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Extending Enforcement: The Coalition for the International Criminal Court

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ABSTRACT

With judges chosen, cases underway, and judgments rendered, the International Criminal Court has officially begun operations. As the Court has proceeded with its activities, its potential has become enhanced. The creation of the Court through the 1998 Rome Statute came through cooperation of an exceptionally broad coalition of NGOs with like-minded states. This article examines the historical background to the Court's establishment, exploring why seemingly favorable conditions after the World Wars failed to result in a permanent judicial institution. Even post-1948 genocides in Southeast Asia, Central Africa, and elsewhere did not lead to international steps. Unexpected events, including the end of the Cold War and special tribunals for the former Yugoslavia and Rwanda, reopened the possibility for action. Despite opposition from most Permanent Members of the Security Council, the Coalition for the International Criminal Court—the major focus of this study—coordinated a network of citizen groups to exert pressure successfully. The 2010 Review Conference for the International Criminal Court reaffirmed the Court's basic directions, and broadened the areas over which it exercises powers of judgment. The 1998 "miracle on the Tiber" and subsequent steps strengthening the Court thus call into

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question long-standing assumptions about the relative significance of states and civil society.

I. INTRODUCTION

Creating the International Criminal Court (ICC) at the end of the twentieth century stands as the outstanding achievement in international human rights during that decade. Cooperation between an extraordinary network of NGOs and a group of activist states, most of them small and at the periphery of "high politics," accounted for this success.

Hundreds of NGOs banded together in the "Coalition for the International Criminal Court" (CICC). By adopting a common set of principles and by working closely with states motivated by similar ideals (the "Like-Minded Group" or LMG), the Coalition succeeded far beyond what even its most optimistic members felt would be possible at the July 1998 Rome Conference, which drafted the statute establishing the Court. As Antonio Cassese noted, the statute "crystallizes the whole body of law that has gradually emerged over the past fifty years."[1] Beyond that, however, creation of the Court broke new ground in international law and illustrated a major success for global civil society.

Especially striking about this success was overcoming the following obstacles:

- A history of disappointed expectations, in which significant advances in international concern immediately after both World Wars foundered on state indifference or outright opposition to such a court;
- Genocide and widespread war crimes in Central Africa and Southeast Asia in the 1970s, carried out without significant global reaction;
- The sheer complexity of the issues involved;
- Attempts during the conference's closing hours by major powers designed to scuttle the Court entirely, or at least for many years; miraculously, both were overwhelmingly rejected;
- And, above all, concern among most Permanent Members of the Security Council that their sovereignty would be jeopardized by the proposed Court.

Part II summarizes the hesitant steps toward global criminal jurisdiction up to and immediately after World War I. During this period, far and away the

1. Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY [hereinafter THE ROME STATUE] 3, 3 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

dominant paradigm of international relations was uncontested state sovereignty. Each country enjoyed full jurisdiction over its territory and all persons residing within it.[2] As a result, any notion of international standards of justice overriding inherent domestic powers of governments proved impossible, in both theory and practice. War criminals went scot-free or received minimal sentences. Pressure placed on the defeated German and Ottoman Empires resulted in trials in the 1920s that became counter-productive when court proceedings aroused further antipathy and did not result in convictions. The League of Nations as a whole proved ineffective, not only in its inability to slow the gallop toward further war, but also in its procedural shortcomings for international justice. Discussions became snared in intractable, interminable debates about sequence: should global crimes or the structure of a potential court be defined first?

Part III of this article depicts a markedly different scene, at least in its initial phases. The International Military Tribunals at Nuremberg and Tokyo pioneered new aspects of international justice, including types of crimes (for example, genocide and crimes against humanity), conscious blending of different legal traditions, judges drawn from multiple countries, and simultaneous translation. History was made in the proceedings. These tribunals represented the acme of global jurisdiction for several decades. As the Cold War's chill spread over the international scene in the late 1940s, efforts at this type of cooperation shrank. The willingness to collectively prosecute those who initiated war or engaged in genocide fell victim to many causes.

Part IV examines possible reasons for this stagnation, indeed regression, in international jurisdiction over recognized war crimes and crimes against humanity between roughly 1950 and the early 1990s. The hiatus can be ascribed to several causes: the Cold War; the aversion of many countries to have their sovereignty restricted by global institutions; distrust of the United Nations and other global bodies as effective institutions; general antipathy toward courts with supra-national mandates; and the need to assimilate and solidify new supranational institutions following World War II. Positive trends existed, however. Most important, the leader of a small Caribbean country called for United Nations action to create an international criminal court in the late 1980s. Their voices presaged what became a rising chorus. The reordering of global politics following the collapse of Communism meant long-dormant ideas could once again come to the fore.

This seismic shift in world politics cannot by itself explain *why* the early 1990s witnessed a resurgence of interest in an international criminal court. Much of the answer lies in the greater prominence of human rights as a

2. There were some exceptions, such as diplomats or citizens of other countries who commit crimes in their new countries of residence.

global issue. Part V sees the culmination of this interest in the triumph of the Rome Conference in July 1998. The CICC came together with astonishing rapidity following publication of a 1994 report by the International Law Commission (ILC). Participating organizations quickly came to agreement on three cardinal principles, which CICC member groups pressed vigorously. The CICC and the LMG engineered a major triumph. By a vote of 120 Yes votes, versus only seven No votes, the Court's statute was adopted.[3] This part of the article examines the creation of the CICC and its development prior to the Rome Conference. Both the governmental and nongovernmental coalitions faced numerous organizational problems, none of them insuperable, but each posing a particular challenge.

Part VI looks briefly at post-ratification developments for both the Court and the Coalition. States parties took several steps to bring the ICC into being. Elements of crimes and Rules of Procedure were drafted and approved. The Coalition worked with ratifying states to ensure that the highest-caliber judges were selected consistent with the statute's call for diversity. In addition, the CICC sought to counter the influence of countries opposed to the Court's effective functioning. It also pressed the prosecutor to bring timely, important, and *actionable* cases to the Court's attention. NGOs looked to their central values of a fair, effective, and independent court as guideposts to their pressure. These have proven to be complex tasks for both.

In the final analysis, the CICC may prove to be the most significant twentieth-century international *network* of human rights NGOs. It multiplied individual groups' effectiveness by bringing them together both as a group and with countries favoring the same goals. In the face of apparently insuperable odds, the CICC and the LMG offered a new model for international relations based on (according to many observers) a growing sense of global civil society.

II. GLOBAL JURISDICTION BEFORE WORLD WAR I

"Laws" for the conduct of war started to emerge in the nineteenth century in Western Europe. The concept of crimes extending beyond national boundaries, while not totally alien, rarely came under discussion by political leaders or legal scholars. It took the experience of two bloody battles on France's frontiers to open the door for international humanitarian law, a source of law for the International Criminal Court.

3. Twenty-one states also abstained. Since there was no roll call record, the identities of the seven remain speculative. However, among them likely were the United States, Algeria, China, Iraq, Israel, Libya, and Qatar.

Faced with the carnage of an 1859 battlefield,[4] Swiss citizen Henri Dunant took modest steps that proved epochal. He penned *Memories of Solferino,* an analysis of the carnage of battle and the lack of treatment for French and Austrian wounded or respect for the dead. Just over a decade later, the Franco-Prussian War erupted, again with enormous casualties and untreated victims. It encouraged Emperor Alexander II of Russia to convene a conference in Brussels, which produced an "International Declaration Concerning the Laws and Customs of War." This brave attempt was never adopted by the countries involved.[5] However, NGOs stepped into the breach. Gustav Moynier (like Dunant, a resident of Geneva) co-founded what became the International Committee of the Red Cross (ICRC) in 1876, and urged creation of an international criminal court that same year.[6] Domestic sovereignty, the cornerstone of the Westphalian compromise, remained the centerpiece of national policy; however, human rights belonged in the exclusive province of states, which exercised full powers within their boundaries. No global constraints existed on war-making with the exception of the 1899 and 1907 agreements intended to limit weaponry, and despite widespread moral injunctions in numerous religious traditions about the tension between ethics and war.

World War I shattered the complacency of the century-long Concert of Europe. Although some conflicts had erupted on the continent in the decades following Waterloo, most had been limited in time, space, and objective.[7] The situation changed totally between 1914 and 1918. Millions of casualties, civilian and military, resulted from unparalleled levels of mechanized

4. The Battle of Solferino was fought on 24 June 1859 and resulted in the victory of the allied French Army under Napoleon III and Sardinian Army under Victor Emmanuel II (together known as the Franco-Sardinian Alliance) against the Austrian Army under Emperor Franz Josef (also known as Francis Joseph); it was the last major battle in world history where all the involved armies were under the personal command of their monarchs.
5. International Committee of the Red Cross (ICRC), Project of an International Declaration Concerning the Laws and Customs of War. Brussels, (27 Aug. 1874), *available at* http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument. Article 8 of the Declaration called for prosecution "by the competent authorities," while Article 12 stated that "[t]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy." *See* 1 Benjamin Ferencz, Defining International Aggression, The Search for World Peace: A Documentary History and Analysis 5–6 (1975). The Declaration did provide a basis for the subsequent 1899 and 1907 Hague Conventions.
6. "However, confronted with the atrocities of the Franco-Prussian War, Moynier concluded that a purely moral sanction was inadequate to check unbridled passions." Andrea E.K. Thomas, *Comment: Nongovernmental Organizations and the International Criminal Court: Implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for Their Evolving Relationship,* 20 Emory Int'l L. Rev. 435 (2006).
7. The same did not apply to South and Southeast Asia, sub-Saharan Africa and other areas where Europeans contended for colonial supremacy and killed hundreds of thousands of people, at a minimum.

warfare. The "war to end all wars" led to renewed efforts at conflict prevention, including possible prosecution of its initiators. When World War I ended 11 November 1918, several leaders (most notably Woodrow Wilson) expressed a desire to build a new global foundation for interstate relations. The resulting League of Nations and ancillary institutions aimed at promoting peace through negotiation. Optimists believed that a new world order might be established, based on widely-accepted principles for pacifistic settlement of disputes.

The judicial treatment of the perpetrators of World War I deeply concerned both the victors and losers alike. The winners finalized arrangements for trials at the Versailles conference.[8] They believed that the leading figures in the German government, notably the Kaiser, should face justice. According to Article 228 of the Versailles Treaty,

> The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies.
>
> The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.[9]

A special Commission established as a result of the Versailles Treaty proposed that a 22-member International High Tribunal be established.[10] The Allied

8. *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference March 29, 1919, reprinted in* 1 Benjamin B. Ferencz, An International Criminal Court, A Step toward World Peace: A Documentary History and Analysis 169–92 (1980). Among the principles most recognized was that "all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree." *Id.* at 181–82.
9. The Versailles Treaty, 28 June 1919, Pt. VII, *available at* http://avalon.law.yale.edu/imt/partvii.asp. Other articles in this brief part called for a special tribunal for the Kaiser and his extradition from the Netherlands. According to Article 229, "persons guilty of criminal acts against the nationals" of one, or more than one, of the allied powers would be brought before the military tribunals of any power concerned. According to Article 230, it was the responsibility of the German government to furnish any and all relevant documents regarding crimes committed.
10. 1 Ferencz, *supra* note 8, at 30. Both American and Japanese delegates did not sign, however, arguing, among other things, that "'the laws and principles of humanity' was too vague a standard to form the basis for a penal prosecution." *Id.* at 31. The extensive legal preparatory work for the post-World War II tribunals underscores the importance of these considerations.

Powers did not feel sufficiently empowered to establish a court or courts *at the global level* that would deal directly with leaders of the defeated countries, however. It was "too ambitious to contemplate a rapid and systematic codification of international law in the nearer future . . . there is no occasion for the Assembly of the League of Nations to adopt any resolution on [the establishment of a Court of International Criminal Justice]."[11] Solutions had to be sought within the defeated states themselves. The whole process of investigation, arrest, and trial fell to them to carry out—and, as should be expected, they showed little relish for these tasks.

The Leipzig and Constantinople trials required by the Versailles Treaty of 1919 and the Treaty of Sèvres of 1920 proved almost risible. Kaiser Wilhelm II of Germany received diplomatic refuge in The Netherlands shortly before the War ended, thus putting him beyond the grasp of both global justice and the German government. Trials in German courts for individuals named by the Allies brought negligible results.[12] Of the 1,590 individuals the victors wanted to put in the dock, only 862 were chosen to appear before the court "as an initial test of Germany's good will."[13] Fearing political repercussions, the Allies decided not to prosecute major political-cum-military leaders such as General Erich Ludendorff or General (and later President) Paul von Hindenburg. By the end of complicated negotiations, a mere 45 persons were charged, of whom seventeen were tried, and ten sentenced.[14] A strong sense that Germany had been unjustly punished by the Versailles Treaty undoubtedly influenced the verdicts rendered and the speed with which those sentenced were released after a few years imprisonment. The common belief was that those imprisoned had only followed orders and that the Allies had also committed war crimes. Further, with the Kaiser beyond jurisdiction and German military leaders popularly feted as heroes, conditions for justice were patently unfavorable. "In almost every sense, Leipzig was indeed unsatisfactory, both for the Allies, and for the Germans who resented the entire process."[15] The trials held before the *Reichsgericht* was a "crashing failure . . . [an] ill-starred enterprise."[16] Although Article 230 of the Treaty of

11. *Id.* at 237.
12. Versailles Treaty, *supra* note 9, arts. 227–29 required that the Kaiser be tried by a special tribunal. Although Germany initially accepted the Treaty, within a month it "denounced the treaty as a *Diktat*," absolutely refusing to honor these articles. The question was in fact moot since the Kaiser had been given refuge in The Netherlands, which refused to surrender him. 1 Ferencz, *supra* note 8, at 32.
13. Having suffered the brunt of German aggression, France pressed the most strongly for trials. British pressure, Kramer points out, reduced the list. Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig*, 14 Eur. Rev. 441, 448 (2006).
14. This excludes trials in absentia. France found 1200 persons guilty of killing of civilians, crimes against prisoners of war, and deportations of civilians. *Id.* at 448–49.
15. *Id.* at 449.
16. Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals 58 (2000).

Sèvres stipulated that the Ottoman Empire had to "hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Ottoman Empire on 1 August 1914," this agreement was abrogated by the 1923 Treaty of Lausanne and essentially no trials were held.

What led to these negative outcomes? First, the Leipzig court allowed those indicted to plead that they were simply following orders—and failed to indict the leaders who had issued them. The essence of military command and discipline is obedience to commands from superiors. Although the issue remains under debate even today in some quarters, the post-World War II Nuremberg and Tokyo trials explicitly precluded following orders as a legitimate defense,[17] and the Rome Statute continues this ban.[18]

Second, the Leipzig trials did not open until long after World War I had ended. The complexion of German politics and society had changed dramatically in a decade, the country having suffered massive inflation and humiliation. The Weimar Republic was being undercut by radical movements of all sorts. Hence, offering up some former officers for trial ran against the grain of public opinion. Having justice delayed meant it was denied for the most culpable.

Trials held by the Constantinople tribunal suffered from serious flaws as well. They were marked by strong external influence, the relative absence of other competing allied interests in resolving issues in post-World War I Turkey once the war ended and the Ottoman Empire had been dismantled, problems in reconciling jurisdiction and sovereignty, and limitations of criminal law. The trials themselves were further affected by considerable British pressure. As Bass observes, the British saw themselves as guardians of Christianity, and accordingly felt a deep degree of sympathy for the Christian Armenians, who were embedded within a Muslim empire. Foreign Secretary Lord Balfour spoke openly in the House of Commons "not to allow 'Armenia . . . to be

17. Charter of the International Military Tribunal at Nuremberg, art. 8 states: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires." Charter of the International Military Tribunal at Nuremberg, (8 Aug. 1945), *available at* http://avalon.law.yale.edu/imt.imtconst.asp. According to Charter for Tokyo, art. 6: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires." Charter of the International Military Tribunal for the Far East (19 Jan. 1946), *available at* http://www.vanderbilt.edu/goyaboy/hist250/assets/pdfs/imtfe.pdf.

