on its agenda all the leftover issues. Questions like the composition of the court, relations with the UN, the financing of the court, the final clauses of the statute, and the establishment of a preparatory commission had been left for the very end of the preparatory process. This final session also had to complete the revision of a number of articles dealing with procedure, general principles of criminal law, and applicable law. More than at any other session, the lack of time and the amount of work left to this meeting induced chairpersons and coordinators to conduct most of the work in informal closed meetings.

Leadership

The process of drafting legislation, whether domestically or through international parliamentary diplomacy, is notoriously dependent on personal interchanges and individual leadership. This was particularly true for the PrepCom, which had no institutional history and had to invent itself in many ways as it proceeded. The committee was fortunate in many of its leaders. We present four of them here. Although we could also single out others as important, most participants would certainly include these four on any list.

William R. Pace, executive director of the international secretariat of the World Federalist Movement, convened and primarily designed the NGO Coalition for an International Criminal Court (CICC). He shaped a career, after early years as a teacher, as a professional official of NGOs dedicated to world peace and the development of international organizations. Although he was immediately recognizable as an American in personal style and personality, his vision and commitments were emphatically internationalist. He had found in the international criminal court a full expression of his emotional and intellectual devotion to rapidly evolving international institutions. These, he believed, could constitute the international governance the world so urgently needed at century's end.

The extraordinary success of the NGO coalition owed much to a fundamental insight by Pace. He realized the coalition had to rely on solidarity among NGOs. This solidarity would have to be sustained despite their differences on some aspects of the international criminal court. To the preservation and skillful deployment of this solidarity, he brought a sharp and flexible mind, foresight, well-developed political skills, fund-raising talent, and a zest—if not always a complete capacity—for management. Although sometimes he did not hold back the expression of his personal views, his integrity, commitment, and fairness in action kept even those who disagreed with him inside the coalition. The same qualities prevailed eventually over his difficulties with the restrained institutional culture of the UN Secretariat and led to close cooperation with it.

Roy Lee, director of the codification division of the UN Office of Legal Affairs, was a skilled diplomat with more than thirty years of experience working for the UN. Approaching the end of his career at the UN, Lee demonstrated throughout the preparatory process of the international criminal court his expertise at discreetly handling complicated and sensitive problems of both a political and a technical nature. Most key government players respected him greatly and sought his expert advice. Looking for perfection, he demanded that his team produce quality results with the shortest delay to answer the growing needs of the PrepCom. He was personally committed to seeing the process of creating an international criminal court succeed, although he initially feared it would be an impossible task.

Adriaan Bos became chairman of the preparatory committee because of his prominent role in helping to establish the ad hoc tribunal for the former Yugoslavia. A senior legal adviser to the Dutch Ministry of Foreign Affairs, Bos served the PrepCom well, faithful to his country's traditional commitment to international law as a major part of its foreign policy and to its long-standing support of the earliest possible creation of an international criminal court. He was an experienced diplomat who had contributed to many of the toughest UN negotiations. His style as chairman was traditional and strong. His leadership was uncontested, and he was not only respected but also trusted by all. His continued effort to maintain transparency and guarantee universal participation among states contributed greatly to their trust in him and acceptance of his chairmanship.

Cherif Bassiouni contained in one person and in his leadership the roles of government representative (Egypt), vice-chair of the PrepCom, scholar (DePaul University Law School), and NGO activist. He was one of the few foremost authorities on international criminal law with extensive publications on the international criminal court and service on innumerable committees of experts and advisory commissions and as a consultant to governments. In the PrepCom, he drove the intellectual conceptualization and the substantive completeness of the draft treaty through his personal prestige with most of the delegations, his strong personality, and his

extraordinary command of almost every aspect of the international criminal court. To this end, his greatest contribution was the organization of the Siracusa intersessional meetings.

There was substantial disagreement with Bassiouni's insistence on a complete and detailed preplanning of the PrepCom's methods and organization. However, the high continuing respect for his abilities and leadership made him—as the PrepCom ended—the leading candidate to chair the drafting committee at the Rome conference.

Organization of the Preparatory Committee

The principal organ of the PrepCom itself was the bureau. It had as a main objective finding ways and means to make the ambitious mandate of the committee achievable. It faced a real challenge in fulfilling a “more specific, goal oriented”¹⁶ mission within the constraints of the General Assembly model, which was unfit for drafting the complex foundations of a new international judicial organization.

Composed of the chairman of the preparatory committee and three vice-chairs, the bureau was elected according to geographical distribution, as required by General Assembly tradition. Its daily contributions appear to have been limited to organizational matters in the narrowest sense. The bureau met regularly during PrepCom sessions and addressed the schedule, daily program of work, and adjustments necessary within the provided scheme of work (e.g., type of meeting needed to address specific issues in the most effective way). When needed, the bureau also suggested strategic decisions on the conduct of the negotiations. Great latitude of style and methodology was left to the chairs of the working groups. No agreement was sought on techniques for presiding. The chairs of the various working groups, chosen on the initiative of members and nonmembers of the bureau, were organized around issues of substance in which designated countries had a particular interest rather than according to regional representation. With the proliferation of drafting groups or issue coordinators, the role of the bureau was made even more remote from substantial decisionmaking.

The chair of the preparatory committee, who, like the chairs of the working groups, often defined his own style and methodology, led the bureau. The highly individualized approaches of various bureau members often led Chairman Bos to make his own decisions in order to be able to act.

Early in the process, bureau members discussed different possible ways of addressing the work of the preparatory committee. Their essential dilemma focused on whether an organized and rigid structure of the committee would find acceptance among member states at an early stage of the process. The move from the analytical phase represented by the ad hoc committee to the actual drafting required in the PrepCom implied an entirely

new process. Most states may well have realized this, but it is doubtful that they were ready to comply from day one with an accelerated and focused schedule. After the two sessions of the ad hoc committee concluded, the positions of the majority of states were still undefined with regard to core, not to mention technical, aspects of the proposed international criminal court. Drafting a consolidated text in open-ended meetings without a strictly defined agenda, however, would clearly be impossible.

As we note above, the first session began a review of the core issues of the proposed court. An instinctive approach, rather than a clear-cut organization of the work, had been preferred to start the new process. Once positions started to materialize on the essence of issues, it became possible at the second session to move from the plenary sessions of the PrepCom to working groups. The early conduct of the negotiations was not planned strategically in advance. Informal working groups were created haphazardly, in response to different issues as they cropped up. The members of the bureau, assisted by the UN Secretariat, improvised on how to handle various problems and issues as they arose in the course of the negotiations.

However, the two sessions of the committee in 1996 "only succeeded in creating a report which compiled various proposals."¹⁷ With nine more weeks allocated to the PrepCom by the General Assembly to produce a consolidated text, the committee had to find ingenious ways to work more effectively in the sessions remaining. Then, a new dilemma arose. It reflected a tension between the need to ensure universal support for the draft statute, which could be achieved by strengthening the participation of all regions of the world, and the need to achieve results through working groups of manageable size. The lack of expertise and small size of a number of delegations were also seen as major obstacles to the progress of the working groups. "Limited members drafting groups" were therefore envisioned as a way "to allow focusing on creation of an acceptable text."¹⁸

The fourth session of the committee saw a dramatic change in the traditional methodology of work. After a short open discussion, most of the discussion on the crucial issue of admissibility was conducted in closed drafting groups. The session also started to institutionalize intersessional meetings. Earlier, such meetings had raised doubts among delegations. The first intersessional meetings were not open; and when they became open ended, financial constraints still kept some potential applicants from attending. Nonetheless, these meetings gained popularity among delegations because of the great progress achieved. The intersessional discussions helped to refine ideas and concepts and to promote communication. Most important, the discussions were essentially transparent, and it was in their personal capacities that experts from governments and civil society attended. The intersessional meetings were designed to shorten proposals with the consent of the authors present.¹⁹ Limited substantive debates took place at these meetings. In general, the resulting new documents were not

imposed on the following PrepCom session as a new basis for discussion that would replace earlier versions but rather were presented as new proposals to be considered.