18. Rome Statute of the International Criminal Court, *adopted* 17 July 1998, art. 28, U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002).

put back under Turkish rule,' and to remove 'from under Turkish rule people who are not Turks, who have been tyrannized over by the Turks . . . and who, I believe, would flourish under their own rule.'"[19] Balfour understated the case, given what has since come to light in this, the second genocide of the twentieth century.[20]

Allied pressures led to the Sultan's instituting special courts martial, starting in December 1918. The process proved deeply unpopular. Thirty-five trials were held by the end of 1920, involving 200 persons. They were far from effective or honest. The Turkish government refused to provide incriminating evidence, and France declined to put pressure on it. Other domestic and international maneuvers also roiled the situation, with the Greek invasion in May 1919 of the Turkish mainland further strengthening nationalist sentiments. Mustafa Kemal's call for the "liberation of the Caliphate" led both to the release of all those imprisoned in Ankara under Allied pressure and to the termination of the trials.[21] The Ottoman government also broke its promise in the Treaty of Sèvres to extradite those suspected of massacre for trial. Overall, the Constantinople trials resulted in seventeen death sentences, none of which were carried out. They were widely perceived as failures, owing to the overt injection of high politics into international criminal prosecutions. Turkish nationalists rejected any Allied demand for punishment of the suspects as interference into national sovereignty—shades of the Leipzig trials and foreshadowing of inter-War debates within the League of Nations.

The dominant approach following World War I came not in court proceedings *after* war had occurred, but in *preventing* conflict. The interwar period was studded with well-intentioned agreements that sought to beat swords into plowshares. "The idea that treaties could stop war found its culmination in the Kellogg-Briand Pact signed in Paris in 1928. Almost all countries renounced war as an instrument of national policy."[22] This was the first attempt to prohibit states from engaging in aggression. The Pact was flawed, though, in that it "limited only the conduct of states party and contained no provision imposing criminal liability upon individuals. It was

19. *Quoted in* Kramer, *supra* note 13, at 442.

20. The wholesale extermination of Herero in Namibia by Germany in 1904–1907 has drawn increasing scholarly attention. A detailed history of the Herero Genocide can be found in Jan-Bart Gewald, Herero Heroes: A Socio-Political History of the Herero of Namibia 1890–1923, at 141 (1999).

21. Within a few years, he had taken a new name: Ataturk, literally "Father of the Turks."

22. 1 Ferencz, *supra* note 8, at 45. Kellog-Briand Pact 1928, art. I, 27 Aug. 1928, 94 L.N.T.S. 57, *available at* http://www.yale.edu/lawweb/avalon/imt/kbpact.htm. It declared in three simple articles that the High Contracting Parties "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." *Id.*

widely accepted and widely disregarded."[23] Furthermore, five articles of the Covenant of the League of Nations (Articles 8–12) deal with disarmament and settlement of international disputes that threatened to escalate into war. The drafters started with "the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations."[24] They criticized the "evil effects" of manufacturing arms. When it came to threats, member states were to "undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."[25] In the words of Article 11, "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."[26]

These attempts to define and regulate acts of state aggression constituted a recipe for inaction, as the events of the 1930s would show. In brief, "the law had not yet advanced to a stage where a premediated [sic] war of aggression could be treated as a punishable offence under positive law."[27] How to define aggression and potentially embed it within a justiciable code of international law remained unfulfilled until well after World War II.[28] Nor was the League equipped with a Security Council on the model of the

23. Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 74 (2010). "[T]he Pact outlawed 'recourse to war for the solution of international controversies'" and the meaning of aggression was left undefined. In his judgment, this represented the international community's first attempt to deal with aggression as a crime.
24. The Covenant of the League of Nations art. 8, ¶ 1, 28 June 1919, *available at* http://avalon.law.yale.edu/20th_century/leagcov.asp.
25. *Id.* art. 10, ¶ 1.
26. *Id.* art. 11, ¶ 1.
27. 1 FERENCZ, *supra* note 8, at 29.
28. The UN General Assembly defined aggression in 1974 as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." This seemingly clear statement in Article 1 is muddied, however, by Article 7 of the Resolution:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

The delicate balance struck in the resolution reflected complex negotiations and delicate adjustments of interests. The Resolution's text can be found at: *Definition of Aggression*, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., 2319th plen. mtg., Supp. No. 19 (1974). This definition was incorporated into the definition used by the International Criminal Court as determined at the 2010 Mandatory Review Conference in Kampala, Uganda.

United Nations, which could order military action in instances of threats to peace or security. Finally, and most important, political will to create a court focused on the actions of individuals did not exist.

The League of Nations attempted to establish an International Criminal Court in the mid-1930s, despite the obstacles tossed in its path by the Depression and the rise of both Nazism and Fascism. Memories remained strong in Europe about anarchist assassinations, the tumultuous independence of Ireland and the IRA's earlier terrorist acts, and civil war in Spain. Debates focused on the potential establishment of separate conventions on terrorism and a criminal court. The near-simultaneous assassination in Marseilles of the King of Yugoslavia and the French Foreign Minister by a Croatian anarchist led France to call for a brand-new tribunal to adjudicate and punish such killings. As a result, the League paid far more attention in the mid-1930s on trying to define terrorism than did negotiators at Rome in 1998, who deliberately delayed consideration of it.[29] Although the clouds of World War II were looming on the horizon, jurists of the time could not imagine the scale of the crimes that would follow in a few years. Thus, the acts that would fall under the League's still-born court included items such as "[i]ntentional acts directed against the life, body, health or liberty of Heads of State . . . [i]ntentional causing of a disaster . . . [i]ntentional destruction of . . . waterworks, lighting, heating or power stations belonging to public services."[30] Governments of the day seemed unenthusiastic about the League's proposals. The table below summarizes their responses:[31]

Table 1.

Name of state	*Favorable*	*Neutral*	*Opposed*
Australia	"agrees in principle . . . but"		"does not favour the creation"
Austria		"could be suitably taken as the basis"	

Table 1. continued on next page

29. Committee for the International Repression of Terrorism, League of Nations document C.184.M.102 (8 May 1935) is *reprinted in* 1 FERENCZ, *supra* note 8, at 269–93. This document includes comments made by numerous governments. Terrorism as a potential area for the jurisdiction of the International Criminal Court was deliberately omitted from the final draft of the Rome Statute.
30. 1 FERENCZ, *supra* note 8, at 271–72.
31. Compiled from *International Repression of Terrorism: Draft Convention for the Prevention and Punishment of Terrorism, Draft Convention for the Creation of an International Criminal Court*, League of Nations document A.24.1936.V, *reprinted in* 1 FERENCZ, *supra* note 8, at 313–36, *passim*. Ferencz also includes governments' observations about earlier drafts of the Convention. *See id.* at 280–92.

Table 1. Continued

Belgium	"willing to give . . . further consideration"		
Bolivia	"in entire agreement"		
United Kingdom	HMG has "carefully and sympathetically considered" . . . but		"the time has not yet arrived for the creation of the proposed Court"
Estonia	"complete agreement" but . . .	. . . not yet able "to reach their final conclusion"	
Finland			Supplementary stipulations necessary
Hungary			"cannot see its way to accept the draft Convention for the Creation of an International Criminal Court"
India			"unable to accept"
Latvia	"in principle . . . have no objection"		
Norway			"for reasons of principle, it is unable to support this draft"
Netherlands			Enumerated offenses covered are "too wide"
Siam		"inclined to refrain from offering detailed comment at the present time"	
Venezuela			"unfavourable"
Poland			"sees no need for the creation of an International Criminal Court"
Romania	"accepts the principles set forth"		
China	"in agreement with the principles"		
Czechoslovakia	"in sympathy with the idea"		(but) "Since, however, many States have adopted a negative attitude towards this draft Convention, it seems unlikely that any agreement will be reached in the near future"

Clearly, these statements represented far from a ringing endorsement. The League nonetheless kept on trying to reach some form of agreement. Not only were its members invited to a special session in November 1937 to adopt the treaty, but so were non-members, notably Germany and Japan, which had resigned from the League, and the United States, which had never joined it.[32] The drafting of "The Convention for the Prevention and Punishment of Terrorism" and "The Convention for the Creation of an International Criminal Court" represented a dying gasp of the League. Thirty-five states signed the two accords. No ratifications were ever received. Several factors account for this, beyond the standard concern for sovereignty. One of these factors was, in the words of Ben Ferencz, that the most conservative views would prevail. Furthermore, diplomats were "paralyzed by their own suspicions and fears and unable to recognize that blind nationalism could lead only to disaster. They forgot about an International Criminal Court—but they would remember it at a later date."[33]

While diplomats debated in the interwar period, civil society advocates pressed for global action for peace. A few organizations joined the Inter-Parliamentary Union[34] and the International Law Association.[35] Both these organizations submitted major proposals for courts with jurisdiction over aggression. Ferencz's massive collection provides details about their work. Others joined organizations such as the Women's International League for

32. *Proceedings of the International Conference on the Repression of Terrorism*, Geneva, 1–16 Nov. 1937, League of Nations document C.94.M.47.1938.V, *reprinted in* 1 Ferencz, *supra* note 8, at 355–98; names of states taken from *id.* at 357.
33. Ferencz, Vol. I, *supra* note 8, at 54–55.
34. Inter-Parliamentary Union (IPU) was one major exception. Established in 1889, the IPU describes itself as "the focal point for world-wide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy." *See* Inter-Parliamentary Union, *available at* http://www.ipu.org/english/whatipu.htm. Some salient points from its 1925 Fundamental Principles of an International Legal Code for the Repression of International Crimes include: 1) recognition that individuals "are answerable for offences against public international order and the law of nations" independently of the responsibility of states, 2) *nulla poena sine lege* (no punishment without prior legislation), and 3) clear indication in any preliminary draft of the "material, moral and unjust elements in an international offence." 1 Ferencz, *supra* note 8, at 247–48.
35. The International Law Association was established in Brussels in 1873. Based in London, its 1926 proposals called for creation of a Permanent International Criminal Court. It would include fifteen judges (five of them deputy), who "possess the qualifications in their respective countries for appointment to high judicial office." In addition, one judge of the nationality of each contest party would sit on the bench. The proposed court would have jurisdiction over *inter alia*, "violations of the laws and customs of war generally accepted as binding by civilized nations." 1 Ferencz, *supra* note 8, at 258, 262; *see also* International Law Association (ILA), *available at* http://www.ila-hq.org/en/about_us/index.cfm. For its role vis-à-vis a proposed International Code for the Repression of Criminal Crimes, see 1 Ferencz, *supra* note 8, at 42–44, 244–68.

Peace and Freedom (WILPF)[36] and the International Federation for Human Rights (Fédération Internationale des Ligues des Droits de l'Homme) (FIDH).[37] Finally, there was the World Federalist Movement, which was formally founded in 1947 as a small, idealistic entity dedicated to establishing world government and outlawing war through disarmament and creation of a global government.[38] This entity was comprised of more than fifty organizations, all of whom wanted "to transform the UN and to draw up a World Constitution through a people's convention."[39] It became the organizing focus for the CICC six decades later. The horrors of World War II made possible unprecedented breakthroughs in global institutions and the organization of justice, including the creation of two major, effective tribunals for alleged war criminals.

III. A BREAKTHROUGH FOR GLOBAL JURISDICTION

The end of World War II constituted a turning point in the history of international organizations. The scale of the carnage (perhaps 70 million dead, the majority of them civilians) profoundly shocked the world. Many leaders were determined to establish a new (or at least substantially revised) foundation for interstate relations, challenging fundamental tenets of the

36. "WILPF was founded in April 1915, in the Hague, the Netherlands, by some 1300 women from Europe and North America, from countries at war against each other and neutral ones, who came together in a Congress of Women to protest the killing and destruction of the war then raging in Europe." *See* Women's International League for Peace and Freedom, WILPF Throughout the Years, *available at* http://www.wilpfinternational.org/AboutUs/index.htm#briefhistory.

37. Founded by national leagues in 1922, the International Federation for Human Rights (FIDH) declared in Article 1 of their FIDH Statutes that it is "hereby created for the purpose of defending and implementing the principles stated in the 1948 Universal Declaration of Human Rights." By 1927, the FIDH had already established a "World Declaration of Human Rights" and had begun to work on the establishment of an International Criminal Court. It was the organization's hope that with the establishment of an International Criminal Court, victims of human rights abuses could be more effectively protected and that those responsible for the abuses could be more effectively prosecuted. The FIDH currently has four priorities to that end: protecting human rights, assisting victims, mobilizing the community of states, supporting local NGOs capacity for action, and raising awareness. There are currently 164 member organizations. *See* FIDH, *available at* http://www.fidh.org/-Acting-FIDH; http://www.fidh.org/-FIDH-s-Statutes; http://translate.google.com/translate?js=y&prev=_t&hl=en&ie=UTF8&layout=1&eotf=1&u=http%3A%2F%2Fwww.fidh.org%2F-Histoire-&sl=fr&tl=en.

38. Operating on a financial shoestring, the World Federalist Movement relied heavily (and continues to rely) on volunteers, interns and a small cadre of dedicated, relatively low-paid staff. For background about the organization, see Rik Panganiban, A Vision of the World: A Short Survey of World Federalist History on the Occasion of the World Federalist Movement's Fiftieth Anniversary, 1947–1997 (1997).

39. *See* World Federalist Movement, Our Vision, *available at* http://www.wfm-igp.org/site/wfm/our-vision.

time-honored Westphalian principle of unfettered domestic jurisdiction. The brief history of the League of Nations and its inglorious demise offered lessons for the future. Progress would be needed in many areas: international justice, global organization, and outlooks on world politics. One of the earliest manifestations came with the San Francisco conference, which approved the Charter of the United Nations in June 1945. It was followed a few months later by the opening of trials in Nuremberg and Tokyo, designed to expose the evidence of unprecedentedly-great war crimes.

Haunted by the memories of earlier failed efforts—the hapless League of Nations, the abortive Leipzig and Constantinople trials, and the fruitless debates over the suppression of terrorism and creation of an international criminal court—Allied planners started midway through World War II to think about a different post-war order. A delicate balance had to be struck. On the one hand, vindictive "victors' justice" might reawaken the hypernationalism and sense of outrage Hitler had effectively exploited. On the other hand, a lenient process left in the hands of the defeated countries could result (as the post-World War I trials demonstrated) in negligible results, if any. It would be better to start afresh, informed by the past, but reconceptualizing what global justice meant in the midst of catastrophic chaos.

A. What did Nuremberg and Tokyo Accomplish?

The Nuremberg and Tokyo Tribunals not only challenged the doctrine of legal positivism, which held that any law was valid if legislated properly by a recognized authority, but they appeared to defy the time-honored principle of no punishment without prior law.[40] Preparation for the proceedings illustrated dramatic splits both within Allied governments and among them, the most significant being whether summary justice or full-fledged, procedurally scrupulous trials should be used and the type of legal system that should be followed. The law employed at Nuremberg consciously mixed Anglo-American/civil and Continental/code legal principles. This represented the first such combination of systems on so massive a scale. Furthermore, the Allied leaders saw the trials as serving didactic purposes, documenting and

40. Many Germans did not think they would be arrested and tried, believing that 1) the charges were "under a code of law totally foreign to them" and 2) the Allies themselves were guilty of major infractions, such as the Katyn Forest massacre or wholesale bombing of civilian targets. Werner Maser, Nuremberg: A Nation on Trial 15, 17 (1979).

dramatizing Nazi atrocities.[41] The Nuremberg and Tokyo Tribunals resulted in numerous transformations in the international justice system and became a significant precedent for future steps in global human rights law.

The first and most vital questions to settle at the trials involved how justice should be administered. Were summary courts-martial preferable to protracted public trials? Where should the proceedings be held? What rules of procedure would apply? Most important, what laws applied in this conceptual thicket?

The Versailles Treaty provided for trials within the host country of individuals indicted for war crimes by the domestic system. The Leipzig and Constantinople trials led to highly unsatisfactory results. To avoid such events in the future, the indicted leaders would face international rather than national courts. Without question, that fact that Germany and Japan had surrendered unconditionally in 1945 made it easier to establish the tribunals.

Rules for the tribunal were drafted rapidly—in fact, their preparation started before the War formally ended. Allegations of there being examples of "victors' justice" were predictably made, but dismissed in the trials. The crafters felt great pride in their efforts. According to chief American Prosecutor Robert Jackson's opening statement,

> Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War, we learned the futility of the latter course. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.[42]

41. The massive documentation prepared and stored by the Third Reich may well have taught would-be genocidal leaders a contrary lesson: avoid leaving a paper trial. Recognizing this potential, the drafters of the Rome Statute allowed for oral testimony (if necessary, with protection for witnesses and financial assistance) to the Pre-Trial Chamber. The treaty also permitted the Office of the Prosecutor to seek out witnesses. It should not be assumed, however, that exposing the horrors of the Holocaust was the prime purpose. Donald Bloxham, Genocide on Trial 17 (2001). Bass writes, "Nuremberg is often incorrectly remembered as if it had been mostly a trial for the Holocaust." Bass, *supra* note 16, at 174.
42. Opening Statement before the International Military Tribunal by Chief Prosecutor Justice Robert H. Jackson (21 Nov. 1945), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal.

According to the Charter of the International Military Tribunal, defendants were charged with four crimes, some new, others unclear, still others well established: 1) crimes against peace; 2) war crimes; 3) crimes against humanity; and 4) membership in a criminal conspiracy.[43] Crimes against peace were the "functional equivalent of the crime of aggression."[44] At the time, the tribunal declared that aggression was to be the "supreme international crime." For even if the crime had been previously undefined, surely "the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[45] War crimes included many references familiar to students of international law. Numerous prior treaties had sought to regulate what types of arms could be used in war, treatment of prisoners, and the like.[46] Similar precedents existed for trials of those who committed actions considered contrary to treaty or customary international law, such as piracy or chattel slavery.[47] Crimes against humanity represented a significant step, a major innovation in global jurisprudence. Shocked by the documentary and visual evidence of the Holocaust, the crime of genocide seemed well-established. Membership of a criminal conspiracy, the fourth grounds for prosecution, was based on recent and relatively weak American precedent, and was dropped during the trials.

Despite the disagreements, one lesson became clear as the trials progressed. Those who prepared for the 1945 International Military Tribunals learned many lessons from the Leipzig and Constantinople trials. International tribunals were far more subject to domestic pressure, nationalist sentiment, or other external influences than national trials. They decided to start ad-

43. Maser, *supra* note 40, at 35. The full text of the IMT's Charter, Article 6, *available at* http://avalon.law.yale.edu/imt/imtconst.asp.
44. Glennon, *supra* note 23, at 74. Article 6 of the Charter defined crimes against peace as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Benjamin Ferencz, *Ending Impunity for the Crime of Aggression*, 41 Case W. Res. J. Int'l L. 281, 282 (2009).
45. Trial of the Major War Crimes Before the International Military Tribunal Judgment (1 Oct. 1946) *reprinted in* Ferencz, *Ending Impunity for the Crime of Aggression*, *supra* note 41, at 281. "The Nuremberg Charter and Judgment were adhered to by nineteen more nations and unanimously affirmed by the first General Assembly of the United Nations." *Id.* at 282. In light of this definition, and subsequent prosecution of the crime of aggression, several "renowned scholars, such as Professors M. Cherif Bassiouni, Claus Kress, Antonio Cassese, William Schabas, and a host of other highly regarded authors, maintain that aggression is already a customary international crime that is subject to universal jurisdiction as a peremptory norm from which there can be no derogation." *Id.* at 285.
46. For a useful compendium, see W. Michael Reisman & Chris T. Antoniou, The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict (1994).
47. Telford Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir 5–10 (1992).

judication rapidly, but avoid drum-head justice. The top two dozen Nazi leaders went on trial barely four months after Germany's surrender.[48] Legal proceedings in the four Occupation zones took just a few years more. By contrast, the *Reichsgericht* didn't initiate its formal court proceedings until 1921, and they concluded a decade after the end of hostilities. Similarly, the victorious powers didn't allow the defeated governments to round up suspects, unless their commitment to making arrests was beyond doubt. The Allies further decided to try only the top leaders, rather than everyone involved.[49] A mere twenty-four of the top Nazi leaders came to trial at Nuremberg.[50] Allied leaders rejected the notion of command responsibility. This principle had been successfully invoked at Leipzig as a defense: many indicted officers were acquitted, claiming simply that they followed superiors' orders. The victors decided as well to utilize documentation as much as possible. The Leipzig trials had relied heavily on witnesses, who had to recall the events of more than a decade earlier, in a dramatically different context. The goldmine of Nazi documents helped not only the prosecution, but posterity, to understand the enormity of their crimes. Significant differences existed as well in terms of who became involved. American indifference and non-participation after 1919, coupled with French and Belgian vindictiveness at Leipzig, contrasted sharply with the common front established at Nuremberg. Finally, the Allies decided to stand up for principles of justice, even in the face of contrary public opinion. The Nuremberg proceedings represented a significant change from the summary execution (whether by shooting or the gallows) demanded by the public and many members of the political elite.[51]

48. This excluded some leaders who could not be located (e.g. Martin Bormann).
49. Political decisions affected decisions after both World Wars. After WWI, The Netherlands offered refugee status to the Kaiser, while German commanders Paul von Hindenburg and Erich Ludendorff became respected senior leaders. Hindenburg even served as President of Germany 1925–1934. After WWII, despite an immense amount of wartime propaganda directed against him, Emperor Hirohito of Japan was stripped of his power but maintained his throne. This decision was made by American General Douglas MacArthur, who was the de facto leader of Japan following its 1945 surrender until 1948.
50. Lesser officials were tried in subsidiary courts, located in the Occupation Zones where the individuals had been captured or surrendered.
51. According to Willis: "The initial impetus for making war crimes trials a war aim came almost entirely from leaders of public opinion outside government circles who were angered by reports of the rape of Belgium. There is no evidence that Allied leaders paid any attention at first to proposals for a trial of the Kaiser or his soldiers." James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War 12 (1982). Bass opines that: "Even before Allied governments came to see the usefulness of anti-German propaganda, British and French citizens were up in arms at the German invasion of neutral Belgium." Bass, *supra* note 16, at 60. "Legalism seems to have been largely an elite phenomenon. . . . In July 1942, 39 percent of Americans thought Hitler should be hanged or shot, 23 percent thought he should be imprisoned or put in an asylum, and 3 percent preferred slow torture. Only 1 percent said he should be given a court-martial." *Id.* at 160.

The Tokyo Tribunal (officially deemed the International Military Tribunal for the Far East, or IMTFE) and others established at Yokohama, Jakarta (then Batavia) and elsewhere in areas previously occupied by Japan, tried and sentenced a far larger number of defendants.[52] As Theodor Meron commented,

> The Allied authorities in Japan also held separate sets of trials for senior officials and lower-ranking officials. In the first set of trials, held at Tokyo, 25 senior officials, known as "Class A" criminals, were tried for war crimes. The group included premiers, foreign ministers, ambassadors, generals, and others. After more than two years, all were found guilty on at least one charge. Seven were sentenced to death. Three of those imprisoned actually returned to government after their release, as minister of justice, foreign minister, and prime minister, respectively. That development suggests that public opinion saw the imprisoned men not so much as criminals as victims of the vindictive Allies.
>
> In the second set of trials, held at Yokohama, another 980 less senior officers and officials—"Class B and C" criminals—were tried for war crimes and crimes against humanity. Some of them held a quite low rank.[53]

Although the Tokyo Tribunal sentenced a far larger number of defendants, it illustrated serious flaws when compared with the Nuremberg proceedings. The IMTFE produced numerous opinions, including a stinging 1,235 page opinion by Justice Radhabinod Pal (India) which questioned the legitimacy of the entire proceedings. Two other dissenting opinions and two separate opinions were issued. Even more tellingly, members of the royal family, several politicians, and scientists useful to the United States were not indicted. The Nuremberg trials could utilize literally tons of documentation, while the judges at Tokyo had almost no written documentation to go on, relied on sometimes questionable testimony, and utilized at least one forged document. Nonetheless, both tribunals seemed to represent important changes in international relations. The question remained, though, if these new precedents would last and give birth to a permanent institution. Many years were to pass before this event occurred.

B. Decades of Stalemate

Despite the revolutionary implications of the Nuremberg and Tokyo Tribunals, states proved unwilling to accept a permanent international criminal court. The two tribunals were viewed as necessary post-war steps that hopefully

52. An estimated 5,000 persons went on trial in these courts, with approximately 900 executed and more than half receiving life sentences.
53. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 Am. J. Int'l L. 551, 562–63 (2006).

would not be needed again. They were one-of-a-kind entities, designed to deal with the extraordinary crimes of 1939–1945. Impetus for other changes in the international judicial realm quickly ebbed. Most governments—including the all-important United States and Soviet Union—opposed the notion that any court should exercise jurisdiction over sovereign states.[54] The Permanent Court of International Justice was retitled and its statute appended to the Charter of the United Nations. Other than its new name, scant change was made. Instead, each country could decide whether or not to accept the court's jurisdiction, which in any case was limited and did not touch directly on matters involving individuals.[55]

Although the United States had deep concerns about a standing court with significant supranational power, it had led the way for the Nuremberg and Tokyo Tribunals. Both were, in Ferencz's words, "primarily . . . American accomplishments and the Americans were the ones who had proclaimed most clearly that the principles laid down at Nuremberg were to govern all mankind."[56]

"Thus in the immediate post-war period there was widespread reaffirmation of international criminal law, at least as far as enemy war criminals were concerned, and there was also a clearly expressed hope that such offences would be condemned in a general Code of International Crimes that would prove acceptable to the entire international community."[57] These tasks fell to the newly-established United Nations. Two UN groups held overlapping responsibilities for carrying them out. While the Economic and Social Council (ECOSOC) and its subsidiary Commission on Human Rights would draft the conventions on genocide and other broad human rights issues, the International Law Commission[58] would prepare an international criminal code and draft a treaty creating a permanent court. Both steps aroused significant disputes, and their histories are intertwined.

54. 2 Benjamin B. Ferencz, An International Criminal Court: A Step toward World Peace, A Documentary History and Analysis 3 (1980).
55. According to Article 34 of the Court's Statute, only states may be parties to cases; they must have accepted its Statute. *See* The International Court of Justice (ICJ), Statute of the Court, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0. The Statute itself is appended to the United Nations Charter, meaning that every country joining the UN automatically becomes subject to the ICJ's jurisdiction. How far the powers of the ICJ extended has raised sensitive political questions. The language of the US Senate would become familiar in later years, as it became the fundamental reservation the United States would issue when ratifying human rights treaties. The ICJ was barred from considering "disputes which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States.*" *Quoted in* 2 Ferencz, *supra* note 54, at 4. For further analysis of the impact of such language, see Natalie Hevener Kaufman, Human Rights Treaties and the Senate: A History of Opposition (1990).
56. 2 Ferencz, *supra* note 54, at 4.
57. *Id.* at 5.
58. As constituted when charged with drafting the statute for "an" international criminal court, the ILC included thirty-four members, drawn from around the world. Its Yearbook can be readily found at the UN website: http://untreaty.un.org/ilc/publications/yearbooks.

Genocide had been one of the major charges against Nazi leaders. Once the Nuremberg tribunal had wound up its business, what institution would try persons should genocide occur in the future? Would the Leipzig or the Nuremberg precedent be followed? In short, would national or international courts exercise primary responsibility? Given growing discord within the United Nations, agreement proved difficult to reach. ECOSOC established a special ad hoc committee in 1948. It could not agree, proposing instead that those charged with genocide be tried by a "competent tribunal of state" in whose territory it was committed or "by a competent international tribunal." This wording was eventually incorporated into Article 6 of the genocide convention. An international criminal court was perceived as "a very desirable instrumentality, but how such a court was to be established, and how it was to function in an international society composed of suspicious sovereign States, presented a stumbling block that seemed insurmountable."[59] Many countries, led by the Soviet Union, "let it be known that an International Court would be regarded as an unacceptable infringement on national sovereignty," arguing that the matter should be left to Security Council.[60] Faced with such an impasse, the General Assembly handed over responsibility to the newly-created International Law Commission (ILC).[61] The General Assembly acknowledged that "in the course of the development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law."[62] Its members went no further. Major actors remained tied up in knots. They were concerned simultaneously about formulating the Nuremberg principles in broader form, drafting a Code of Offenses, considering the establishment of a Criminal Court, and defining aggression.[63] With the immediate post-War euphoria gone and the chill of the Cold War all around, progress could not be made.

A search for consensus meant negotiations required elusive common ground, often at the lowest common denominator. Since difficult questions

59. 2 Ferencz, *supra* note 54, at 16–17.
60. *Id.* at 14.
61. Most relevant to this discussion, the ILC was created by the UN General Assembly in 1947 for "promotion of the progressive development of international law and its codification," primarily through drafting treaties in areas where there has already been extensive state practice and precedent. G.A. Res. 147 (II), U.N. GAOR, 2d Sess., 96th plen. mtg. (1947). *See* International Law Commission, *available at* http://www.un.org/law/ilc/. Its members are "persons of recognized competence in international law." The ILC is comprised of thirty-four members, up from its original fifteen. *See* Encyclopedia of the Nations, International Law Commission, *available at* http://www.nationsencyclopedia.com/United-Nations/International-Law-INTERNATIONAL-LAW-COMMISSION.html.
62. 2 Ferencz, *supra* note 54, at 15.
63. A consensus on a new definition of aggression was not reached until 1974 when the General Assembly defined aggression in Resolution 3314. Consensus was made possible by a number of "vague compromises" and a "generic declaration" that left it open for interpretations. Ultimately it was "left to the council to decide whether any act of a state was aggression or not." Ferencz, *Ending Impunity for the Crime of Aggression*, *supra* note 41, at 282.

might prove divisive, repeating calls for "further study" became one of the favorite, and necessary, stratagems.

Many International Law Commission members in the late 1940s wished to embed the Nuremberg innovations rapidly into international law. They argued that crimes against peace, war crimes, and crimes against humanity should join far older global ones dealing with piracy, the slave trade, traffic in women and children, the narcotics trade, counterfeiting, and terrorism. Other members were far less eager. As Ferencz commented, the ILC presented two diametrically opposed views: one called for the subordination of sovereignty through codifying the Nuremberg innovations; the other argued that "the time cannot as yet be considered ripe for the establishment of such an organ."[64] Despite these radically different positions, the ILC managed to draft detailed proposals for an International Criminal Court by 1951.[65]

Eleven states commented on questions set out by the ILC's 1951 report. The following table summarizes their responses:[66]

Table 2.

Country	*In favor*	*Neutral*	*Opposed*
Australia			"taking of steps to establish an international court of criminal jurisdiction would be premature both for political reasons and in view of the dearth of positive law which such a court could apply."
Chile	Draft is "generally acceptable"		
France	"approves the general lines of the draft statute"		
Israel		(Extensive comments, including) "within legal limits, reserving for subsequent phases of the discussion the formulation of its political attitude"	
Netherlands	"the time is now ripe to subject [the question of the establishment of an international criminal court] to a thorough examination and to prepare a solution for it"		
Norway			"An international court will, under the present conditions, hardly be able to perform its task in a satisfactory way."
Pakistan			"a very great deal of progress has still to be made . . . before the setting up of any such international court of criminal jurisdiction could be regarded as a practical proposition."
South Africa			"the time is not ripe"
United Kingdom			"can see no warrant for the establishment, on a permanent basis, of a court the effective exercise of whose jurisdiction would be dependent on fortuitous and unusual combinations of circumstances, and therefore largely hypothetical."
China		"the draft statute could be improved in several respects"	
Denmark	"not opposed to the provisions contained in the draft, and the Danish Government would undoubtedly be able to sign a convention."		"provided such convention could find general support. However, the discussions which have taken place seem to indicate that there would be much difficulty about establishing an international court of criminal jurisdiction which would really fulfill its purposes."

Table 2. continued on next page

64. 2 Ferencz, *supra* note 54, at 25.
65. *Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 11, at 21, U.N. Doc. A/2136 (1952), *reprinted in* 2 Ferencz, *supra* note 54, at 337–64.
66. Summarized from 2 Ferencz, *supra* note 54, at 365–81. The original UN document is: *International Criminal Jurisdiction: Comments Received from Governments Regarding the Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., U.N. Doc. A/2186/Add.1 (1952).

Table 2. Continued

The various responses confirmed that the International Law Commission would face many challenges as it moved forward. As Ferencz aptly comments, preparation of a definition of the crime of aggression, a code of offences, and a draft statute for the International Criminal Court "all began to move forward on parallel tracks. It was a very slow train."[67] Progress was made on important areas, however. By 1954, the ILC had agreed that the Court would have no jurisdiction unless specifically conferred upon it and that pre-trial screening by five judges would determine whether sufficient evidence to sustain a complaint existed. The Commission submitted its final Code of Offences that year as well. The idea of an international criminal court had by this time fallen into a deep freeze, however. Increasing conflict in colonial areas and elsewhere roiled the world stage. Large-scale conflicts in Algeria, Vietnam, sub-Saharan Africa, and other areas complicated the scene. The Cold War, tensions between Israel and its neighbors and terminal colonialism affected the global political climate. Also, the complex, highly political agenda confronting the International Law Commission and the General Assembly made agreement about international justice almost impossible. Sequencing remained a central issue. "To most members it seemed that the Court was the horse, the Code was the cart and the definition was part of the cargo. Their logic called for loading the cart before hitching the horse. To others it seemed the other way round."[68]

Despite these political and procedural problems, the idea of an International Criminal Court remained alive, and was nurtured by individuals, an increasing number of NGOs, and a few governments. Periodic thaws in the Cold War made it possible to inch ahead slowly. Scholars continued to play a minor role: the *Revue Internationale de Droit Pénal* published an issue devoted to a possible court in 1964, with a committee of the American Bar Association adding its support. The Washington-based World Peace through Law Center published a book in 1970 supporting the thesis that an International Criminal Court was both necessary and feasible within limits.[69] The panoply of global agreements grew with the addition of numerous treaties in human rights and other areas. Noble assertions such as the Universal Declaration of Human Rights, the two International Covenants, and other parts of the "international bill of rights" lacked an essential complement, however: a way by which individual perpetrators of major human rights abuses could be brought to justice where domestic procedures did not function adequately.