The last two sessions of the PrepCom were marked by more meetings known as *informals* and *informal-informals* (spontaneous small-group meetings of delegates), by the natural leadership of a number of delegations, and by the designation of subissue coordinators. These meetings were held at the UN and also at the permanent missions of several delegations. 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 sessions. 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.

The conduct of the latest intersessional meetings of the extended bureau, such as the meeting in Zutphen, however, showed a clear improvement in accessibility.²⁰ This was also true of the newly nominated bureau of the diplomatic conference when it met informally in Courmayeur, Italy, in early May 1998 to prepare for the Rome diplomatic conference.

The UN Secretariat

Senior officials of the UN Office of Legal Affairs agreed that the creation of the international criminal court would be the most important development in international law at the end of the century. Roy Lee and his team in the codification division clearly acted from this conviction throughout the PrepCom, despite their continuing regular responsibilities and their concurrent work for other negotiations.

The codification division provides the UN Secretariat's expertise on treaties, carries out its responsibilities as a treaty depository, and pursues its interests in the development and consolidation of international law. It gives conference support to the main UN bodies and conferences that consider or make international law, including treaties. It has standing responsibilities to the International Law Commission and the sixth committee, both of which have been major players in the history of the international criminal court at the UN.

The purposes and functions of the Office of Legal Affairs—unlike those of some other UN bodies—are readily understood and accepted. Thanks to their professional standing and qualifications, its officers are an important and appreciated asset for international law and of the UN. Their experience gained from continued long service to international law, their institutional memory, and their broad personal and organizational contacts have made them widely known and well regarded by diplomats, international lawyers, and scholars. The office has also benefited from the professional

prominence its legal counsels have almost always enjoyed and from the respect shown them by the secretaries-general they served. A key part of their role has been to be the secretary-general's in-house lawyer, and most of them have done well in it.

The duties of the UN Secretariat to the officers of any negotiation such as the PrepCom are diplomatic, parliamentary, legal, and bureaucratic. At the same time, the Secretariat must also advance the institutional interests of the UN in the negotiations. There was very wide agreement²¹ in the PrepCom that the Secretariat team did very well on most of these requirements.

As several members of the team put it, their central task in the PrepCom was to help its delegations and officers consistently "to see the woods as well as the trees," that is, to keep focused on the treaty text as a whole and on the totality of the court it would create. Sitting beside the chairperson on the dais, Roy Lee and his colleagues maintained lists of speakers; advised on parliamentary procedure; recorded, collected, and organized delegation amendments and proposals; placated interpreters on unpaid overtime; and—on the spot—answered technical and historical questions on international law. All of this was indispensable to the momentum, the pace, and the rhythm of negotiations that delegations needed to discourage pettifoggery, to build a sense of common purpose, and to sweep forward (or crawl continuously) to agreement.

The negotiations were about creating a text. Fast, accurate, and comprehensive drafting was therefore essential. The Secretariat was often able to produce fresh drafts between morning and afternoon meetings on the same subject. It was almost always able to do so overnight. The frequent failure to produce these drafts in a timely fashion in languages other than English was usually because of staff reductions or because other simultaneous meetings left the UN translation service understaffed and overburdened.

With a small staff and inadequate technology, the Secretariat was unable, however, to maintain a rolling consolidated text. Such a text would have helped delegations to keep up with changes (especially structural and placement ones) and would have prevented much of the last day's frenzy. The codification division did manage to prepare a full new text in the interval between most of the PrepCom sessions. In the early sessions, this gave delegations a chance to take a fresh look at the whole project and to assess its progress. Moreover, because the text prepared by the Secretariat compiled proposals by many nations, it enjoyed a high legitimacy, which preempted or stalled efforts by some countries to induce the PrepCom to accept their own drafts as bases for its negotiations. France failed in such an effort with a very elaborate text.

Two key contributions by the Secretariat to drafting the text came just before and just after the PrepCom's last session. First, the Zutphen draft

clarified language and contained all the changes and additions from the previous session. It contained thirty new articles, many of them concerned with the establishment and administration of the international criminal court. Then, the 1998 Courmayeur meeting produced another heavily revised complete draft treaty for Rome. This text had ninety-nine articles, seventeen hundred brackets containing disagreed language, and two hundred options.²² The quality, speed, and completeness of the Secretariat's drafting of these two documents constituted a remarkable feat of expertise, intellectual power, and composure under pressure.

The officers of the PrepCom needed the Secretariat team's diplomacy, political astuteness, and long-standing ties with important government and NGO players to manage their relationships with delegations and with each other. In these roles, as in all of its work, the UN group had to be self-effacing, disinterested, sympathetic, responsive, and alert to direct credit to others. It largely succeeded in this, although there were moments when time ran out, when countries in a minority lost their tempers, or when the interests of the UN in the success of the PrepCom took precedence.

Experience with previous negotiations was very valuable as well. The dynamics, politics, and many of the countries and persons in the Like-Minded Group and in regional groupings were much the same as in other UN bodies and meetings on international law and human rights. The behavior of NGOs in previous UN meetings (especially in those related to the UN General Assembly) was markedly different, however, from their style and organization in the PrepCom. Although slow to understand this difference, the Secretariat was eventually successful in doing so and in learning to make use of it.

The setting and human services for the negotiations at the UN served the participants well; the technology did not. All would have been familiar to an observer in the same room in the 1960s. Its restrained Scandinavian modern decor, well-modulated lighting, broad side aisles, and wide spaces between rows of seats gave delegates a quiet sense of occasion and room for side consultations during meetings. Interpreters performed their routine feats in five languages simultaneously. Conference service officers were responsive, expert, and patient. Except for their own laptop computers, delegates and committee officers had no computer services. The meetings depended entirely on paper documents, only some of which were produced by computer. Participants queued in long lines at a single small document window or waited for seat-to-seat distribution by conference officers. Without the projection screens and individual monitors of modern conference rooms, amendments and suggested language had to be tediously read out at dictation speed by the proposers.

The consequences of this technological deficiency became more severe for delegates in coping with the text when the draft treaty consolidated and the sequence and cross-references of its provisions became more

complicated and often more controversial. This was particularly evident in the final meetings of each PrepCom session, when the chairpersons informed delegations or asked for their approval of final changes and additions. He or she read these out rapidly in going through the English text section by section. Many delegations, especially those working in other languages, could not keep up.

This slowness, confusion, and uncertainty inhibited agreement, raised tempers, and reduced confidence. Small delegations and those declining or unable to use English regularly cited these difficulties in their frequent complaints about the *nontransparency* of PrepCom proceedings. Modern conference technology would have prevented much of this and would have made it easier for all delegations to keep the entire text in mind as they negotiated.

The Nature of an International Criminal Court

When the idea of a permanent international criminal court resurfaced in the early 1990s, there was widespread belief that the endeavor was simply unrealistic. The political challenge that such a major international institution represented was only part of the problem. Many believed that the absence of a basic framework of international criminal laws and rules of procedure would make it impossible for governments to agree on creating such a court.

Many participants found it hard to adjust psychologically, operationally, and intellectually to the implications of negotiating what would be not only a new and unique international institution but also a court. Elements that in various combinations and at different times seemed either hard to reckon with or alien included permanence, the specialized nature of a court, the notion of a treaty to implement rather than advance international law, and its application to individuals rather than to states. Human rights organizations usually sought to ensure that the court would embody the current status of international humanitarian law. However, they sometimes succumbed to the temptation to try to use the PrepCom to advance the current status in international law of issues such as war crimes and crimes against humanity.

Almost all delegations struggled occasionally to strike the balance between too much and too little structural and procedural detail in the treaty. Nonlawyers often thought that this effort was unnecessarily prolonged and complicated. Lawyers with domestic criminal law experience had to be reminded that, unlike national prosecutors who must consider all properly presented complaints, an international criminal court prosecutor would have to be very selective in choosing cases. The detailed procedures appropriate for a prosecutor confronted with hundreds of cases would not be needed. Moreover, distance, unfamiliarity, and language difficulties would

constitute special international problems in protecting the rights of parties, victims, and witnesses.

Reaching agreement on rules of procedure and evidence was expected to spark major difficulty. Even then, most observers did not expect the topic to command a major portion of the preparatory committee's time over two and a half years. Many among the court's strongest proponents had hoped that delegations would agree to focus on basic principles and let the court develop more detailed rules to fit its needs. A minority of states fought hard, however, to have the statute spell out details of the court's rules of procedure and evidence. The debate over rules of procedure was in many ways elevated to a political battle between major legal systems. Among a small number of civil law countries led by France, feeling strong that the international ad hoc tribunals for Yugoslavia and Rwanda had privileged common law and that this must not be allowed to happen with a permanent international criminal court. Because most criminal law experts came with a deep knowledge of their own system and considerable ignorance of other systems, they spent long hours explaining their own concepts and finding similarities with those of others. A tough challenge eventually arose: finding a compromise that would work out. This required first a balancing of civil law and common law perspectives that could, of course, never fully satisfy either. Then, the resulting compromise had to be tested for its suitability to the international criminal court. Eventually, the preparatory committee managed to agree that the most detailed rules would be incorporated in a separate document and adopted by state parties to the international criminal court treaty at a later stage of the process.

Delegations

The delegations were composed of a mixture of career diplomats from missions to the UN, senior civil servants from capitals, public and private experts (the largest group), and a few politicians. Most came through foreign ministries, but larger countries (France, the U.K., the United States, Russia) included representatives from justice and defense ministries. Expertise within and among delegations had to be diverse. The draft contained extremely sensitive political issues of interest and concern to the highest state officials. The great technicality of other issues called for specialists in various areas of penal, procedural, and international law, which a majority of countries were not able to bring to the negotiations. Lawyers abounded. Often, their specialty was international law (Israel, Italy). A good many had gained experience with domestic criminal law as judicial personnel, civil servants, or defense lawyers (Pakistan, Argentina). Some small or developing countries deployed impressive homegrown talent (South Africa, Lesotho, Malawi, Singapore), whereas others recruited from foreign universities (Samoa, Egypt, Fiji).

The existence of and formal requirements for instructions varied a great deal. Some countries had such an extensive national policy commitment to the international criminal court that specific instructions were rarely necessary or required (New Zealand, Norway). Others, such as Japan and the permanent members of the Security Council, came to each session with long instructions worked out through elaborate internal decisionmaking. It was also clear in a few cases and probably happened in many more that these delegations frequently asked for and received instructions in response to new developments in the course of PrepCom sessions.

Certain delegations were in special or unique circumstances. Some were leaders of negotiating or regional groups. Countries that became president of the European Union during the PrepCom were constrained by that role. Italy was to be the host of the Rome conference; the Netherlands was the undisputed candidate to be the host country for the international criminal court.

Finally, there were the numerous silent delegations, barely able to mount a presence and, at least at the start of the process, lacking the resources and expertise to speak up. They were a constant challenge to the universality of the PrepCom. Even with the help of generous governments, the preparatory committee was able to meet the challenge only partially by specially informing and financing the delegations of developing countries.²³

National Strategies for the International Criminal Court

With the convening of the PrepCom, almost all countries recognized that a serious effort to actually establish an international criminal court had begun in earnest. Participation in the PrepCom represented at least a national commitment "to prepare a widely acceptable consolidated text of a convention for an international criminal court."²⁴ The practical options for countries that had first indicated that they were unconvinced of the need for an international criminal court (China, India, Japan, Kenya) were to promote enduring disagreement, to work for a very weak court, or to do some of both. However, by the second session of the PrepCom, its atmosphere had turned hostile to open efforts to foment disagreement. The five permanent members of the Security Council had concerns about the relation of the international criminal court to the council and the possibility that the court might try members of peacekeeping forces. At the same time, France, the U.K., and the United States felt and responded in different ways to the strong impetus in the international community toward an international criminal court. Both the U.K. and the United States had elements within their governments that strongly favored an international criminal court and regarded it as a logical extension of the U.S. initiative to create ad hoc tribunals for Yugoslavia and Rwanda.

A considerable number of countries, many of which coalesced into the Like-Minded Group, started with a clear general vision of the strong, independent international criminal court they wanted. Other countries, such as Singapore, saw in the PrepCom, as they had in other multilateral negotiations, the opportunity to display international good citizenship and impressive mastery of the subject. Pakistan, India, Cyprus, Indonesia, Israel, and Iraq—among other nations—had reservations about the international criminal court because of their special regional situations.

When the International Law Commission proposed a role for the UN Security Council in the jurisdiction of the international criminal court, the proposal raised fears among developing countries about giving the council added power. The proposed role included referring matters to the international criminal court and the authority to block investigation of situations being dealt with by the Security Council under its powers in Chapter VII of the UN Charter.

Permanent members of the Security Council in turn feared that the proposed court would impede their collective duty to take action to maintain world peace and order. The permanent members' initial vision of the institution was indeed closer to a permanent ad hoc tribunal of the Security Council than to an independent international judicial institution. This vision led them to oppose giving power to the prosecutor to trigger the jurisdiction of the court or, alternatively, to demand the case-by-case consent of interested states when the jurisdiction of the court had been triggered by either a state or the prosecutor. These positions clashed with the independent and effective institution that a growing number of states in the Like-Minded Group wanted to see created. Many less developed countries and others with a particular sensitivity about sovereignty feared an international criminal court that would ignore powerful developed countries and specialize in human rights violations in poorer and weaker countries.

Key Issues

Early in the negotiations, it became clear that the core issues of the court were closely interconnected. The role given to the Security Council, the powers of the prosecutor, and the scope of the inherent subject matter jurisdiction of the court were three completely inseparable political stumbling blocks. Governments realized that options on these issues could be defined and streamlined in the preparatory committee, but only the Rome diplomatic conference would be able to negotiate them. A short list of unsettled core issues included the trigger mechanisms of the court and the role of the prosecutor, the role of the UN Security Council, the scope of inherent jurisdiction of the court, and the definitions of crimes. Agreement existed from the outset that certain crimes would fall under the jurisdiction of the court, namely genocide, crimes against humanity, and war crimes.

The crime of aggression gathered significantly less support at the start. The court would have jurisdiction over these crimes if and only if the states with original jurisdiction were unable or unwilling to prosecute them (the international criminal court does not supersede national justice systems).

The jurisdiction of the court could be triggered by either the Security Council, a state party, or the prosecutor, based on information submitted by any source. Opposition by small but vocal groups of states to a self-starting prosecutor (China, the United States, Russia, India, Indonesia, Iran, Japan, Mexico), to the proposal for Security Council referral of cases to the international criminal court (India, Mexico, Malaysia), or to both was expressed throughout the PrepCom.

Equally controversial was the proposed requirement of the additional consent of one or several states concerned to the jurisdiction of the court (the state where the crime took place, the state of the accused's nationality, the state with custody of the suspect) on a case-by-case basis. Under this regime, the court would have inherent jurisdiction only for the crime of genocide.

Finally, the definition of crimes was long debated. As a result, both crimes against humanity and war crimes were included in many of the brackets and options in the draft treaty sent to Rome. The definition of war crimes proved to be the most sensitive. A number of states favored a restrictive list and definitions of these crimes (France, the United States, India, Pakistan, Iran), whereas others demanded that the treaty language of humanitarian law be reproduced without substantial alteration or omission (Switzerland, Norway, Sweden, Samoa).