67. 2 Ferencz, *supra* note 54, at 41.
68. *Id.* at 43–52, *quoted at* 52.
69. Robert K. Woetzel co-edited the volume. 2 Ferencz, *supra* note 54, at 56–63.

IV. THE THAW AND UN EFFORTS IN THE 1990S

A global ice jam broke in 1989. The fall of the Berlin Wall symbolized the end of the Cold War. Military and political confrontation between American- and Soviet-led blocs seemed to collapse abruptly. New initiatives could be undertaken, including resuscitating the dormant concept of an international criminal court. Cassese puts the changed climate thus:

> The end of the Cold War proved to be of crucial importance . . . . [A] new spirit of relative optimism emerged, stimulated by . . . a clear reduction in the mutual mistrust and suspicion, . . . [the acceptance] of successor states to the USSR [of] some basic principles of international law, . . . and unprecedented agreement in the UN Security Council.[70]

Surprisingly, initiatives within the United Nations to reexamine the International Criminal Court came from a country peripheral to almost all "big issues" of global politics. Trinidad and Tobago became increasingly liable to crime resulting from international drug trafficking in the 1980s. Prime Minister A.N.R. Robinson took a strong personal and political interest in strengthening global jurisdiction over the drug trade. He had long been associated with efforts for greater cooperation among states, both as an individual and as head of state. A graduate of the Inner Temple and of Oxford, Robinson enjoyed unique opportunities to interact with a variety of internationally-minded individuals. Among the NGOs, he became involved with what was the "largely dormant" Foundation for an International Criminal Court[71] and the Parliamentarians for Global Action.[72] He was elected to the Trinidad and Tobago legislature in 1958, and then became Minister of Finance, and later of External Affairs.[73]

Robinson's subsequent contacts when he became Prime Minister gave him opportunities to advance his ideas on the international stage. He acted at a propitious time. The *détente* and then thaw of the late 1980s opened an opportunity for major changes. The idea of an International Criminal Court, which had been kept alive by a handful of visionaries such as Benjamin

70. Cassese, *supra* note 1, at 10–11.
71. Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement 10 (2006).
72. Interview with William R. Pace, Convenor, Coalition for the International Criminal Court (CICC), in N.Y. (26 Sept. 2010) [hereinafter Pace Interview III]. "PGA aims to promote peace, democracy, the rule of law, human rights, sustainable development and population issues by informing, convening, and mobilizing parliamentarians to realize these goals." *See* Parliamentarians for Global Action (PGA), *available at* http://www.pgaction.org/aboutus.aspx.
73. A.N.R. Robinson Biography, *available at* http://www.nalis.gov.tt/Biography/bio_ANR_ROBINSON.html.

Ferencz and Robert Woetzel,[74] and by some small NGOs, edged its way back toward to the fore. Robinson used his 1989 speech at the UN General Assembly to issue an unexpected call for creation of an international court that would deal with the drug trade, having previously gathered a coalition of supporting countries.[75] The General Assembly acted immediately because the request seemed innocuous, came with the support of seventeen Latin American and Caribbean states, fitted well with the mandate of the International Law Commission, and appeared appropriate for the temper of the emerging post-Cold War order. States in that geographic region "were concerned that growing narcotics related terrorism could easily overwhelm the resources of small countries and could intimidate law enforcement and judicial officials. They argued that international action was necessary 'for prosecuting and punishing offenders who command the means to evade the jurisdiction of domestic courts.'"[76] Even the United States, which in a few years would turn into the Court's sharpest opponent, seemed to applaud: its delegate to the ILC reported a consensus "that it was a 'particularly favorable time' for such a development."[77]

The decades of stagnation in the UN drew to an end in 1990. On 25 November, thanks to the initiative of Trinidad and Tobago, the General Assembly asked the International Law Commission "to undertake the elaboration of a draft statute for an international criminal court."[78] With the General Assembly's mandate in hand, the International Law Commission started an intense period of consultation and drafting, which according to James Crawford, Chair of the ILC, coincided with a sea-change in underlying attitudes

74. Both were professors of law highly committed to international justice. Ferencz had served at Nuremberg as a major prosecutor; Woetzel had taken a major role in the World Federalist Movement and associated ventures, and had been a student and friend of Robinson at Oxford. Both Ferencz and Woetzel assisted Robinson in drafting ideas. Biographical information available at http://www.wagingpeace.org/menu/programs/awards-&-contests/dpl-award/2002-dpl_woetzel-bio.pdf; http://www.benferencz.org/index.php?id=3.
75. Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73, 90–91 (1995).
76. Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, CONN. J. INT'L L. 1, 13 (1998).
77. Marquardt, *supra* note 75, at 91 (*citing* Stephen C. McCaffrey, *Current Development: The Forty-Second Session of the International Law Commission*, 84 AM. J. INT'L L. 930, 933 (1990)).
78. *Report of the International Law Commission on the Work of its Forty-Fourth Session*, G.A. Res. 47/33, U.N. GAOR, 47th Sess., 73d plen. mtg., Supp. No. 49, at 287, U.N. Doc. A/47/49 (1993). The mandate was renewed the following year by *General Assembly in the Report of the International Law Commission on the Work of Its Forty-Fifth Session*, G.A. Res. 48/31, 48th Sess, 73d plen. mtg., U.N. GAOR Supp., No. 49, at 328, U.N. Doc. A/48/49 (1994). Working Group on a *Draft Statute for an International Criminal Court*, U.N. GAOR, Int'l L. Comm'n, 46th Sess., U.N. Doc. A/CN.4/L.491/Rev.2 (1994), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf.

towards a court.[79] Crawford subsequently commented that rapid action on a proposal from small Caribbean states would not have been likely had it not been for three massive changes in the global political scene:

- Large-scale breakdown and abuse of government authority in several post-Cold War states, leading to human rights violations on a massive scale;
- Intense media coverage of atrocities; and
- The Security Council's action in establishing the *ad hoc* Tribunals for the former Yugoslavia and Rwanda.[80]

Delicate balancing would be essential. For example, the ILC draft needed to be "modest enough to gain initial support and not to scare potential and influential States, in particular, the United States, thereby (as it turned out) allowing a range of pressures for a more ambitious system to have their effect at the diplomatic level." Consistency with basic principles had to be assured. "Guiding elements" balancing "political realism and legal principle" included the following:

- The new court would be a permanent body, but sit only as required;
- It would be created by treaty rather than UN resolution, but would have close relation with the UN, especially the Security Council;
- The court would have defined jurisdiction over crimes under *existing* international law and treaties, a procedural model "quite unlike the ICC as it eventually emerged";
- Its jurisdiction would depend on acceptance of states or triggering by the Security Council;
- The court would be integrated with existing system of international criminal assistance, not displacing existing, capable national systems; and
- It would offer full guarantees of due process as recognized by international law.[81]

Reflecting on what occurred, Crawford observed, "[t]hus, there were strong reasons for starting with a modest proposal, and few reasons to anticipate the eventual dynamic which was to lead to the 1998 Rome Statute."[82]

79. James Crawford, *The Work of the International Law Commission*, *in* THE ROME STATUTE, *supra* note 1, at 25. The ILC draft gave the Security Council considerable power, however, in effect subjecting reference of potential cases to Great Power vetoes. Having an independent Prosecutor or a Court Chamber able to initiate action on its own part became a central organizing point for the Coalition for the International Criminal Court.
80. *Id.* at 24–25.
81. *Id.* at 25–26.
82. *Id.* at 28.

The International Law Commission thus sought evolutionary rather than revolutionary change. Accordingly, Article 20 of its Draft Statute emphasized crimes already outlawed by treaty: genocide; crimes against humanity; "serious violations of the laws and customs applicable in armed conflict"; and "exceptionally serious crimes of international concern" listed in an appendix to the report.[83] Expressed somewhat differently, the ILC proposals covered crimes under general international law; crimes under a list of treaties in force; and various "suppression" conventions.[84]

Subsequent drafts narrowed this list, most notably dropping items likely to result in significant political wrangles or to lessen the significance of the court by involving it in relatively less important matters. One consequence was the elimination of transnational trafficking of narcotics, which the ILC "transcended."[85] The same was true of officially-sanctioned terrorism across state boundaries (as recommended by Germany and Russia).[86] However, crimes under general international law *including* genocide, aggression, serious violations of humanitarian law, crimes against humanity, unlawful seizure of aircraft, apartheid, and hostage taking remained.[87] As Marlies Glasius comments, "[t]his little word 'including' allowed the ILC to make proposals for a court with much more extensive jurisdiction. . . . No one in the Commission considered framing the ICC merely as a drugs court. Instead, the debate focused on whether it should have jurisdiction only over crimes against the peace and security of mankind, or over other crimes as well."[88]

The International Law Commission recognized that some areas fell into muddy political waters, notably a legally-binding definition of aggression. Although possession and use of nuclear weapons attracted significant interest from several countries, it too was left aside.[89] Differences among proponents, opponents, and fence-sitters would have to be ironed out, leading in 1993 to the ILC's inviting states to comment on its draft proposals.

83. *Draft Statute for an International Criminal Court, supra* note 78, arts. 20, 50. Among those listed were "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."
84. Reference was intended here primarily to narcotics and psychotropic substances.
85. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Court*, 10 Harv. Hum. Rts. J. 11, 56 (1997).
86. Christopher Keith Hall, *The History of the ICC, Part II: From Nuremberg to the PrepComs*, Int'l Crim. Ct. Mon. 7 (Feb. 1998).
87. Encyclopedia of the Nations, *supra* note 61.
88. Glasius, The International Criminal Court, *supra* note 71, at 11. *See also* Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court, in* Global Civil Soc'y 2002, at 137 (Marlies Glasius, Mary Kaldor & Helmut Anheier eds., 2002).
89. James Crawford, *Current Development: The ILC Adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404, 410 (1995).

The ILC incorporated observations it received, finishing its work by 1994, in "lightning speed by its own standards."[90] Within three sessions, the ILC had "completed work on a difficult and controversial topic, one where the element of codification was almost entirely absent, and the element of 'progressive development' overwhelming."[91]

The ILC raised a political red flag in including aggression, an area where the United Nations had long engaged in debate, and where consensus had long proved difficult to reach. Because of the problem of reaching consensus, aggression was eventually dropped during the Rome conference as a crime for which prosecution could be launched.[92] Many NGOs and states continued to press for reopening aggression as a crime, however, and the 2010 Assembly of States Parties was scheduled to deal with it.

By that time, the euphoria of 1989–1990 had disappeared. With the veneer of one-party rule removed, ethnic animosities resurfaced in parts of Europe. The "velvet divorce" that split Czechoslovakia had no echoes in the Balkans. Multi-national Yugoslavia collapsed, the victim of strong sentiments whipped up by politicians of all ethnicities. The relatively peaceful secession of Slovenia was followed by war between Serbia and Croatia and with genocide and war crimes inflicted on multi-national, multi-religious Bosnia. This "problem from hell," in the words of Secretary of State Warren Christopher, starkly posed the question of justice: what should be done with the perpetrators?[93] The Security Council responded quickly. Following a proposal from Germany, which had been flooded with Bosnian refugees, the Security Council passed Resolution 827 on 25 May 1993, creating the International Criminal Tribunal for Yugoslavia (ICTY). Empowered to adjudicate grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity, the ICTY represented the first such entity since the Nuremberg and Tokyo trials almost four decades earlier. Analogous steps occurred after the 1994 slaughter of approximately 800,000 Tutsi and educated Hutu in Rwanda—killings largely by machete unleashed by collective fear. The International Criminal Tribunal for Rwanda (ICTR) was established by the Security Council eighteen months later, sitting in Tanzania for the ease and safety of witnesses and others.[94] The

90. Glasius, The International Criminal Court, *supra* note 71, at 13.
91. Crawford, *Current Development*, *supra* note 89, at 405.
92. At the Rome conference, the Coalition for the International Criminal Court did not include the crime of aggression as priority item. Additional information appears in the section dealing with the negotiation of the Rome Statute itself.
93. Christopher's remarks were made on *Face the Nation* (CBS television broadcast) 28 Mar. 1993); *quoted in* Samantha Power, A Problem from Hell: America and the Age of Genocide, at xii (2002).
94. Security Council Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 1, U.N. Doc. S/RES/955 (1994), *available at* http://www.un.org/ictr/english/Resolutions/955e.htm.

Horn of Africa was torn by conflict as well, resulting in two Security Council resolutions that sanctioned armed humanitarian interventions in Somalia.[95]

Why did the shocking acts in Bosnia and Rwanda result in international action—militarily in Bosnia and Somalia, in the former Yugoslavia and Rwanda by post-conflict trials? After all, analogous civil wars and related widespread violence and genocide from the early 1950s until the late 1980s had passed relatively unnoticed. Just as the deaths of millions of Armenians in World War I escaped international scrutiny, so too had the slaughter of millions of Bangladeshis during their country's ultimately successful secession from Pakistan,[96] widespread killings of Hutu in Burundi in 1972, or of Cambodians by the murderous Pol Pot regime in 1976. Conventional wisdom stresses the confluence of events in the early to mid-1990s: the enormity of the slaughters in Bosnia and Rwanda; the unparalleled media coverage they received; the flood of refugees into other countries; and the end of the Cold War. Beyond these, however, many other causes can be discerned. Women's groups were mobilized by the widely publicized sexual abuses in Bosnia: forced impregnation, rape camps, and the deflowering of Muslim girls affecting their marriage prospects. Further, the United States—long dubious about the value of global institutions of any sort unless it played a major leadership role—edged toward accepting the idea of a single international criminal court. Rather than go through the ado of creating tribunals de novo *following* outbreaks of mass violence, why not establish a permanent entity whose existence and powers might *deter* individuals potentially bent on genocide, war crimes, or the like? As Cassese observed, "[t]he overall successes of the ICTY and ICTR, respectively, provided a final spur to the emergence of the ICC."[97]

In July 1994—a few months after the genocide in Rwanda erupted onto TV screens and newspaper pages around the world—the International Law Commission completed its final draft statute for an International Criminal Court, and presented it to the General Assembly that fall.[98] It ran to seventy-four double-column printed pages, with sixty articles, plus an annex and many supporting appendices. Clearly the ILC had acted carefully, thoughtfully, and speedily.[99] Its proposed statute reiterated the specific crimes on which

95. United Nations Operation in Somalia I (Apr. 1992–Mar. 1993), *available at* http://www.un.org/en/peacekeeping/missions/past/unosomi.htm
96. Ironically, humanitarian intervention by India resulted in widespread criticism at the time.
97. Cassese, *supra* note 1, at 16.
98. *Draft Statute for an International Criminal Court*, *supra* note 78.
99. "Draft legal codes could languish for decades in the rarefied atmosphere of the ILC, far from the political limelight, where years were sometimes spent on the definition of a legal clause. Indeed, stalling was exactly what some countries, including the United States, had in mind when they agreed to refer the idea of an international criminal court to the ILC." Glasius, The International Criminal Court, *supra* note 71, at 11.

the tribunals in Nuremberg, Tokyo, The Hague (the International Criminal Tribunal for Yugoslavia), and Arusha (the International Criminal Tribunal for Rwanda) had judged or were judging defendants, in short in areas where a significant degree of consensus had already been established. Article 20 defined these crimes as genocide, aggression, serious violations of the laws and customs of war, crimes against humanity, and a variety of other "exceptionally serious crimes of an international nature." Beyond this, however, the ILC engaged in substantial extension of international law, through its mandate for progressive development and codification of international law. As Cambridge don and ILC point-person James Crawford commented, both structural and historical reasons accounted for the non-existence of a permanent international *criminal* court. Criminal law "is seen to be closely associated with state sovereignty, with the ultimate application of the power of the state to persons within its territory or jurisdiction."[100]

Despite the unprecedented extension of international law, the court proposed remained "subordinate to the Security Council" and the desires of the five permanent members. In this draft it was the Security Council who would determine whether cases that pertained to jurisdiction should be considered by the ICC and the Security Council had to act "before any alleged crime of aggression could be prosecuted against an individual."[101] This early draft was a sure indication of the battle to come between the permanent members of the Security Council and those who wanted an *independent* court.[102]

On 9 December 1994, the General Assembly released the first in a series of resolutions, each almost exactly a year apart, marking the process leading to Rome. Resolution 49/53 called upon UN member states and specialized agencies "to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries." The resolution further established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995.