The preparatory committee therefore worked to identify positions and compile them in sets of options. Delegations put much effort into a set of secondary political issues such as the standard of admissibility of a case by the court. Governments reached an agreement on the relationship between national criminal justice systems and the jurisdiction of the international criminal court. The PrepCom also succeeded in defining such mixed political and technical issues as states' cooperation with the court. One core issue, the definition of crimes within the jurisdiction of the court, was partially resolved by the committee. Disagreement among states about the scope of customary international law raised major difficulties, however, in the definition of war crimes.

The small but very expert delegation of Singapore suggested an important compromise at a time in the preparatory process when no one could see a bridge between radically different state positions on core issues. They proposed replacing the controversial provision that the International Law Commission had suggested. The original provision prevented any prosecution arising from a situation that is being dealt with by the Security Council under Chapter VII of the UN Charter, unless the Security

Council otherwise decides. The initial proposal was seen as giving a de facto veto power over investigations to any of the permanent members of the Security Council. Singapore's suggested amendment provided that an investigation could not proceed if the Security Council so decided, thus requiring an affirmative decision and agreement of the five permanent members and four nonpermanent members in order to block an investigation. Several delegations welcomed the proposal—both those countries advocating a strong role for the Security Council (China, Russia, and the U.K.) and those favoring the court's independence from the Security Council.

The Road to Rome

The so-called Singapore compromise was the last of several psychological breakthroughs in the course of the PrepCom process. The first of these breakthroughs was the creation of the preparatory committee itself. As we note, the transformation from ad hoc committee to preparatory committee represented a whole different stage of work. Even the name of the preparatory committee indicated that its function was to prepare a diplomatic conference. In turn, this implied a commitment to the diplomatic conference and the need for actual negotiations and drafting of a text.

During the first session of the preparatory committee, the evolution from the ad hoc committee was striking. Observers were well aware that although many countries, including several major powers, had previously made statements indicating their governments were not yet convinced of the need for an international criminal court, none were willing to say in the PrepCom that they opposed the court.

Fixing the date of the diplomatic conference at the conclusion of the second session in August 1996 was a major turning point. A group of self-named "like-minded" countries formed around precisely this issue. They shared one common interest: to create a permanent international criminal court as soon as possible. They realized that, if not seized, this opportunity could vanish for another fifty years. The Like-Minded Group of countries worked through the three years of negotiations as champions of a strong, independent, and effective international criminal court. They developed a strong partnership with the NGO coalition and with other experts, and their achievements were impressive. At every opportunity offered at the international level, individual members of the group fought for their visions of an independent institution.

The initial strategy of this group of countries was to expand its number. However, after growing from a dozen members to more than forty, members began to worry that further growth would endanger the group's solidarity. Very late in the process, the Like-Minded Group decided to explore commonalities on core issues of the negotiations in order to eventually

develop shared benchmarks for Rome. The like-minded guiding principles and objectives were discussed at length but never put in writing. They were the independence of the international criminal court from the Security Council, the independence of the prosecutor, the extension of the inherent jurisdiction of the international criminal court to cover all core crimes, the full cooperation of states with the international criminal court, a successful diplomatic conference, the prompt creation of an independent and effective court, and the power of the international criminal court to finally decide on the unavailability or unwillingness of national systems to proceed with a case.

Another major development, in the opinion of a number of observers, occurred during the December 1997 preparatory committee session when the U.K. confirmed its decision to oppose the provision in the draft statute that would require prior approval by the Security Council before the court could proceed with investigations and trials. This change of policy by the U.K. ultimately led to its joining the Like-Minded Group. In addition, this demonstration that change and compromise were possible gave the committee renewed optimism.

Nongovernmental Organizations

Most NGOs at the PrepCom organized their activities through the NGO Coalition for an International Criminal Court. A few particularly strong international human rights organizations helped to found the coalition and influenced and respected its coordination, but they also carefully preserved their separate identities and influence. These organizations and their representatives had long-standing relationships with diplomats, scholars, and the UN Secretariat and had participated in the early work of the International Law Commission on the court. Prominent among them were Amnesty International (Christopher Keith Hall), Human Rights Watch (Richard Dicker), and the Lawyers' Committee for Human Rights (Jelena Pejic). The European Law Students Association (ELSA) had a large, changing delegation under continuing leadership at each session of the PrepCom. It enjoyed strong representation in several European capitals and support from its headquarters in Brussels. Its members were effective in lobbying and in giving the NGO coalition access to delegates from their countries.

NGOs engaged in two principal sets of activities in support of the PrepCom outside its sessions. They largely failed in one of them and succeeded brilliantly in the other. Although the coalition tried hard through its communication and contact networks to encourage and coordinate NGOs to influence governments at home, the results were disappointing. ELSA had some success in a few capitals. No Peace Without Justice/Transnational Radical Party, a founding member of the CICC, had a pan-European

presence from its base in Italy. Its greatest contributions were the personal missions of its prominent and greatly respected leader, Emma Bonino, the commissioner for humanitarian affairs of the European Union, and its cosponsorship of major regional meetings on the international criminal court, such as the Dakar conference. These and similar efforts likely had some effect but—with the exception of the regional meetings—did not make a major difference. However, regional and national initiatives undertaken by representatives of the main international human rights organizations developed important personal contacts and put the position papers of these groups into play in national policymaking. These missions both benefited from and supported the intersessional meetings, whose essential contributions to developing the draft treaty text we have already described.

The NGO coalition included private organizations, such as humanitarian, parliamentary, religious, and women's organizations, under the leadership and guidance of international human rights groups. The need to have a stronger NGO presence was first felt when six NGOs attending the meeting of the sixth committee in autumn 1994 realized their inability to monitor and influence negotiations in such an important set of talks at the UN. In particular, they were unable to assist a number of the like-minded countries, which wanted a strong and specific resolution on the creation of an international criminal court, whereas the five permanent members of the Security Council wanted to send the international criminal court proposal on for further studies.

The New York office of the World Federalist Movement was chosen to convene the first meeting of founding organizations of the coalition. This relatively obscure organization had for a long time monitored UN activities and conferences, disseminated information, coordinated delegations and meetings, and shared information through a fax network. William Pace, its executive director, was known by several of the founding groups for his expertise on the organization and structure of and actors in UN negotiations. One of the biggest challenges foreseen was whether the NGOs would be granted access to the PrepCom's meetings. Other negotiations, such as the Vienna Conference on Human Rights in 1993 and the Beijing Conference on Women in 1995, had set positive precedents for NGO access to and roles at UN conferences.

The CICC grew from thirty to some eight hundred NGOs from all regions of the world and sectors of society. The bigger groups were the intellectual leaders of the coalition. They used it to circulate and promote new research and expert documents. Smaller groups were often more effective at networking, disseminating information, and building coalitions than the larger international organizations. Through this process, the coalition developed an increasingly powerful role in the development of the draft statute. The NGOs became partners in the negotiations, especially through consultative roles with a growing number of governments. The

coalition organized meetings with government delegations at the Prep-Com. General strategy meetings and also groups and caucuses met to develop their positions individually. The main groups of the coalition were the women's caucus for gender justice, the victims' working group, the faith-based working group, and the children's caucus. The coalition as a whole never took positions during the PrepCom in order to maintain both the plurality of ideas and objectives represented by the coalition and the solidarity among its members.

As the NGO coalition grew in strength, an alliance developed between it and the Like-Minded Group. The coalition assisted delegations in the latter group by preparing thoughtfully researched commentaries on every issue discussed. It made the commentaries available to group members and other delegations prior to the PrepCom sessions. Through regular meetings, the coalition helped the Like-Minded Group develop guiding principles to serve as the first unified "position" of the group before the diplomatic conference.

One of the first and most important challenges to face the CICC was obtaining assured and continuous access for its members to PrepCom meetings. During the third session, the PrepCom discussed the question briefly behind closed doors and then reconvened in a formal plenary. In this open meeting, the committee both confirmed an early decision that plenary meetings would be open and also decided to open informal working groups to NGOs. The bureau agreed to this procedure on the recommendation of the Secretariat, which had discussed it with the CICC.

The United Nations

The prospect of a functioning permanent international criminal court offered a great deal to the UN at the turn of the century, when, like its member states, it was called on to define itself as an international actor, to demonstrate its value, and to find its position amid the privatization of international relations and the globalization of technology and commerce. At the simplest, the birth of a serviceable new international organization would in itself confirm the need for and the relevance of multilateral institutions. The court's central principles of the responsibility of individuals for their own participation in gross international crimes and of direct justice for victims fit well with the intense desire of many NGOs to bring persons and peoples within international law. Moreover, nations themselves had accepted these principles through the precedents of the Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals. Accordingly, the UN felt itself strongly supported by its two most important constituents in its activism on the international criminal court. Moreover, the court was a direct and straightforward response, conceived and promoted at the UN, to obvious and horrible crimes. People everywhere felt the same loathing and

anger about such crimes. The UN had no need to walk softly around cultural relativism here.

The UN would thus deserve much, and get a reasonable amount, of the credit for the success of the international criminal court negotiations as an inspiring and astonishing act of collective international creativity. If the outcome in Rome were to be a disappointment, NGOs and other observers would lay most of the blame on governments.

Beyond these calculations of much to gain and a lot less to lose, international civil servants at the UN had strong personal reasons for wanting the international criminal court. It would serve some of the most important requirements and objectives of the UN Charter to which they were devoted. Many of them had seen genocide, war crimes, and offenses against humanity in painful personal experiences. Moreover, they saw in the court a unique way to make the UN more relevant to the lives and feelings of human beings everywhere.

For these reasons and with the help of UN Legal Counsel Hans Corell, the senior management of the UN began to highlight the international criminal court in speeches and interviews by the end of 1996. The secretary-general repeatedly called the court one of the three most important objectives of the UN before the millennium.²⁵ Inside the UN, officials of the codification division discerned with satisfaction a growing demand from the secretary-general's office for reporting on the progress of the PrepCom. This interest from the "top of the building" tended to reinforce the division's own sense of the importance of the success of the effort for the international criminal court to the future of the UN.

The Media

The PrepCom received the same scant attention in the general media as other comparable UN meetings, although it found extensive coverage in the specialized press, such as journals of political science or international law. The CICC and the UN Correspondents Association cosponsored a news conference at each session. The number, relative importance, and knowledge of the journalists attending these conferences were a measure of slowly rising and then accelerating media interest. The last conference was distinguished by a standing-room-only crowd, informed questioning, and the presence of representatives of major newspapers.

PrepCom officers and delegations appeared to be much less concerned than NGOs about the media and public opinion. Chairman Bos had one press conference in which neither he nor the media seemed to be very interested. A sense among participants that the world was watching their proceedings or greater media reaction to PrepCom action on particular issues might have both served to promote agreement and led to more (perhaps not always desirable) attention in capitals. It was clearly a mistake to close so many of even the most formal PrepCom sessions to the media,

especially after they had been opened to NGOs. If journalists had had access, at least some of them might have earlier seen past the apparently nonnewsworthy technicalities of the negotiations to their underlying and often obvious drama. In the event, however, despite some good efforts, especially by NGOs, and despite growing interest at the end, the PrepCom did not prepare the media well for Rome.

The Preparatory Committee as Precedent

Most of those participating in the PrepCom had the same essential and emphatic feelings, thoughts, and beliefs about war crimes, genocide, and crimes against humanity. They also agreed that the core of international criminal law on these offenses was already substantially in place, although there was plenty of disagreement on its full reach and some of its definitions and elements. This spared the PrepCom much of the obscurity and confusion other conferences experienced in trying to negotiate both the content and the implementation of norms at the same time. By no means early enough but quicker than many expected, the PrepCom was thus able to find and keep its concentration on constructing a court.

This sense of standing together in the middle of broad common ground, even if its ultimate boundaries were still not agreed, promoted mutual acceptance of many kinds among the participants. Governments and the team from the Office of Legal Affairs came to accept NGOs as indispensable consultants and worthwhile advocates. The CICC and its members attained full legitimacy and great, sometimes determinative, influence as brokers of solutions to impasses, as experts, and even as confidants. As the coalition's leaders had planned from the beginning, a powerful and vivid precedent had been set for the role and presence of NGOs at future meetings convened by the General Assembly.

NGOs in turn had learned to accept a great deal in the institutional culture and style of international treaty conferences, which many of them had been previously inclined to ignore. This included matters of procedure, timing, access to documents, decorum, and even dress. Without yielding their often justified suspicion of governments, NGOs came to accept that national positions, however obstructive, frequently have specific genuine causes, better addressed by dialogue than by simple condemnation.

The UN Secretariat found that it was able to win acceptance from the bureau, governments, and NGOs alike for the reach of its work and presence. Promoting its expertise and pursuing its objectives with a self-effacing aggressiveness, the Office of Legal Affairs achieved a lasting and influential demonstration of the unique value to treaty making of the support of international civil servants.

Leadership in the PrepCom was as determinative as it was hard to analyze. All of its senior official leaders and most of the junior and informal ones acquitted themselves with both integrity and knowledge. Accordingly,

governments in the PrepCom could be confident that its most important leaders understood its politics, knew the issues, and would conduct the negotiations fairly. Knowing this, delegations usually showed patience for mistakes, for problems of organization and logistics, and for occasionally inept initiatives. The PrepCom reconfirmed a truth here—long recognized in legislative diplomacy—about leadership and trust.

As law and other standards for international life increasingly move in their development from declaration to enforcement, the old century ends and the new will begin with struggles to make new multilateral institutions. Whatever the outcome of the efforts to establish an international criminal court would be, the preparatory committee had shown the future builders of those institutions the need for new negotiating models and methods and the promise that trust, compromise, and confidence can take hold among them. It will stand as a landmark both in the emergence of new actors and for the lasting importance in international legislation of patience, knowledge, endurance, and a common moral commitment.

An Afterword About the Rome Conference

Three times on the night of 17–18 July 1998, jubilation exploded through packed meetings of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which was drawing to a dramatic close in Rome.²⁶

The committee of the whole assembled at first in the Red Room at the headquarters of the Food and Agriculture Organization, a UN agency based in Rome. In this cramped and inconvenient space with too few seats, representatives of NGOs and governments alike thronged the aisles and sides. India and the United States asked for votes on their proposed amendments to the complete draft text of the statute for the international criminal court, which Chairman Philippe Kirsch of Canada had introduced. Following a scenario carefully choreographed by the bureau and the UN Secretariat, Norway's delegation and other speakers addressed the conference before the vote was taken. They pronounced the chairman's text a delicately balanced and painfully achieved package and claimed that—if any element of it were to be changed—the package would fall apart. When India's amendment was defeated by 114 votes out of 148 cast, an exuberant uproar ensued. It was a celebration that the package had held with the support of a majority that would give it legitimacy.

In the biggest and most emotional demonstration of the evening, cheering, hugging, weeping, and rhythmic applause followed the similar defeat (by 113 votes) of the U.S. amendments. The intense reaction reflected a fear many participants had harbored: that even at the last minute the strenuous diplomacy of the United States in Rome and its blunt bilateral

maneuvers around the world would succeed either in putting the conference in impasse or in rendering largely impotent the eventual court.

Later, just before Friday night, 17 July, turned into Saturday morning, 18 July, the United States again asked for a vote, this time on the statute as a whole. The proceedings had migrated from the Red Room to a long and narrow ceremonial meeting hall for the formal, final plenary session of the conference. Electronic scoreboards installed at each end of the long hall displayed the votes. The final tally counted 120 votes cast for the statute, 7 against, and 21 abstentions.