At this point, NGOs started to become much more heavily involved. The CICC, formally established in February 1995, became the leading actor on the nongovernmental side of the equation. Its development will be given much greater attention subsequently. Whereas members of the International Law Commission were primarily international lawyers and diplomats, per-

100. Crawford, *Current Development*, *supra* note 89, at 406.
101. David J. Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12, 13 (1999).
102. Pace Interview III, *supra* note 72.

sons drawn from different backgrounds entered onto the scene and began contributing. To summarize observations by Adriaan Bos: as time progressed, NGOs slowly became more involved and areas of consensus were identified. A clear indication of this was the submission of the Siracusa discussion paper at the second Ad Hoc session. It was at these committees that an important decision was reached about the method by which the Court would be established.[103] Instead of being created by means of a UN Charter amendment or a General Assembly resolution, it would be established by a multilateral treaty. This would help prevent questions of the Court's legitimacy, as the General Assembly cannot adopt resolutions binding on sovereign states. [104]

Resolution 50/46 of 11 December 1995 called for further discussion in a Preparatory Conference (PrepCom) of "the major substantive and administrative issues" posed by the ILC draft. In order to "sound out" the opinion of governments, numerous Preparatory Conferences were planned. Resolution 51/207 of 17 December 1996 established specific dates for various PrepComs and called for completion "of a *widely acceptable* consolidated text of a convention," which would be placed before a "diplomatic conference of plenipotentiaries" in 1998. Resolution 52/160 of 15 December 1997 agreed that the final conference would meet in Italy from 15 June to 17 July 1998.[105] The same resolution established that PrepComs would continue their work, as had been approved in Resolution 51/207, calling on them to submit "the text of a draft convention." A series of PrepComs met over the next several months, developing and clarifying text, although certainly not resolving all areas of contestation.[106] This crucial task was carried out in Zutphen, a small city in Holland, in January 1998, between the fifth and sixth PrepComs. To quote Bos, the session included "[m]embers of the Bureau, Chairs of different Working Groups, various Coordinators and the Secretariat." Its main purpose involved identifying issues 1) "that needed further discussion," 2) those not discussed at all, and 3) some "that did not appear in any paper, but which nevertheless should be included in the Draft." Quoting further,

103. This seemed to represent a cognizant effort by the LMG to put a deadline on what could have become an "interminable process." Email from Marlies Glasius, Senior Lecturer, University of Amsterdam, to Claude Welch (25 Jun. 2010) (on file with author).
104. Adriaan Bos, *From the International Law Commission to the Rome Conference (1994–1998), in* THE ROME STATUTE, *supra* note 1, at 40.
105. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res. E., U.N. Doc. A/CONF.183/10 (1998), *available at* http://untreaty.un.org/cod/icc/statute/final.htm (emphasis added).
106. Six of them met, generally for periods of two to three weeks, from March 1996 to April 1998. The Zutphen meeting does not figure in this total. PrepCom discussions resulted "not only in better understanding among delegations about the consequences of various options, but also in a reproduction of these options in more coherent and clearer drafts and finally in a more accurate insight into the views of the delegations on these options." Bos, *supra* note 104, at 64.

"[t]he Zutphen text for the first time offered a coherent and complete alternative for the ILC Draft. . . . The acceptance of the Zutphen text as the basis for the further discussions in the PrepCom was very important."[107] The resulting draft of ninety-nine articles bore the burden of being heavily bracketed, however, indicating that substantial areas of disagreement remained. Nonetheless, tremendous progress had been made, with the consolidation of various proposals "into a more or less coherent text."[108]

In short, the official trajectory had been set: diplomats would assemble at a specific time and place, using material initially put together by the ILC experts that had been subjected to debates and changes within the General Assembly and a series of PrepComs, with input from governments and UN specialized agencies. *Not* included in the calculations were civil society groups.

All these UN actions reinforced what the nascent CICC sought to achieve. Desire for action, given mass slaughters and "the temper of the times," had put pressure on governments to show they could act quickly and decisively. The Like-Minded Group of states worked to set a deadline when the proposed treaty-making conference could be held; otherwise, debate within the General Assembly might have dragged on interminably.[109] Equally, these factors forced NGOs to find effective means to coordinate their strategies and pool their strengths in order to maximize their impact. NGOs from numerous backgrounds sensed an opening to help recreate, or at least reshape, the world order while giving more emphasis to law and justice. All "sides" would utilize the ILC report, whose detailed recommendations provided ample material for discussion. As Glasius aptly wrote, "[w]hile the final authorisation [for international law treaties] has to come from states, the moral and intellectual impulse to draft such rules inevitably comes out of global civil society."[110]

Even before the various PrepComs started to meet, a number of NGOs started to raise concerns about the proposals from the International Law Commission. Speaking broadly, a number of these concerns became lighting rods for criticism by the CICC throughout the PrepCom and Rome Conference:

- Action by the proposed court could be undertaken *only* 1) in instances of genocide, 2) by reference from the state having custody of the suspect or the country in which the alleged acts occurred, or 3) by the Security Council. Thus under this draft, the proposed court did not have jurisdiction

107. *Id.* at 60–61. *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands,* U.N. GAOR, Prep. Comm'n on the Est. of an Int'l Crim. Ct. 16 Mar.–3 Apr. 1998, U.N. Doc. A/AC249/1998/L.13 (1998) [hereinafter *Zutphen Report*].
108. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 17 (3rd ed. 2007).
109. Glasius e-mail, *supra* note 103.
110. GLASIUS, THE INTERNATIONAL CRIMINAL COURT, *supra* note 71, at 3.

over important issues such as war crimes in an internal conflict, therefore excluding contemporary wars and favoring an a la carte jurisdiction regime.[111]

- These requests would be filed with the prosecutor, who at this point could follow cases up the point of adjudication. In other words, the prosecutor did *not* have the right to undertake investigations at his or her own behest. To use the Latin term, the prosecutor possessed no power of *proprio motu*, "on personal initiative."
- Some crimes listed in earlier legislation (notably for Nuremberg) were expanded. However, many civil society groups found the provisions too weak in light of the atrocities such as forced impregnation and mass rape camps in Bosnia.

Clearly room for strengthening existed *if* the will to do so could be encouraged or created. The CICC stepped fully into the debate, to ensure that a nongovernment voice would be heard.

V. TWO COALITIONS EMERGE, 1994–1998

In the mid-1990s, two pro-Court groupings emerged, each with vastly different composition and power in international relations. One was comprised of governments, the other of NGOs. Both were vital in the ultimate adoption of the Rome Statute. They cooperated informally, the NGOs wanting more significant powers for the proposed International Criminal Court than many, and perhaps most, states were prepared to grant. But without the access to the "inner workings" provided through cooperation with governments, civil society groups would not have gained the success they claimed. What individuals proposed, states disposed. This Part examines the Like-Minded Group, juxtaposing its formation, development, and contributions with those of the CICC.

In terms of preparation for and presence at the Rome Conference, a new coalition emerged that cut across almost all of these lines. The LMG started to emerge within the Sixth Committee of the General Assembly, which handles legal matters, in the fall of 1995. The LMG's members[112] supported many of the objectives sought by the CICC and the International Law Commission. These included: 1) a specific date for a diplomatic conference to finalize wording of a binding treaty, a goal achieved by December 1997; 2) a Court

111. Glasius e-mail, *supra* note 103.
112. In its early months, roughly ten to fifteen states participated. By the Rome Conference, the number had grown to sixty-two countries. Glasius, The International Criminal Court, *supra* note 71, at 22–23.

that would be "as effective as possible, with wide definitions of crimes" with which it would deal; and 3) a simple complementarity arrangement.[113] (This meant that in almost all instances, the proposed international criminal court could take action only after "local remedies"—in other words, domestic legal systems—had been fully utilized.)

Although some relative "powerhouses" counted among its members, the veto-wielding members of the Security Council did not join the LMG prior to Rome, with the exception of the United Kingdom.[114] With a few exceptions, most of the world's most populous countries remained outside the Like-Minded Group. Member states of the Organization of the Islamic Conference generally opposed the idea of the Court. Finally, Asian states appeared remarkably cool to the concept. (More details appear shortly.)

Great heterogeneity marked the Like-Minded Group. None of the "traditional" splits (east-west; north-south; affluent-less-developed) appeared among LMG members. Both substantive and regional sub-cores existed within the LMG, however. According to Glasius, the most active states within it included Argentina, Canada, the Netherlands, and Norway.[115] Another group came from the European Union, thirteen of whose members banded together for common objectives. Indeed, Germany was responsible for chairing the LMG.[116] Their extensive experience with prior economic and political links facilitated cooperation, although Great Britain under Prime Minister Tony Blair conspicuously remained skeptical, even while supporting creation of the Court.[117] The third center came from two less-developed parts of the world, the Caribbean and southern Africa. Both regions had established intergovernmental entities, the Caribbean Community (CARICOM), which came into existence in 1974, and the Southern Africa Development Council (SADC) in 1980.[118] A few other African and Latin American countries joined the LMG as well. Member states' similar points of view and willingness to

113. *Id.* at 22.
114. "In December 1997, Great Britain swung around to support the proposal. Britain became the first and only Permanent Five member to join what was becoming known as the 'like-minded' group—a loose coalition of some sixty countries favoring a more robust Court." Vanessa Haas, *Power and Justice: the United States and the International Criminal Court*, 1 Eyes on the ICC 161, 170 (2004).
115. Glasius, The International Criminal Court, *supra* note 71, at 22.
116. Pace Interview III, *supra* note 72.
117. Part of the reason for the change in Great Britain's stance was "[t]he need for New Labour to differentiate itself from the Conservatives" for electoral reasons in 1997. Driving this change was the Foreign Secretary of the United Kingdom, Robin Cook, who demanded British foreign policy have an "ethical dimension." Paul Williams, *The Rise and Fall of the "Ethical Dimension": Presentation and Practice in New Labour's Foreign Policy*, 15 Cambridge Rev. Int'l Aff. 53, 54–55 (2002).
118. Southern African Development Community (SADC) contains fifteen countries, ranging from the (relatively) wealthy island state of Mauritius to the vast, impoverished, and war-torn Democratic Republic of the Congo. Membership information can be found at http://www.sadc.int/.

cooperate emerged during Sixth Committee discussions. Each supported 1) setting a firm date for a final conference to negotiate the ICC treaty, 2) a court with as wide a definition of crimes as possible, and 3) an independent prosecutor.[119]

The LMG was not without its "enemies."[120] Perhaps the most organized of them were Arab states. They opposed the inclusion of internal armed struggle within the Court's jurisdiction, wanted to delete gender from the Rome Statute, to reword clauses dealing with child soldiers, and to include the death penalty. Further, they found Article 27, "which removes head of state immunity, as incompatible with their own constitutions, basic laws or concepts of government."[121] Interestingly enough, "many senior government officials in the region" also saw refraining from joining the ICC as a sign of support for the United States. This was of particular interest for Arab nations as in the late 1990s and early 2000s the United States started campaigning "very strongly in these countries to sign 'Bilateral Immunity Agreements.'"[122] According to Cherif Bassiouni, perhaps the biggest reason for Arab opposition was Article 7, which speaks to crimes against humanity. Apparently, many military officials interpreted this to mean that they could be tried for crimes against humanity in instances where "conduct is directed against 'civilian populations' and is carried out on a 'widespread or systematic' basis," actions that they believe often necessary to stop threats to national security.[123]

Additional opposition came from the permanent members of the Security Council who all wanted the Court to remain subject to control of the Security Council for obvious reasons. The five permanent members of the Security Council (P-5) did not coordinate policy, however, with each country pursuing its own major objectives. Beyond this, there was limited concentrated opposition.[124] Indeed, there seemed to be more disinterest then concentrated hostility. Take for example Asian states. Speculatively, Asian states may have been very sensitive to protection of domestic sovereignty,

119. Glasius, The International Criminal Court, *supra* note 71, at 23–24. This "parsimonious" set of objectives counted as one strength. Another came through their close association with Adriaan Bos, mentioned earlier.
120. As Glasius observes, "enemies of the Court" included Arab states as well as powerful, populous countries and nuclear powers such as China, India, Pakistan, Israel, and (particularly as the Rome Conference unfolded and subsequently) the United States. *Id.* at 25–26.
121. M. Cherif Bassiouni, *The Arab States and the ICC: Twelve Years Since Rome*, 40 Int'l Crim. Ct. Mon.17, 17 (May 2010–Oct. 2010), *available at* http://www.iccnow.org/documents/monitor40_english_web.pdf.
122. *Id.*
123. *Id.*
124. It has been suggested that part of the reason for the lack of opposition was a simple disbelief among 'policy elites' (i.e. leaders at the UN and in academia) that the ICC would ever come into existence. Pace Interview III, *supra* note 72.

owing to (for many) their recent independence; however, such an argument did not apply to African countries. A more plausible explanation lies in the almost-total absence of continental organizations for Asia, in turn stemming from the extraordinary variety within and long history of the area. With close to sixty percent of the world's population, Asia houses many contrasting civilizations.[125] It has also been suggested that Asian participation has been relatively limited due the fact that currently Asian countries are more concerned with "development than with democratization" and they don't want to subordinate "kings" to potential Court jurisdiction.[126]

The important lesson of the situation was stated as such by Glasius: "While certain states found each other in opposition to specific proposals within the negotiations, there was no concerted effort by a group of states to scupper the negotiations altogether."[127] Significantly, the LMG developed a cordial working relationship with the CICC in order to fortify what Richard Dicker (Human Rights Watch's point-person for the Court) called "the better instincts" of states.[128]

The seeds for the CICC had already been planted decades earlier by activists, scholars such as Ferencz and Woetzel, and by NGOs interested in the issue. But what role could citizens' organizations play in the new world order emerging after the end of the Cold War? Their efforts started to sprout in 1994, starting with a set of major recommendations from Amnesty International. Its suggestions built on the draft statute from the International Law Commission, which was "significantly improved" from the ILC's previous set of proposals.[129] In a detailed, carefully reasoned, and amply documented analysis, Amnesty International set forth a detailed prescription for what should characterize a new international criminal court.[130] The lacunae and problems highlighted in this report helped crystallize creation of the Coalition.

Twenty-six NGOs gathered in New York in early 1995. Buoyed by the unusually rapid pace of discussions within the International Law Commis-

125. To the extent inter-governmental organizations exist, they either developed from economic needs (for example, the South Asian Association for Regional Cooperation (SAARC) or the Asia Cooperation Dialogue (ACD), or from military orientations originating in the Cold War, such as Association of Southeast Asian Nations (ASEAN).
126. Interview with William R. Pace, Convenor, CICC, in N.Y. (15 July 2010) [hereinafter Pace Interview II].
127. Glasius, The International Criminal Court, *supra* note 71, at 26.
128. *Id.* at 44–46, *quoting* Richard Dicker of Human Rights Watch.
129. Telephone interview with Christopher Hall, Legal Officer, Amnesty International (1 Mar. 2008); the earlier draft to which he referred had been prepared by Doudou Thiam, Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind. *See also* Crawford, *Current Development*, *supra* note 89.
130. Amnesty International (AI), Establishing a Just, Fair and Effective International Criminal Court, IOR 40/005/1994 (Oct. 1994), Amnesty International, *available at* http://www.amnesty.org/en/library/asset/IOR40/005/1994/en/3ac602a8-ebeb-11dd-8cf1-49437baee106/ior400051994en.pdf.

sion, they shared a sense of tempered optimism about the prospects for change. Transformation *could* come about in the global *legal* order, just as had occurred in the world *political* order with the end of the Cold War. The civil society groups shared a common purpose: commitment to the rule of law on a world-wide basis. In order to do so, they argued that international institutions *supported by states* could transform international relations. Justice required a fair, effective, and independent criminal court with global jurisdiction. Almost all the NGOs were small in terms of membership, financial support, geographic spread, and public awareness about them, however. This meant that unity would be necessary for any measure of success.

The NGOs present at the Coalition's inception 10 February 1995, included the following:

Table 3.

Amnesty International (London)	International Commission of Jurists: American Committee (New York)
B'nai B'rith International and Coordinating Board of Jewish Organizations (New York)	International League for Human Rights (New York)
Baha'i International Community (New York)	Lawyers Committee for Human Rights (New York; now Human Rights First)
Bowery Productions (presumably New York)	No Peace without Justice (Rome)
Carter Center (Atlanta)	Nuclear Age Peace Foundation (California)
Center for Development in International Law (New York)	Parliamentarians for Global Action (New York)
CURE (Center for UN Reform Education) (New York)	Quaker UN Office (New York)
DePaul Institute for Human Rights (Chicago)[131]	Transnational Radical Party (New York)
Equality Now (London, New York, and Nairobi)	United Nations Association (New York)
Ford Foundation (New York)	War and Peace Foundation (New York)
Global Policy Forum (New York)	World Federalist Movement (New York)
Human Rights Watch (New York)	World Federalist Association: ICC Project (New York)
Institute for Global Policy (New York)	World Order Models Project (New York)
International Commission of Jurists (New York office)	

131. Through Professor M. Cherif Bassiouni, both DePaul University Law School and the International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy) became involved with the International Criminal Court in its earliest, pre-Rome stages. He held chairs at both institutions and convened several sessions in Italy to help prepare a draft statute. As Glasius comments, these "'Siracusa meetings' . . . became an important informal complement to the official meetings over the next eight years." Glasius, The International Criminal Court, *supra* note 71, at 11. Bassiouni Biography, *available at* http://www.law.depaul.edu/faculty_staff/faculty_information.asp?id=5.

In the eyes of interested human rights NGOs, the ILC proposals suffered from several defects. Grave issues such as genocide were juxtaposed with much more limited problems. Far and away the most significant issue in the ILC proposals came with their state-centric nature. In other words, at least in the view of human rights NGOs, the ILC draft made only a limited dent in the government-focused, power-oriented structure of international relations because the Security Council continued to play a significant role.[132] This recognition of existing limitations, despite dramatic alterations in global politics following the end of the Cold War, disappointed civil society leaders. Advocates of a *fair, effective,* and *independent* court—the three goals the CICC consistently fought for—recognized (as had the ILC) that focus on only the most serious crimes and stress on basic principles were essential. They wanted far more dramatic steps that would encourage the rule of law in a fashion not dominated by the Security Council. Hence, removing or at least minimizing its impact would be essential.

The crucial question involved how best to organize and coordinate their efforts. Should the lead be taken by one of the major human rights NGOs such as Amnesty International or Human Rights Watch, by a smaller and less-known one, or by an organized network? This posed serious issues since the major human rights groups were almost exclusively based in industrialized Western countries, enjoyed access to global media, to resources in terms of membership (for Amnesty International), and financial support (for Amnesty International and Human Rights Watch) that far outstripped other human rights NGOs.[133] Would it be better to try and organize regional bases, bringing together networks of groups that presumably shared common experiences and other affinities? This approach ran afoul of the obvious fact that significant differences exist within regions in their approaches to human rights. Why not utilize common interests, such as women's rights, peace and justice, and the like? Problems existed with these potential approaches as well. For them, support for a new international criminal court would be peripheral to their major interests. Most fundamentally, few global networks of human rights

132. *Draft Statute for an International Criminal Court, supra* note 78.

133. For example, in 2005 the American section of Amnesty International spent $50,485,520. Reports for other years are not publicly available. *See* Amnesty International USA, Financial Statements 2005, *available at* http://www.amnestyusa.org/about/pdf/financial_statements_2005.pdf. For the fiscal year ending 30 June 2009, Human Right Watch reported total expenditures of $44,040,379. *See* Human Rights Watch, Financial Statements 2009, *available at* http://www.hrw.org/about/financials.

NGOs had ever functioned effectively.[134] Although new ground would not have to be broken, the scale of the undertaking appeared insurmountable.

For a variety of reasons, the World Federalist Movement (WFM) emerged as the convener. It had a long history marked by consistent support for effective institutions that transcended national ones, including global institutions for justice.[135] It launched a formal project favoring creation of the Court in 1987, and soon thereafter "housed" the fledgling Coalition. By 1994, three people worked part-time for the CICC, all within the framework of the World Federalist Movement. The goals of the WFM for international justice clearly accorded with the basic principles of other pro-International Criminal Court NGOs. It did not threaten other potential partners because of its small size and willingness to remain in the background.

Formal creation of the CICC occurred 10 February 1995.[136] Impetus for this informal session came in a series of telephone calls between Christopher Hall of Amnesty International[137] and Bill Pace of the World Federalist Movement, who agreed to invite other organizations to get together at the WFM's New York City offices. The meeting itself was described by one participant as "a low key event complete with orange juice and pretzels."[138] This was

134. Some exceptions exist: earlier efforts to abolish slavery, although contacts were made largely among groups in Western Europe and North America; humanitarian groups such as the Geneva-based International Red Cross and Red Crescent Movement; Oxfam; or Amnesty International, whose International Secretariat in London is supported through assessments levied on national chapters.

135. The WFM arose from the energy and thoughts of an American pacifist between the World Wars. Recognizing the wreckage of war and paralysis of rehabilitation, its founders sought a global government, with executive, judicial and legislative branches, organized on a federal basis. Two analysts of its history focus on six themes: UN reform; regional federation; global citizens and global rights; peace-keeping; protecting the earth; and social and economic development. Panganiban, *supra* note 38.

136. Among the participants were Larry Cox (Executive Director of Amnesty International-USA since March 2006, but at that time senior program officer for the Ford Foundation), Richard Dicker (Program Director for International Justice, Human Rights Watch), Silvia Fernandez (CICC; Ms Fernandez also represented Argentina on the General Assembly's Sixth Committee), Christopher Hall (Senior Legal Adviser, Amnesty International) and Juan Mendez (President of the International Center for Transitional Justice but then senior counsel for Human Rights Watch and Director of its Latin America division). Coalition for the International Criminal Court (CICC), *Insight on the International Criminal Court: Newsletter of the NGO Coalition for the ICC*, Tenth Anniversary Special Edition (2005), *available at* http://www.iccnow.org/documents/insight_anniv_en.pdf.

137. Hall was the major author of his organization's critique of the 1994 ILC draft statute. *See* Amnesty International, *Establishing a Just, Fair and Effective International Criminal Court*, *supra* note 130, at 30.

138. E-mail from Andrew Clapham, representative, Amnesty International, to Claude Welch (5 Apr. 2008) (on file with author). He characterized this session as "very relaxed." "I remember sitting with Bill and Silvia [Fernandez, from Argentina] at one end of that square table and we discussed the difficulties NGOs were having re access and documentation and it was clear that NGOs wanted to support the process but we were not developing positions on any substantive points."

intended to be neither the formal launch of a global ICC civil society NGO, nor a groundbreaking discussion on establishing the world's first permanent international court. "[T]he issue was really whether NGOs would be able to participate in the ICC process."[139] "We thought we were coordinating our approaches to governments on procedural issues."[140] Achievement of three basic principles—a court that would be fair, effective, and independent—embodied in a binding treaty seemed inconceivable. "I remember many people sitting around and laughing about these lofty goals," said a major leader of the CICC.[141] Editors of a special tenth anniversary issue of the Coalition's newsletter aptly characterized this seminal session as "nothing less than 'a friendly agreement to work together,'" whose participants "had little sense of what they had set in motion."[142] All but the most optimistic participants did not expect to see establishment of an International Criminal Court before they died. Bill Pace himself observed in 2005 that "[t]ruthfully, most of us thought the ICC was more likely to be established in 2098 rather than 1998."[143] Christopher Hall, who had prepared a lengthy legal analysis of the ILC draft the prior year, called this session the "defining moment" for NGOs working on the International Criminal Court. "Bill Pace had brilliant insight into what was needed in 1995; namely a long-term 'body' to coordinate our activities . . . and that is exactly what was born on February 10th."[144]

A trio of basic principles, shaped at this seminal meeting, provided CICC supporters their core values. These included:

1. A court that would be *fair* to all, not with one system for the strong (i.e. the Permanent Members of the Security Council) and another for others;
2. A court that would be *effective*, not hampered by the veto power set forth in Article 27, 3 of the UN Charter; and
3. Guaranteed *independence* from the Security Council for both the Court and the prosecutor.[145]

Within barely two weeks, the CICC started to take on more formal shape. NGOs participating in the Coalition varied widely in size and visibility. A

139. *Insight on the International Criminal Court*, *supra* note 136, at 3.
140. Clapham E-mail, *supra* note 138.
141. Interview with Tanya Karanasios, Program Director, Coalition for the International Criminal Court, in N.Y, (14 Mar. 2007).
142. *Insight on the International Criminal Court*, *supra* note 136, at 3.
143. *Id.* at 1.
144. *Id.*
145. Interview with William R. Pace, Convenor, CICC, in N.Y. (23 May 2007) [hereinafter Pace Interview I]. Not only would this independence protect the Court from the politics of the Security Council, but would make the Court, logistically speaking, easier to establish because it would be an overwhelming task to amend the UN Charter. Pace Interview III, *supra* note 72.

Steering Committee was established 25 February 1995. The core membership expanded. It included other well-known international human rights groups such as the International Federation for Human Rights (FIDH), the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace without Justice, and Parliamentarians for Global Action. Some of these groups predated World War II. The oldest of these organizations is the Paris-based FIDH, established in 1922.[146] The World Federalist Movement was established in 1947.[147] The International Commission of Jurists followed in 1952, Amnesty International in 1961. Human Rights Watch in 1978 and Parliamentarians for Global Action in 1978–1979 rounded out the list of significant players. In addition to these players, there were many small and young organizations that had overlapping interests in global justice. While these organizations had similar broad objectives, there was no reason at that time for the organizations to act together. The International Law Commission's report, coupled with increased interest in the General Assembly, provided ample impetus for these organizations—big and small—to come together and work toward a common goal.

Although the growth of the CICC was quite rapid, it was in no way planned by any person or organization. Indeed, most of the development seemed to be an organic outgrowth of the circumstances. Most broadly, elite international and national political opinion demanded more effective implementation of global justice.[148] Far more important, however, were widespread feelings of horror at the atrocities committed in Bosnia and Rwanda and the inept global steps to deal with their perpetrators. Thus, "the times were ripe" factor seemed to apply. Third, detailed, persuasive legal work had been completed by major NGOs, notably Amnesty International, supplementing and commenting upon the ILC draft statute. In addition, foundation funding started to flow to the Coalition, a critical fourth reason for its growth. Presence of a senior Ford Foundation officer at the February 1995 session, plus support from the John D. and Catherine T. MacArthur Foundation, The European Commission,[149] the Siracusa

146. FIDH claims affiliated organizations in 155 countries. According to its website, its total disposable income in 2008 was €4,391,674, or $6.5 million USD. *See* Fédération Internationale des Ligues des Droits de l'Homme Balance Sheet (2008), *available at* http://www.fidh.org/IMG/pdf/Accounts_2008.pdf. Calculated using average Euro exchange rate for 2008, *available at* http://france.usembassy.gov/irs-euro.html, 1/13/09.

147. The organization drew its inspiration from the post-World War I Declaration of Montreux. Panganiban, *supra* note 38, at 11–12.

148. As Bassiouni opined: "World public opinion favors the establishment of an effective and fair system of international criminal justice. Governments cannot forever ignore public opinion if they are to retain their political credibility." Bassiouni, *supra* note 85, at 61.

149. Coalition for the International Criminal Court (CICC), Promoting a Fair, Effective and Independent International Criminal Court, *available at* http://www.iccnow.org/audiovisual/CICC_PowerPoint_Sept05.ppt.

Foundation,[150] and the Paul Soros Foundations, made major conferences and hiring additional staff possible.[151] Beyond these, the International Criminal Tribunals for Rwanda and Yugoslavia had started to swing into action. "Requirements" for joining the CICC remained minimal, involving endorsement of its three cardinal principles.[152] Finally, and least possible to quantify, personal qualities of Bill Pace accounted for the Coalition's creation and eventual success. His energy, unparalleled commitment, ability to help disparate groups reach consensus, and knowledge of international human rights made him the central individual. With his self-effacing nature, Pace provided the organizing genius of the CICC.

Before joining the WFM in 1994, Pace had taught high school social science and college-level science and astronomy, and then moved into human rights work. Described as "a life-long civil and human rights activist, environmentalist, peace-advocate, inner-city activist and opponent of unsustainable development," he worked with Amnesty International as a coordinator of its 1988 "Human Rights Now!" tour. He then joined the London-based Environmental Investigation Agency and as executive director of the Center for Development of International Law in Washington D.C. and New York.[153] Pace also had experience at several earlier global conferences (Rio 1992 and Vienna 1993). Having thus "learned the ropes of such

150. Bassiouni played an instrumental role in this foundation, helping to secure funding. He is an international criminal expert who has long advocated for establishment of an international criminal court. He became involved with the 1989 General Assembly initiative, attending numerous meetings and, through his many connections, ensuring that external financial support existed, as well as support for conferences. The Siracusa Foundation is closely linked to Bassiouni, President of the International Institute of Higher Studies in Criminal Sciences and Distinguished Professor of Law at DePaul University, Chicago. Pace Interview I, *supra* note 145. Pace also observed that Macarthur may have helped fund Siracusa. Pace Interview III, *supra* note 72.

151. According to Larry Cox, then Senior Program Officer for Peace and Social Justice at the Ford Foundation, "what the Coalition was initiating during that February meeting was a unique opportunity to make history, and I was certain they would succeed." *Insight on the International Criminal Court*, *supra* note 136, at 3. In time, funding would also come from the European Union, the Like-Minded Governments, and individuals. The Coalition thus differed in practice from many international human rights NGOs in its willingness to accept governmental contributions, so long as these conform to CICC's policy guidelines.

152. Helen Durham, Increasing the Effectiveness of the International Criminal Court: The Contribution of Non-State Actors 79 (June 1999) (unpublished S.J.D. thesis, University of Melbourne), *available at* http://eprints.unimelb.edu.au/archive/00001392/01/Durham.pdf.

> The Coalition was always envisaged as informal, and there has never been any attempt towards formalisation, such as legal incorporation. The procedure to become a participating organisation in the Coalition is simple—merely involving returning a form which advises that the organisation endorses in principle the creation of a just and effective International Criminal Court and wishes to be involved at some level with efforts to create an ICC.

153. The World Federalist Movement-Institute for Global Policy, *available at http://www.wfm.org/site/index.php/councillors/135* (8 Jan. 2008).

conclaves," he was ready to apply some simple lessons: 1) keep common drafting and common statements to a minimum; 2) advocate establishment of an international criminal court based on a small number of common objectives and principles; and 3) support adequate financing for the existing International Tribunals on Rwanda and the former Yugoslavia.[154] Pace knew the importance of "Great Power" support for major new initiatives in human rights—an awareness that was put to the test at Rome. His position in the World Federalist Movement provided an excellent platform.

The CICC confronted difficult problems of time and resources, however. Timely grants facilitated a quantum shift in the emerging Coalition's level of activity. The importance of this seed money cannot be underestimated. It made possible holding special meetings for NGOs and legal specialists, supporting staff at the WFM headquarters in New York City, and initiating publications advocating creation of the ICC. Growth became possible. Communication could be enhanced. Above all, initiatives "from below" could be coordinated and mobilized in a synergistic fashion.

All these factors would have made no difference, however, had conditions at Rome differed only marginally. We must look at the conference's dynamics closely at this point. These dynamics were influenced by the prior work of the International Law Commission, the Ad Hoc Committee, the Preparatory Committee, the LMG and, of course, the CICC. To quote Kirsch and Holmes,

> [T]he stage was set for the Rome Conference, with participants holding sharply contrasting views of what the outcome of the negotiations should be. For some, the ICC was intended to be the fulfillment of a historic promise, a new pillar among international institutions, alongside the International Court of Justice and the United Nations, to help enforce the widely recognized but often violated norms of humanitarian law. For others, a more cautious approach was considered preferable for the time being, lest an experimental institution be created with overreaching powers that would negatively affect the existing system of international relations. But the differences in Rome were not a simple dichotomy between those favouring a strong court and those favouring a more cautious approach. Many controversial issues resulted from diverse historical and political perspectives of participating States, generating conflicting views on issues such as drug trafficking, terrorism, aggression, and internal armed conflicts. Thus, the Rome Conference was characterized by a complicated matrix of possibilities and interests.[155]

154. Telephone interview with William R. Pace, Convenor, CICC, in N.Y. (26 Aug. 2002).

155. Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference, in* THE ROME STATUTE, *supra* note 1, at 72, (*citing* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999)).

VI. THE ROME CONFERENCE: THE LMG AND CICC

What explained the "miracle on the Tiber"? By all accounts, what occurred at Rome must be considered nothing short of miraculous. No event of this magnitude or importance results without careful advance preparation, continuous adaptation to changed circumstances, willingness to cooperate, effective leadership—and lots of good luck.