As exhausted delegates roused themselves for another twenty minutes of exultation, the U.S. delegation found itself, according to the records of most observers, dissenting in the company of the delegations of Israel, China, Iraq, Yemen, Libya, and Qatar. The United States had been unable to accommodate itself to the shift from the actions of states to the accountability of individuals, a shift that the momentum of the PrepCom had carried into the Rome diplomatic conference. Moreover, it had been outmaneuvered in the politics and process there by the Like-Minded Group, assisted by the determination of the new chairman and the UN Secretariat to achieve a workable statute and a viable international criminal court.

A New Chairman

A few months earlier, shortly after the preparatory committee had drawn to a close in April 1998, sad news circulated. Chairman Adriaan Bos was seriously ill and, as a result, would be unable to preside over the committee of the whole at the Rome conference. Many of those individuals in the UN Secretariat and the PrepCom bureau and among government representatives who had actively participated in the three years of preparatory meetings realized it would be extremely difficult to replace him. No candidate seemed to exist who both shared Bos's unusually high diplomatic skills and leadership experience of major UN negotiations and also had taken part in the PrepCom. The only name to rally enthusiasm was that of Bos's eventual successor, Philippe Kirsch. Kirsch had the required experience of UN diplomatic conferences and negotiations. He had also been a legal adviser with the Canadian mission to the UN and therefore knew well some of the main actors of the treaty negotiations, including government representatives and UN Secretariat staff members. However, he had not been involved in the preparatory process until its last session. Some observers feared that he lacked Bos's diplomatic skills and was too straightforward.

As delegates weighed the possibilities, they decided against both Hans Peter Kaul from Germany and Richard Anthony Rowe from Australia because of political-strategic considerations rather than for a lack of personal skills. Germany, a leading country of the Like-Minded Group, had the

most extensive view of the court's jurisdiction and powers. If Germany were to chair the committee of the whole, the group would lose its most progressive element. Germany also seemed, at the time, quite isolated on the question of the inclusion of the crime of aggression within the jurisdiction of the court. Australia's new government, however, clearly did not have the international criminal court as its highest priority. Finally, Canada, as a good neighbor, would easily converse and negotiate with the United States.

Kirsch's style was reflected at all levels in the techniques chosen and used throughout the negotiation in Rome. Pushy in driving delegations through negotiations, Kirsch was also strong, determined, compelling, and straightforward. The unfolding of a successful outcome on the last day of negotiations led many to view him as the perfect chairman. This success was all the more amazing since his style and techniques had been seriously criticized by several groups or individual countries.

Negotiating Techniques

At a preparatory meeting convened in Courmayeur, Italy, in May 1998,²⁷ newly elected officers of the Rome diplomatic conference identified an initial, broadly defined strategy, part by part, issue by issue. Participants determined which issues would most likely prompt major debate and difficulties and then earmarked them to be dealt with mainly through informal negotiations.²⁸ They determined that Part 2 of the statute, which contained core political issues, would be dealt with both in the committee of the whole and informally. Their meeting revealed the concern of the leaders of the conference that they come up with packages on these core issues as soon as feasible. Many at the conference believed that countries would not lay their cards on the table without knowing how these critical questions would interrelate. As far as other issues were concerned, discretion was left to the working group chairs to decide whether and when they would convene informal meetings on specific issues or articles.²⁹

With a deadline of five weeks to adopt a treaty, everyone attending the Rome conference knew that time would be a constant factor and have a major influence on negotiation techniques employed there. They accepted as a given that the chair would attempt to use time and lack of time as a negotiating tool throughout the conference. Ultimately, the swift pace of the negotiations exhausted delegates and at least weakened otherwise zealous filibusterers. Most delegates at first underestimated the pace of negotiations. Lunch sessions were held from the first week of the conference, competing afternoon informal meetings quickly became routine, and night and weekend sessions later followed.

After the first two weeks of negotiations, the conference turned into a marathon. Delegates ate on the run, arriving at informal meetings with a

small sandwich in hand or quickly chewing a panini in the small and smoky Polish Bar at three in the afternoon. This process managed at times to foster a bond and a sense of common enterprise among all actors. Being in the same boat and suffering together favored a relaxed etiquette. It also soon triggered complaints that the process was unfair. Smaller delegations once again felt excluded because they were absolutely unable to cover all meetings.

At the end of the first three weeks, it became evident that most of the working groups were completing their portions of the statute. Kirsch then began to put pressure on conference issue coordinators who were procrastinating and on delegations who were thwarting the push to reach consensus in some working groups. The drafting committee, working almost around the clock, was keeping current with the agreed texts coming to it from working groups through the committee of the whole. Under the firm and thoughtful chairmanship of Cherif Bassiouni and with superb technical and conceptual support from the Secretariat, the drafting committee's finished work was smooth, accurate in all five official languages, and properly cross-referenced internally.

Breakthrough

Chairman Kirsch decided to convene a selective meeting of twenty-eight delegations on Sunday, 5 July, after three weeks of negotiations in Rome. He sought to identify the elements of a compromise statute and put on the table an informal "package deal" paper.³⁰ The meeting was intense and very much epitomized Kirsch's daring initiatives and style as a chair. These can be summarized in his own words: "Whatever I do, I'll look bad."³¹ Meeting organizers retrieved the chairman's discussion text from participants before they adjourned both because of the selective and informal nature of the meeting and because organizers thought it strategically better that the text not go to capitals immediately.

Criticism indeed came vehemently from the right and the left wings. The United States, a participant, viewed the meeting as a Like-Minded Group setup and questioned Kirsch's impartiality as chair. The text appeared to the United States as favoring like-minded positions. On the same evening, the text was substantively modified by Kirsch in order to reflect some U.S. positions. Several smaller countries later saw the meeting as an undemocratic one, accommodating big countries.

On the following day, the bureau issued the first comprehensive discussion paper on Part 2 of the statute.³² The paper was a suggested package of all core issues, offering at least one and as many as three options for most of the crucial points. Its contents were controversial, but states accepted Chairman Kirsch's initiative. From the start, as we mention earlier, most participants anticipated a package approach to the most difficult

political issues: it clearly seemed to be the only possible way to progressively limit the number of options and to narrow differences.

Beginning on Wednesday, 8 July, Chairman Kirsch opened the committee of the whole for a point-by-point discussion of the bureau paper. In order to avoid a general debate, he requested at the opening of the session that states answer a set of precise questions. This technique limited the scope and length of answers and forced delegations to be specific. Each in their turn, delegations gave the same answers again and again, demonstrating the weight and support of majority positions. This "virtual vote" technique allowed for finding out where everybody stood.³³ It left time for delegations to receive instructions from capitals over the weekend. The chair explained that it would also permit the completion of a final chairman's draft text to be released on Friday, 10 July.

The review of positions, carefully recorded by participants and observers, renewed concerns about the likelihood of the conference reaching a consensus on the entire package. Participants began to envision that the chair would have to put some of the essential issues to a vote. With such a package on the table, however, a second round of diplomatic negotiations to deal with unresolved substantive issues was unlikely to occur. Moreover, the package renewed general optimism as the shape of the treaty was finally emerging.

The role and input of the main actors at the diplomatic conference tended to correspond with what had occurred at preparatory committee meetings. Trends that appeared at the PrepCom were generally confirmed and strengthened in Rome. Despite earlier fears, the carryover from the PrepCom to Rome of key government individuals, leaders, and groups was extensive.

Governments

The political groupings identified in the PrepCom maintained their broad characteristics at the conference. The Like-Minded Group of countries strengthened its leadership role throughout the negotiations and grew from forty-two to more than sixty states as it abandoned its fear of expansion. This group was the only one with an operational strategy. All its key meetings were carefully prepared, and its issue subgroups, meetings, and briefings for smaller delegations were well organized. The group had also designated issue coordinators early in the meeting. The Like-Minded Group planned and thought through the entire progress of the conference.

Its leadership was seen by several other delegations (the United States, India, France) or groups of delegations (Arab states) as unfair, exclusive, or uncompromising. However, most nongovernmental actors argued that the constant efforts of the Like-Minded Group to accommodate others threatened and ultimately sacrificed vital principles of the international

criminal court statute. As the negotiations concluded, it was clear for all, however, that the group had efficiently led the negotiations to their success. The necessary broad support was gathered in exchange for substantial but limited concessions.