Given the number of persons involved, the complexity of the issues, the highly-charged political nature of numerous topics, and the tight time limit set by the General Assembly, only an incurable optimist would have predicted success. The major changes made at Rome came in the wide scope of powers vested in the International Criminal Court (including the prosecutor's office), stunning votes in the conference's final minutes, and the unexpectedly influential role played by the CICC and its member NGOs.

Rome at any season of the year is a pleasure to visit. Its magnificent churches, public buildings, piazzas, fountains, and sidewalk cafés convey a sense of conviviality and sharing. Its restaurants remain open well into the night, contrasted with straitlaced Geneva where nightlife essentially ceases by 10 p.m. Analysts writing after the fact can only speculate, but many persons present at the Rome Conference believe that the setting in Italy's capital made a difference in the outcome of negotiations.

At Rome, NGOs worked closely with governments that shared the same broad objectives. The Like-Minded Group provided the leverage within closed diplomatic sessions for goals NGOs desired. States that often sat on the sidelines of global politics banded together on issues of mutual concern, working in turn with similarly-inclined civil society groups. Certain countries orchestrated coordination within the LMG. Among NGOs, Amnesty International and Human Rights Watch played important roles in creating the CICC, but consciously soft-pedaled their part in the broader interest of unity within it. Less well-financed NGOs did not feel themselves shouldered aside by the giants, which remained in the background, offering technical and advocacy assistance. This symbiosis benefited all those wanting a fair, effective and independent court. Meanwhile, the World Federalist Movement obtained grants, which brought more than sixty experts, many from Coalition member organizations in the Global South, to Rome.[156]

156. "The World Federalist Movement (WFM) was the largest delegation of participating NGOs, exceeding even the largest government delegations." William R. Pace, *The Relationship Between the International Criminal Court and Non-Governmental Organizations, in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 202 (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds.,1999). This delegation was the largest since it included many persons recognized by the UN, especially given CICC's power in accrediting individuals.

Attendees convened in the headquarters of the FAO (Food and Agriculture Organization), one of the United Nations numerous special agencies.[157] Its employees grumbled about being required to take their regular vacations a month early. The FAO building included numerous and desirable meeting rooms and informal discussion spaces, all of them essential for complex treaty-making. Few participants had ever explored its reaches before, and areas for private discussions could be found. Outside the FAO complex itself, hotels, and trattorias encouraged face-to-face caucusing.[158] Hence, despite the official separation between government and NGO representatives, numerous opportunities and locales existed for informal interchange and for mutual accommodation. Direct links between the CICC and the LMG facilitated both the compromises and the muscle needed to negotiate the Rome Treaty successfully.

How did this cooperation come about? We need to look further at the countries, individuals and organizations involved.

A. The "Like-Minded Group" (LMG)

Despite the increasing visibility and strength of the LMG, it needed to persuade fence-sitters. Governments had to be coaxed into providing support. For many, no obvious national interest was served by establishing supranational jurisdiction. They had not suffered major atrocities such as Rwanda or Bosnia.

157. Food and Agriculture Organization of the United Nations (FAO), *available at* http://www.fao.org/employment/en. According to its website, the FAO employs more than 3,600 staff members—about 1,600 professional and 2,000 general service staff—and currently maintains five regional offices, nine sub-regional offices, five liaison offices and seventy-four fully-fledged country offices (excluding those hosted in Regional and Sub-regional Offices), in addition to its headquarters in Rome.

158. Durham raises an interesting point in this respect. To quote her directly:

> During the Ad Hoc Committees and the first PrepCom, the Coalition did not have access to a room in the United Nations Building and hence had to conduct all activities in areas such as the Delegates' Lounge, UN public areas and the Church Centre of the UN. On the one hand there were disadvantages in relation to issues of privacy. However, some benefits were discovered with the use of public spaces. In particular, discussions were transparent and it became obvious that the Coalition was able to conduct meetings with eminent jurists, powerful State representatives and senior members of the UN structure. This assisted the Coalition to develop both exposure and credibility. The concept of the different benefits gained with "public" rather than "private" space continued to be used as a tool throughout the whole negotiating process. Even once the Coalition obtained its own room, certain meetings continued to be held in coffee shops and UN public areas.

Durham, *supra* note 152, at 82. Bill Pace raised many of the same points with me as well during our discussions, pointing out that while the Coalition did not have the right to reserve a room itself, it did ask the Netherlands and New Zealand to reserve a room on its behalf. Pace Interview III, *supra* note 72.

Skeptics included countries that were 1) uncertain about the overall benefits a new court might bring relative to the risks of reduced national sovereignty, 2) concerned about possible infringements on areas they deemed critical, 3) poorly-informed or uninterested, or 4) so focused on other matters that they did not see negotiating the treaty as requiring high-level attention. Diplomatic persuasion was necessary since international treaty-making conferences operate on the basis of consensus, not majority votes.

Some countries expressed outright opposition to any major new international criminal court. The extraordinary hostility the United States was to demonstrate did not become manifest until the Rome Conference itself for reasons that will be explored subsequently. It had expressed increasing reluctance as the PrepComs unfolded and the infinitesimal odds of success increased, however. Arab countries remained deeply concerned about what the ILC draft incorporated, including restrictions on internal armed struggle which they considered essential to national liberation.[159] The Vatican expressed deep concern, and was able to exert significant direct and indirect influence (no doubt enhanced by the conference's taking place in Rome), because of language that it concluded would open the door to wider use of abortion (a cause in which the Holy See was joined by many Muslim countries and supported by several women's NGOs that were fearful about making abortion more readily available).

In short, no clear consensus existed among participating countries. They divided along several lines of cleavage, derived primarily from perceptions of their national interests. Common ground would have to be found. Advance required new ways of thinking. If the terms and nature of debate were changed, a quantum leap could be achieved. Thus, if NGOs and some countries "framed" the crucial issues governments considered in a manner favorable to a fair, effective, and independent Court, agreement might be easier to reach. The LMG and the CICC played this crucial shaping role. A vital step had been taken in this fashion.

B. The Coalition for the International Criminal Court (CICC)

The Coalition joined the LMG in helping to persuade ambivalent governments to adopt a positive position. Its goal was simple: creation of a just and effective International Criminal Court. The Coalition did not adopt hard-and-fast positions, apart from its three cardinal principles. Where dissensus marked

159. Jordan remains the sole Arab state to join the LMG and to have ratified the Rome Statute, CICC, *available at* http://www.iccnow.org/documents/RATIFICATIONSbyRegion_18_August2010_eng.pdf.

member organizations, the CICC did not expend its political strength.[160] Australian scholar Helen Durham commented that

> This decision, at times, has proved to be controversial. Numerous discussions have been held on whether or not the Coalition should develop a small number of "common positions," in particular the definition of "just and effective."
>
> . . .
>
> On the other hand, others argued that the strength of the Coalition lay in the fact that it is perceived as non-political and able to incorporate a range of diverse views, under the umbrella of advocating for the Court. In this sense the Coalition is an administrative body, providing a platform for information rather than policy. . . . During every PrepCom the Coalition continued to remain informal in structure and did not develop common positions, serving rather to raise awareness of the positions of its members.[161]

This common set of beliefs and objectives facilitated the emergence and the growth of both the LMG and the CICC. Fairness, effectiveness, and independence provided the organizing frame for the two coalitions. The Coalition functioned as a group of equals, in which respective strengths were recognized and size, wealth, or primary objective were subordinated to common goals. Any organization that accepted the three basic principles were welcome to join.[162] The CICC used several approaches to achieve its goals. In terms of print, it initiated the *International Criminal Court Monitor* in July and August 1996. Published on a regular basis since then, the *Monitor* gives readers access to a variety of succinct, well-researched stories about cases initiated by or being examined by the Court, ratifications of the Rome Statute, comments on significant issues, and the like. The Coalition has since gained additional funding and expertise, enabling it to utilize electronic publishing even more extensively. Subscribers receive frequent updates, often several times per week. Its website has many handy links and is an invaluable source for activists, interested citizens, and scholars alike.

160. This was the case with aggression, for example. Consider the two following statements from Bill Pace, both published in *Terra Viva*: "Many NGOs would like to see aggression included, but are wary of doing so because of the power it would give the Security Council." "And while NGOs would like to see terrorism included in the court's docket 'over time,' they recognized that this would be difficult to do so at present, when no prior common legal understanding of this crime exists." TERRA VIVA (23 Jun. 1998), *available at* http://www.ips.org/icc/tv230602.htm. Two days before the conclusion of the Conference, "Pace said that the inclusion of aggression as a war crime was not a priority for the Coalition, because there is no consensus among NGOs on the matter." TERRA VIVA (15 July 1998), *available at* http://www.ips.org/icc/tv150701.htm.

161 Durham, *supra* note 152, at 80–81.

162. Practically no exceptions were made. The only groups tended to be so strident in their particular demands that they in effect self-excluded themselves. Pace Interview I, *supra* note 145.

One of the most significant contributions made by the CICC came in its equivalent of straw polls. In this instance, its staff monitored formal speeches and negotiations at formal events such as the PrepComs and the Rome Conference, to the extent they could, and reported on positions taken by governments. These "virtual votes" were tallied *in advance of formal votes.* Such a quasi-roll call gave wavering states a sense of where larger numbers of countries were trending, or where states in different regions might share common interests.[163] A bandwagon effect meant that pressure from specific countries (notably from the United States, which increasingly exerted its influence for modifications as the Rome Conference moved toward its conclusion), could be resisted—even though several concessions were made to the US during the negotiations themselves. The CICC further facilitated face-to-face discussions between NGOs and governments, especially LMG members. These conversations started well before the conference opened, and took place at different levels: between the Coalition's leader and the head of the LMG; by individual civil society groups with their own governments; and by influential persons sharing the goals of a fair, effective, and independent court. NGOs subordinated their individual identities. With very few exceptions, they downplayed issue preferences that could interfere with the Coalition's key goals. The "800-pound gorillas"—Amnesty International and Human Rights Watch—played careful hands. Their contributions occurred largely behind the scenes, through legal advice and preparing position papers under extraordinary time pressures.

Additional organizational tasks came with providing experts and interns to some government delegations, holding regular press briefing and daily Coalition Strategy Sessions, and particularly in meeting regularly with governments (notably from the LMG) and weekly with the chair of the treaty conference.[164] Finally, NGOs from specific regions interacted as closely as possible with countries in those areas, recognizing that they might enjoy

163. According to the Coalition, "Terra Viva served primarily as a serious resource to ensure delegates remained up to date." *Insight on the International Criminal Court, supra* note 136, at 5. One of the persons interviewed suggested that by the time each daily edition appeared, the important aspects were already widely known. Face-to-face contacts also made a major difference. Unlike larger delegations which, by the time each daily edition appeared, had already been informed about the important issues of the day either by word of mouth, telephone, or electronic means (as one person interviewed suggested), smaller delegations often did not have enough people, power, or financial resources to keep up with the volume of papers, clauses, and amendments being added day to day. In particular, as has been frequently stressed, the count that the Coalition and Terra Viva provided of states' apparent positions on major issues contributed to the bandwagon effect of the hectic closing days. Issues have been scanned and are available now in digital format from the Coalition.

164. Pace, *The Relationship Between the International Criminal Court and Non-Governmental Organizations, supra* note 156, at 202.

greater credibility due to their similar cultural backgrounds. "Greater credibility" rested fundamentally on the degree of political openness in the respective countries, however. As a general rule, the less protective of human rights governments were, the more likely NGOs would be subordinated to them, or perhaps not exist at all. No easy one-to-one relationship can be proven, but the tendency is clear. As a result, NGOs from Asia[165] and particularly from the Arab world participated to only a limited extent, or not at all, in the Coalition itself.

In addition to the increasing number of its members, the Coalition gained strength from its persistent, consistent, and strategic actions. The World Federalist Movement, which convened the Coalition, was perceived as small, neutral, and non-threatening by smaller NGOs, in particular those from "southern" or "developing" countries. Joining the Coalition proved simple, "merely involving returning a form which advises that the organization endorses in principle the creation of a just and effective International Criminal Court and wishes to be involved at some level with efforts to create an ICC."[166]

More than 800 NGOs identified themselves as members of the Coalition by July 1998. Almost all the 236 NGOs accredited for the conference belonged to the CICC.[167] This large number would have been unwieldy without prior agreement on issues to emphasize. The CICC would have been ineffective unless it supported a small number of common principles. The large number of the Coalition's members and its diversity in terms of emphasis of individual NGOs, their geographical distribution, and the equality among all made the Coalition stronger without eliminating opportunities for action by its members *as long as its three basic ideas were accepted and individual organizations given reasonable opportunities for their own efforts.*

The Coalition had gained experience during the six PrepComs. Pace modestly suggested that during these PrepComs, "more than 90 percent" of the CICC work focused on providing vital services to Coalition members, the UN, and governments (as opposed to issue-oriented advocacy).[168] This experience served all parties well during the crowded weeks in Rome. The

165. As Durham has noted, not a single Asian NGO produced a paper during the three years of PrepCom negotiation. Durham, *supra* note 152, at 83.
166. *Id.* at 85; Glasius, *Expertise in the Cause of Justice*, *supra* note 88, at 137–68.
167. William R. Pace & Mark Thieroff, *Participation of Non-Governmental Organizations, in* The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results 392 (Roy S. Lee ed., 1999).
168. "It is important to emphasize that more than 90 percent of the Coalition Secretariat's work is focused on the provision of vital services to Coalition members, the UN and governments, as opposed to issue-oriented advocacy." William R. Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission, in* The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 711 (Roy S. Lee et al. eds., 2001).

Coalition maximized its effectiveness there by subdividing its work among various types of entities. First, paralleling overall UN and general conference structure, several *regional* caucuses were established. NGO members from them could (at least in theory) more readily establish contact with their governmental counterparts than NGOs from elsewhere. By sharing (relatively) common experiences and outlooks, NGO and state representatives alike might reach compromises more readily than in larger settings. *Issue* or *thematic* caucuses constituted the second part of the CICC tripod. They were established during the PrepComs to ensure that perspectives of particular constituencies were incorporated into all aspects of the negotiations. Although categories inevitably overlapped at the conference, specific groups focused on gender justice, victims, children, peace, and faith-related issues. These have been continued and redefined with the passage of time.[169] Finally, and possibly most important, the Coalition created a dozen *working groups,*[170] explicitly shadowing or tracking states on the 128 articles of the draft treaty.[171] Many of the approximately 1700 diplomats in Rome had come as part of small delegations, poorly briefed or instructed by their governments. They were called upon to make critical decisions, often at times when their ministries of foreign affairs had closed for the night. Thus, having counsel not only from trusted states but also from highly-informed NGOs made a major difference for them.[172] Here, as elsewhere, NGOs provided vitally-important information.

Effective communications require knowledge. "Information politics," in the phrase of Keck and Sikkink, figured among the Coalition's strengths. NGOs had no official direct access to government delegations during the Rome Conference. Informal contacts existed, however, which provided a sense as to where governments stood. Positions of states could also be inferred from delegates' speeches. *Terra Viva* appeared daily during the Rome Conference.[173] *Terra Viva*, published by the InterPress Service,[174] featured

169. CICC, *available at* http://www.iccnow.org/. At present, sectoral caucuses include women's initiatives for gender justice, victims' rights, a faith and ethics network, universal jurisdiction, children's issues, and peace.
170. According to Glasius, these groups were "perhaps the most effective, allowing all NGOs, and the smaller state delegations, to keep abreast of all the sub-negotiations even if they could not physically be there." Glasius, The International Criminal Court, *supra* note 71, at 28.
171. While the terms shadowing or tracking were not used explicitly in *The Relationship Between the International Criminal Court and Non-Governmental Organizations,* they were frequently used in interviews with experts on the Coalition and the Court. Pace, *The Relationship Between the International Criminal Court and Non-Governmental Organizations, supra* note 156, at 202.
172. Given the complexity of issues and problems of expertise, many small delegations turned to these reports as their major source of information.
173. Select articles from the publication are *available at* http://www.ips.org/icc/.
174. The InterPress Service prints newspapers for many UN conferences.

a large insert from the CICC called the *Rome Treaty Conference Monitor*. Gossip among delegates and *Terra Viva* facilitated growing consensus.