The Nonaligned Movement played an active role in the first stage of the negotiations. Its membership seemed to unify around a strong India and a group of Gulf states. A substantial number indeed agreed on two principles of the Nonaligned Movement: the inclusion of nuclear weapons in the list of prohibited weapons and the absence of control by the Security Council. However, cohesion faded as the negotiations progressed and as positions were being fine-tuned. Many countries stated that, although they strongly favored one or both of these principles, they could agree with one of the compromises offered on them. The leadership of the Nonaligned Movement did not build on these two basic principles and did not succeed in providing leadership when bargaining began. Members of the Nonaligned Movement soon began to group regionally (African and Arab states) or joined the Like-Minded Group.

Early in the conference, a group of Arab countries (Syria, Libya, Lebanon) was conspicuous for its many objections, proposals, and amendments, in particular to sections debated at length during the preparatory process.³⁴ Their attitude was first seen widely as obstructionism. However, the source of many of their interventions was later understood to be twofold: linguistic misunderstandings due to recurrent translation inaccuracies and the lack of long-term involvement by these countries with the international criminal court process. Several delegates spent time personally reassuring and explaining technicalities to these Arab representatives, an approach that solved many problems.

African countries met as a group throughout the conference. The core group of countries in the Southern African Development Community gradually succeeded in bringing a number of francophone and other African countries first to meet with them and eventually to join the Like-Minded Group. Most African countries broke out of the Nonaligned Movement as a result.

Europe, minus France, was united within the Like-Minded Group. A common European Union position was not envisioned at the beginning because France (and to a lesser extent the U.K.) kept a narrow "Permanent Five" vision of the jurisdiction and powers of the court. In the end, however, the U.K. kept faith as a member of the Like-Minded Group, and France joined with it in voting for the statute after obtaining a final concession on the scope of the court's jurisdiction.

The United States never accepted the idea of international criminal responsibility for, and the focus of the court on, individuals. The U.S. delegation repeatedly expressed its government's feelings that the process had been unfair and that compromise had not been sought hard enough.³⁵ The

tone of the delegation even became threatening at the turning point of the negotiations. In what came to seem an irony, representatives of the U.S. Justice Department made genuinely important contributions to several sections of the statute (penalties, procedure, enforcement).

Other Actors

The NGO Coalition for an International Criminal Court was well prepared and organized for the conference. Its convenor and steering committee had planned for a shift in its tactics to a more aggressive campaign mode. For that purpose, they designed a new organization of work. The coalition set up thirteen teams covering each part of the statute. As a result, experts took more responsibility to convey daily insight, information, and analysis to all present. This new technique increased the sense of responsibility and solidarity among NGO participants at the conference in Rome, something newcomers to the preparatory committee meetings, by contrast, sometimes believed to have been missing. Another important element was the carry-over of major NGO actors from the preparatory committee meetings.

Aside from the particular benefits it afforded NGOs, this shared coverage, together with an extended meeting schedule, also made it much harder for conference delegates to get away from NGOs in Rome. NGO leaders retained their consultative role there. Chairman Kirsch was eager to keep NGOs on his side and at times took pains to avoid losing the very strong support accorded to him from the start of the conference. He booked time for weekly private meetings with selected international and Canadian NGOs. When his package deal papers were issued, NGOs raised substantial concerns, but they always supported his initiatives. NGO leaders all deeply trusted Philippe Kirsch. His straightforwardness and radical style fit well with the NGO vision of the ideal chairman.

UN Secretariat and Support Staff

Legal Counsel Hans Corell and Roy Lee's codification division office remained the nerve center of UN Secretariat support in planning and organizing all aspects of the Rome diplomatic conference. This time, they led a team of staff drawn from the UN offices in Geneva (documents, conference services) and Rome (security) along with their colleagues from UN headquarters in New York who had served all the sessions of the Prep-Com. The strong personal commitment and involvement of the secretary-general was reflected at all levels in the support given daily by core representatives—and by all UN staff—to the chair and officers of the conference. The UN was not simply a neutral convenor and, to the contrary, weighed in a lot on the side of Chairman Kirsch in pursuing their common goal of achieving a successful meeting. The secretary-general's

strong speeches, his presence at both the opening and closing ceremonies of the conference, and his attention to daily developments made it clear that a successful outcome was essential for the UN.³⁶

Conclusion

Any conclusions about the Rome diplomatic conference, as about its preparations, must take into account the almost total and frequently fervent moral agreement on the crimes it addressed. This point applies especially to the package technique. Common in many public and private negotiations, use of the technique is still relatively rare in negotiations at the UN—and especially in the General Assembly—where consensus is normally sought and found. By contrast, it is the nature of the technique that it eventually puts an end to all attempts at further compromise and offers a product that is accepted or rejected.

The package approach requires very strong leadership, such as that illustrated by the careful advance planning undertaken by the new chairman, the bureau, and the Secretariat before the conference got under way. Because absence of consensus means that matters will be decided by voting, the leadership in and of meetings that use this approach must also command the loyalty of a significant number of committed followers. As a strong majority builds through methods such as those used in the Rome conference, the feeling of a need for consensus fades. Countries that felt excluded from the design of the international criminal court package and from the consultations on it among selected governments were lifted nonetheless by the rising tide of agreement at the conference. If a package is used successfully again soon, especially in another UN-sponsored meeting to create a multilateral institution, the Rome diplomatic conference may well prove to have broken the taboo at the UN against voting and against bureaus that deliberately plan for it. When the circumstances are right, the package is clearly a unique tool to overcome indefinite obstruction by those who do not wish to achieve prompt or any results. The final broad view in Rome was that the package approach was the only way to achieve a statute in five weeks.

In the behavior of groups at the conference, regional caucuses clearly prevailed over the Nonaligned Movement. The progressive isolation of the movement's leadership and of its dwindling followers through the skillful work of the chairman and the Like-Minded Group was so striking that here too a taboo may well have been broken. This was especially marked by the enthusiastic defection from the Nonaligned Movement by sub-Saharan African countries.

The NGO coalition served as a formidable, disciplined, and omnipresent ally for the bureau, the Like-Minded Group, and the Secretariat. Its actions set a new standard and precedent for NGO effectiveness, both at further conferences and almost certainly in the General Assembly and

elsewhere in the UN. Because the coalition's solidarity accommodated a considerable range of specific positions within a general commitment to the international criminal court, this kind of NGO mobilization may recur more readily than any other feature of the CICC. In particular, NGOs demonstrated that they could deal expertly and responsibly with the sorts of questions in the domain of peace and security that the international criminal court will affect and confront.

The final meaning of the Rome diplomatic conference and of all the preparatory work that preceded it must depend greatly on whether the international criminal court exists and works. In Rome, many thought they saw a window opening on the future. If the court fails, that window will close. Even so, the celebrants on the last night of the conference will still have been right to cheer. Old patterns of agreement, outworn groupings, fears of the powerful, and inhibitions on leadership were weakened or cut down there. For the multilateral making of new global institutions in a new century, there are now new ways to negotiate and to reach agreement. They were tested in Rome in the summer of 1998, and they worked. 🌐

Notes

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1. Authors' notes. The authors attended and participated extensively in NGO activities at most sessions of the preparatory committee and were present throughout the Rome conference. In 1998, they interviewed many participants in the PrepCom, including UN Secretariat officials and government and NGO representatives. All of these people asked that their comments not be attributed.

2. For a short but thorough history of the international criminal court, see a two-part article by Christopher Keith Hall, "The History of the ICC," *International Criminal Court Monitor*, no. 6 (November 1997): 6-7; no. 7 (February 1998): 7-8. The *Monitor* is published by the NGO Coalition for an International Criminal Court. These articles, many basic documents on the international criminal court, and much other analytical and historical material are available online at the coalition's website, <http://www.igc.apc.org/icc>. No summary or verbatim records of the PrepCom were kept. Much in this article is therefore based on the authors' notes and personal observations.

3. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 United Nations Treaty Series, p. 277. See the series of war crimes conventions adopted on 12 August 1949, which appear in 75 United Nations Treaty Series, pp. 85-287. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts, 12

December 1977, at 1125 United Nations Treaty Series, p. 3. Draft Code of Crimes Against Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-fifth session, 3 May–23 July 1993, in UN General Assembly, forty-eighth session, Official Records, Supplement 10 at 21, UN Doc A/4810 (1993).

4. UN General Assembly, Resolution 4654 (XLVI), forty-sixth session, Official Records, Supplement 49 at 286, UN Doc A/46687 (1991).

5. *Ibid.*, Resolution 4953 (LIII), forty-ninth session, Official Records, Supplement 49 at 292, UN Doc A/49738 (1994).

6. *Ibid.*, Resolution 5046 (L), fiftieth session, Official Records, Supplement 49 at 307, UN Doc A/50639 (1995).

7. *Ibid.*, Resolution 5216 (LII), fifty-second session, Official Records, Supplement 49 at 384, UN Doc A/5249 (1997).

8. *International Criminal Court Monitor*, special edition (December 1997): 1.

9. See Christopher Keith Hall, "The First Two Sessions of the Preparatory Committee on the Establishment of an International Criminal Court," *American Journal of International Law* 91, no. 1 (1997): 177.

10. See William Pace and Tanya Karanasios, "Outcome of Preparatory Committee Meeting, March 25–April 12," NGO Coalition for an International Criminal Court, home page (online): <http://www.igc.apc.org/icc>.

11. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN General Assembly, fifty-first session, Official Records, supplement 22A, vol. 2, UN Doc. A/51/22 (1996).

12. *Ibid.* See also Christopher Keith Hall, "The Third and Fourth Sessions of the Preparatory Committee on the Establishment of an International Criminal Court," *American Journal of International Law* 92, no. 1 (1998): 124.

13. See Christopher Keith Hall, "The Fifth Session of the Preparatory Committee on the Establishment of an International Criminal Court," *American Journal of International Law* 92, no. 2 (1998): 333.

14. Preparatory Committee on the Establishment of an International Criminal Court, "Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands," UN Doc A/AC.249/1998/L.13, 4 February 1998.

15. M. Cherif Bassiouni, "Observations Concerning the 1997–98 Preparatory Committee's Work," in M. Cherif Bassiouni, ed., *The International Criminal Court: Observations and Issues Before the 1997–98 Preparatory Committee; and Administrative and Financial Implications*, 13 bis *Nouvelles Études Pénales* (Pau, France: Association Internationale de Droit Pénal, 1997; Chicago: De Paul University Press, 1997).

16. *Ibid.*, p. 7.

17. *Ibid.*

18. M. Cherif Bassiouni, "Observation on the Structure of the (Zutphen) Consolidated Text," in Leila Sadat Wexler and M. Cherif Bassiouni, eds., *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee*, 13 bis *Nouvelles Études Pénales* (Pau, France: Association Internationale de Droit Pénal, 1998; Chicago: De Paul University Press, 1998).

19. *International Criminal Court Monitor*, no. 1 (July–August 1996): 1.

20. According to participants interviewed by the authors.

21. According to participants interviewed by the authors.

22. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Report of the Preparatory Committee on the Establishment of an International Criminal Court," UN Doc A/CONF.183/2/Add.1, 14 April 1998.

23. According to the authors' notes and to participants interviewed by the authors.

24. UN General Assembly, Resolution 5046 (L), fiftieth session, Official Records, Supplement 49 at 307, UN Doc A/50639 (1995).

25. Kofi Annan, speech delivered to the American Bar Association Conference on the Fiftieth Anniversary of the UN Declaration on Human Rights and of the Convention on the Prevention of the Crime of Genocide, UN press release SG/SM/6484, New York, 12 March 1998.

26. The documentation of the Rome conference consists of verbatim records of plenary sessions (not available yet at the time of writing), statements of delegations circulated by themselves, conference room and working papers, and the various versions of the packages and of texts as they went to and from the drafting committee. By the time this article is published, much of the listed material will have been published by the UN and be available online at sites linked to its main web page: <http://www.un.org>. UN documents for and during the conference are in the series UN Doc A/CONF./183. Most of the main documents are also now available through the NGO Coalition for an International Criminal Court (online) at <http://www.igc.apc.org/icc>. The organization of work for the conference is UN Doc A/CONF.183/3, 12 May 1998. The final Rome Statute is UN Doc A/CONF.183/9, 17 July 1998.

27. The meeting in Courmayeur took place 6 May–9 May, a month after the last preparatory committee meeting concluded 3 April 1998. The newly nominated bureau of the diplomatic conference and the PrepCom bureau met there to prepare for the Rome diplomatic conference.

28. This approach involved private sessions organized on the chair's initiative to address specific issues or articles, in order to facilitate compromise or agreement when such could not be found in a formal session.

29. The working groups reported to the committee of the whole, which in turn sent agreed text to the drafting committee. The drafting committee reported back to the committee of the whole, which adopted final text. The committee of the whole reported to the plenary in the final week of the conference. A revised schedule of meetings was issued on the second day of the conference, listing the parts of the statute to be dealt with in a working group and parts to be dealt with by the committee of the whole, and further referred either to the drafting committee or to informal discussions. For a detailed description of the organization of work of the conference, see UN Doc A/CONF.183/3, 12 May 1998.

30. *Terra Viva*, no. 19, 9 July 1998. *Terra Viva* was the newsletter at and about the conference, published by Inter Press Service, available online at <http://www.ips/org/icc>. Bound into it but editorially independent was the *International Criminal Court Monitor*, available online at <http://www.igc.apc.org/icc>.

31. Reported to the authors by several government and NGO representatives from their personal conversations with Chairman Kirsch.

32. UN Doc A/CONF.183/C.1/L.53, 6 July 1998.

33. In an impressive demonstration of determination and organization, the coalition collected, counted, and analyzed these "virtual votes" and published them on the early morning of Friday, 10 July 1998, in a special issue of the *International Criminal Court Monitor*. This drove home the sense of a snowballing majority, which encouraged timid delegations and starkly demonstrated the isolation of the United States. The United States later derided this virtual voting and, by extension, the package approach that it advanced, calling it "a numbers game" and "a rug sale." James Podgers, "War Crimes Court Under Fire," *American Bar Association Journal* 84 (September 1998): 69.

34. See *Terra Viva*, no. 14, 2 July 1998.

35. The U.S. delegation later complained that it had been confronted at the last minute with fresh text that contained new and unacceptable provisions. These provisions offered the chance for countries to choose to be exempt from the court's jurisdiction over war crimes for seven years from the date of depositing their ratification, included terrorism and drug trafficking as crimes after further definition, and forbade reservations to the statute. See David J. Scheffer, Ambassador-at-Large for War Crimes Issues and head of the U.S. delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court. Statement before the Committee on Foreign Relations of the U.S. Senate, 23 July 1998, available through the NGO Coalition for the International Criminal Court (online) at <http://www.igc.apc.org/icc>.

36. UN Secretary-General Kofi Annan, statement at signing ceremony at the Campidoglio, Rome, Italy, UN press release SG/SM/6643, 17 July 1998. The secretary-general subsequently described the work of the Rome conference and urged ratification by all nations, including the United States, in his address on receiving the honorary doctorate of law from the University of the Witwatersrand, Johannesburg, South Africa, UN press release SG/SM/6686, 1 September 1998. He also praised and described the work of the NGO coalition at Rome as a precedent for civil society, in his statement at the Third World Youth Forum in Braga, Portugal, UN press release SG/SM/6669, 7 August 1998.