This consensus was important as the course of the conference did not always run smoothly. The languor of early weeks may have been necessary to air governments' positions, but the seemingly-unstoppable verbiage caused despair among the Court's strong advocates.[175] Significant changes occurred outside public view, as compromises were hammered out on the basis of growing trust and the inexorable pressure of time. Politically sensitive areas were dropped from potential inclusion in the emerging treaty, as were crimes that appeared to fall below the threshold of criticality needed for International Criminal Court action. A kind of band-wagon effect developed. As it became clear that a large number of countries supported a particular position—especially if these states were perceived as influential—others would leap aboard. All direct observers and commentators concur: the Coalition's daily publication of where governments stood on particular issues hastened eventual adoption.

The discussions at Rome alternated between long periods of public and private tedium and a few moments of high public drama, and a great deal of time was consumed in official orations in the opening two weeks plus, allowing states to set out their respective positions. The overwhelming bulk of serious negotiations occurred outside the popular eye, in various working groups, once the initial round of speech-making had concluded. Most of these sessions were closed and confined to governments. They took place outside the direct observation of NGOs, especially in the most delicate areas of negotiation. Different groups worked on specific sections of the draft text. Despite the formal boundaries between them, however, contact between official and unofficial representatives proved possible, especially thanks to rapport established between particular states or their delegates with individual NGOs and their members. The parallel structure of "official" and "unofficial" working groups did not preclude achieving common ground. Mutual osmosis occurred. In short, the formal barriers between "governmental" and "nongovernmental" turned out to be relatively permeable. Feedback strengthened the desire for change and the hope for success; it clarified the eventual treaty language, despite the extraordinary number of bracketed sections—at least 1700—with which the conference began.[176]

One of the most important examples of unofficial, mutually beneficial cooperation between NGOs and specific countries came with efforts to

175. "Moreover, about fifty of the state delegations, mainly from developing countries, had not taken part in the preparatory committee meetings at all." Glasius, *Expertise in the Cause of Justice*, *supra* note 88, at 140.

176. Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, *in* THE INTERNATIONAL CRIMINAL COURT, *supra* note 167, at 13.

curb use of the veto power within the Security Council where potential Court activities would be involved. Counteracting the veto power of the P-5 counted among the principal goals of the Coalition and the LMG. Many proposals were floated prior to Rome (witness the ILC draft, which accepted the existing distribution of the UN powers), contrasted with the suggestions of some states and several NGOs, which strongly advocated the Court's independence from the Security Council's veto.[177] Political realism collided with idealism. As stressed throughout this article, a paradigm shift would be necessary to overcome the Charter-granted prerogatives of the Security Council. The euphoria accompanying the end of the Cold War had suggested such a transformation had occurred. This optimistic assumption did not square with reality: few, if any, of the P-5 would surrender their unique ability to block actions contrary to their perceived national interests or those of close allies. For the LMG and NGO bloc, accordingly, the challenge came in "squaring the circle," in finding a delicate compromise that would satisfy all states so that consensus could be reached.

In this process, the mini-state of Singapore provided a critical contribution. For centuries, it prospered as a center of commerce. Singapore stood out in its region not only for its small size, but also for its homogeneity, high-tech savvy, and common law heritage. What became quickly known as the Singapore Compromise was offered at a critical point. At the August 1997 PrepCom, Singapore floated an amendment to the ILC draft, which

177. The following table indicates some typical positions.

Organization	Position
Amnesty International	The statute should not, however, permit the Security Council to prevent the investigation and prosecution of cases involving such situations. http://www.iccnow.org/documents/ALMakingRightChoises97PartI.pdf
Human Rights Watch	However, we are strongly opposed to the inclusion of Article 23(3), which prevents the Court from beginning a prosecution arising out of a situation being dealt with by the Security Council under its Chapter VII powers unless the Council expressly permits otherwise. http://www.iccnow.org/documents/HRWCommentary.pdf
Lawyers Committee for Human Rights	Having in mind that Chapter VII situations are precisely those in which crimes within the Court's proposed jurisdiction are most likely to be committed, it seems obvious that this mechanism would seriously affect the Court's independent functioning. http://www.iccnow.org/documents/2PrepCmtEstablishICCLCHR.pdf
Committee on International Law and Committee on International Human Rights	The Security Council's primary role in the maintenance of international peace and security should not include the power to block the initiation of cases within the ICC's jurisdiction. http://www.iccnow.org/documents/3PreCmtReportonICC.pdf

revised the relationship between the Security Council and the International Criminal Court. As Haas relates,

> Lionel Yee, a young government attorney out of Singapore, proposed that instead of requiring Permanent Five unanimity to launch a Court investigation, why not require Permanent Five unanimity in order to block one? More specifically, why not establish a system where a majority vote of the Security Council could at any time prevent any further Court action on a given case for a renewable period of up to twelve months. The concept was called the "Singapore Compromise" after its creator.[178]

Most of the P-5 were skeptical, likely hostile, to restrictions on their powers. This had been abundantly demonstrated in the period leading up to Rome. Support from the Great Powers was essential for the proposed compromise to work and their opposition had to be overcome by persuasion from others. Were this suggestion to remain a goal of the LMG and pro-Court NGOs only, it would have been consigned to failure. On 18 June, for example, France expressed its view that removing the veto power would "see the court turned into a political forum." The Foreign Secretary "asked for patience on the part of the NGOs, and stressed that it was still early days. The implication was that France might endorse the Singapore compromise, if it [felt] satisfied with other aspects of the emerging draft."[179] The balance tipped, however, with important developments before and during the Conference. Great Britain decided in December 1997 to support it, a mere four months after Singapore had launched its proposal. Several reasons have been adduced for the UK change of stance: the election of Tony Blair as Prime Minister in May 1997[180]; the work of Foreign Secretary Cook in adding an "ethical dimension" to British foreign affairs[181]; pressure from other members of the

178. Haas, supra note 114, at 170. See also Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1510 (2002). France and the United States also reacted positively to Singapore's recommendation, a prognostication soon belied by American actions later in the conference. *See* Farhan Haq, *US Proposal Could Hurt Criminal Court, NGOs Warn, available at* http://www.ips.org/icc/background/backdiez.htm.

179. *France Urges Caution on War Crimes*, TERRA VIVA 4, 18 June 1998; *Dutch Disbelief at American "Defeatism,"* ON THE RECORD 4, 18 June 1998, *available at* http://www.advocacynet.org/resource/360#Dutch_Disbelief_at_American__Defeatism_. *On the Record* is the name of an electronic insert.

180. Marlies Glasius, who is the best-informed academic who has examined the Rome Conference, remains somewhat skeptical about Blair's direct role. She notes that the "somewhat ambiguous position under Labour is that the head of the delegation, long-term career diplomat Franklin Berman, was completely invested in the special relation with the US, whereas other members such as Elizabeth Wilmshurst (who later resigned over Iraq) were much more in favour of a progressive court." Glasius e-mail, *supra* note 103.

181. Williams. *supra* note 117, at 54.

European Union; and pro-Court actions by British civil society groups. Toward the end of June however, Britain began to backtrack on its support for the proposal by arguing that the Security Council should control cases under its purview and lack of support for an independent prosecutor.[182]

The roles of small and medium-size states and of NGOs must not be minimized. Frustrated by the opposition of the Great Powers, they organized a coalition of "like-minded" states that included more than fifty members. A break in the ranks of the Great Powers came after the election of Tony Blair when the United Kingdom joined the coalition. At the recommendation of the UN Secretariat, the Prepcom "opened its plenary meetings as well as informal working groups to the NGOs, which were thus able to participate in the actual drafting of treaty language and mobilize public opinion in order to apply pressure on recalcitrant governments."[183]

By early July, the Like-Minded Group had grown to sixty countries. A majority of its members had found the Security Council position, by means of which it would control the proposed Court's docket, unacceptable. By inference, they supported Singapore's recommendation. Other issues remained between the LMG and the P-5, however. A second Asian country tried to bridge the gap between the permanent powers and an increasing number of states. South Korea stepped into a major debate over governments' "consent." Central to any country's sovereignty is its control over citizens and non-citizens within its boundaries.[184] Should governments with an interest in a particular individual be required to give its consent before action by the Court? On 19 June, four days after the conference opened, South Korea recommended that any of four types of "interested" states should have to agree to Court jurisdiction: 1) where specific alleged crimes were committed; 2) the accused person(s) home state; 3) the government of the purported victim; or 4) the government whose nationality the accused held. The South Korean delegate asserted such an arrangement would permit a broad range of crimes to be tried.[185] Needless to say, any proposal that smacked of expanding the Court's potential power ran into staunch opposition. American objections surfaced immediately, as did those of Germany. David Scheffer, US Ambassador at Large for War Crimes Issues, argued that this would in effect apply a treaty to a country without its consent and conflict with traditional international law. Looking at this objection from the perspective

182. *"Rebellious" Rome Conference Demands Curbs on Security Council Veto Power*, ON THE RECORD 7, 23 June 1998, *available at* http://www.advocacynet.org/resource/363#_Rebellious__Rome_Conference_Demands_Curbs_on_Security_Council_Veto_Power.

183. Bernard E. Brown, *What is the New Diplomacy?*, 23 AM. FOREIGN POL'Y INT. 3, 7 (2001).

184. Some exceptions exist, such as persons protected by diplomatic immunity.

185. *South Korea Floats Compromise on Jurisdiction*, TERRA VIVA 6, 22 June 1998, *available at* http://www.ips.org/icc/tv220602.htm.

of the LMG, the NGO Coalition, and the result of the Conference itself, he counted in a small minority. The Court itself was intended to help create (or, alternatively, to extend and consolidate) the paradigmatic shift made at Nuremberg. Crimes that were strongly condemned by the international community should be prosecuted globally. Ample precedent existed for countries to be subject to legal strictures not explicitly accepted by their "regular" legislative and/or executive processes.

Canadian judge and diplomat Philippe Kirsch must be credited with saving the negotiations from potential failure.[186] He assumed the critical position of chair after Adriaan Bos announced in April 1998 that he was seriously ill and would therefore be unable to preside as chairman at the Rome Conference. Both of them facilitated links between LMG members and critical entities in the negotiations.[187] At critical points, Kirsch stepped into the action. He held several private bilateral discussions with select states. They did not lead to the positive results he had desired, however. To quote him directly, "this exercise proved disappointing as delegations generally signalled little flexibility. . . . Thus, it became clear that the major issues would only be resolved as part of a package."[188] He posted notice about all informal meetings in advance, thus easing "concerns among Southern states that too many meetings on key topics were being conducted informally with little or no prior notice."[189] In addition, he proposed composite drafts (9 July) and a final "take-it-or-leave-it" version (16 July, the day before the required adjournment).

In addition to these initiatives from the Chair, the Coalition made a major contribution to the debates in a clever and indirect fashion. Where governments stood on critical issues—a court not subject to vetoes from the Security Council, an independent prosecutor, and fair procedures—had to be deduced from their public statements. According to one observer,

> [T]he CICC had the idea to record speeches and correlate the percentages for and against each of these (choices). The results were overwhelming. About 79% of states favored more robust organisms. This (information) was circulated next day; this was stunning in its own right. It showed how widespread support was for a robust, effective institution. Many delegations faxed results back to their capitals for senior officials to be aware of, to encourage them to actively support a stronger institution. That was a terrific accomplishment on the part of CICC. At that moment, it was priceless.[190]

186. Kirsch is a Canadian lawyer and career diplomat. He served as "Chairman of the Committee of the Whole of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court." DON M. MCRAE, CANADIAN YEARBOOK OF INTERNATIONAL LAW/ ANNUAIRE CANADIEN DE DROIT INTERNATIONAL 3 (1999). He was elected first President of the International Criminal Court in March 2003. His term on the Court ended in 2009. See University of Ottawa, *available at* http://www.president.uottawa.ca/doctorate-details_683.html.

187. "As a result, the chairman, Adriaan Bos and his successor, Philippe Kirsch, were able to place fellow LMG members in key 'coordinator' positions, chairing subgroups of the negotiations." GLASIUS, THE INTERNATIONAL CRIMINAL COURT, *supra* note 71, at 25.

188. Kirsch & Robinson, *supra* note 155, at 74.

189. *Non-Aligned Nations Target Nukes*, TERRA VIVA 9, 26 June 1998, *available at* http://www.ips.org/icc/tv260601.htm.

The closing date of the conference had been established by the General Assembly. Formal action was mandatory by midnight Friday, 17 July. Would the negotiators succeed in developing an acceptable package of compromises? If so, would the nearly 150 governments present accept it? Pressures had built, and the fate of the proposed Court hung in the balance. Canada took a leading role in getting the conference on track. On Monday, 6 July, less than two weeks before the mandated conclusion, a "discussion paper" prepared within the LMG was circulated and "key" delegates invited to the Canadian Embassy during the weekend for discussions. Options for Part II of the statute, which contained the most controversial parts, were narrowed down in a proposal distributed three days later. Drama mounted to a crescendo on Thursday night, 16 July, twenty-four hours before the conference would end, when a final "take-it-or-leave-it" package deal was circulated. As Glasius wrote,

> While it looked as if little progress was being made in these last ten days, delegates were involved in a frenzy of secretive talks in search of compromises. Nevertheless, many proponents of the court, both governmental and NGO representatives began to panic. There was a strong feeling that if the statute were not concluded now, a window of opportunity would be closed, and it might be a long, long time before the same momentum could be reached again.[191]

The draft statute came to the floor 17 July 1998, the last formal day of the Conference. Feelings had run high at points in the negotiations. The proposed treaty contained almost all the Coalition and LMG central principles. It provided for an independent prosecutor, to be elected by the ratifying states.[192] The concept of a professional lawyer free from political influence

190. This information was spread in several ways: by direct contact by specific NGOs with delegates (especially where there were personal links or regional links), through the dozen specialized groups set up by the Coalition, through the information published in *Terra Viva*, and, above all, by informal discussion among and within delegations. The significance of diplomatic chitchat cannot be minimized in such delicate, complex negotiations, particularly when it opened the door for NGO expertise and perspectives. Interview with Richard Dicker, Program Director for International Justice, Human Rights Watch, in New York. (24 May 2007).

191. GLASIUS, THE INTERNATIONAL CRIMINAL COURT, *supra* note 71, at 14. She bases this observation on her interviews; persons with whom I spoke reinforced this view. An interview with Bill Pace seemed to reinforce this view. Pace Interview III, *supra* note 72.

192. Rome Statute, *supra* note 18, art. 15.

conformed to basic principles of human rights.[193] An independent prosecutor had run contrary to the desires of several powerful countries, however, since they feared that an independent prosecutor could turn against their own interests. Concern about this became particularly marked in the United States. The 1994 ILC draft had permitted the Office of the Prosecutor (OTP) to undertake investigations only with receipt of a formal complaint or referral by the Security Council. In other words, *proprio motu* had not been envisaged. The draft statute as presented at Rome clarified definitions of crimes falling within its jurisdiction, set forth detailed procedures for selection of judges from varied pools, and the like. In short, much had changed from the original ILC text; hundreds of pieces of bracketed text had been discussed and compromises ironed out; and a distinctive "product" emerged.

Evoking particularly strong emotions was the crime of aggression. Although, part of the four "core crimes" of the statute, there was much debate about whether to include the crime because of the failure to reach a definitive definition. As the conference progressed though, more and more states indicated their support for the inclusion of the crime. Support was particularly strong among the Non-Aligned Movement (NAM). Support was lacking was among the permanent members of the Security Council who were concerned about the Security Council's role in determining whether an act constituted aggression or not.[194] Towards the end of the conference though, an agreement was reached. "The creative last-minute compromise contained in Article 5(2) reflected the continuing tension between States that were still unwilling to surrender part of their sovereign right to wage war and the desire of weaker States that sought protection against aggressors behind the shield of an independent international court."[195] Under this compromise, the crime of aggression was under the Court's jurisdiction, but subject to an "acceptable provision" of the definition being adopted.[196] This essentially postponed the problem by postponing a definition of aggression.

Tension escalated even further when the Plenary Session resumed on the final evening of the conference. Would the arduous five weeks of negotiations result in any substantial advance? Or would the series of diplomatic compromises collapse in the face of exhaustion, intransigence, or some unforeseen circumstance? The weary delegates joined for the final plenary session. To quote from the chair,

193. AI, Establishing a Just, Fair and Effective International Criminal Court, *supra* note 130, at 25. Amnesty International also wanted the Prosecutor to be able to proceed on basis of a complaint. *Id.* This possibility does not exist under the Rome Statute.
194. Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l L. 22, 30 (1999).
195. Ferencz, *Ending Impunity for the Crime of Aggression*, *supra* note 41, at 284.
196. The acceptable provisions could be adopted through amendments taken up at a review conference.

> The final session of the [Committee of the Whole] began at 6 p.m. on Friday 17 July. Every seat was filled and scores of exhausted delegates stood in any spaces available at the back of the room. Other delegates, NGO observers, and media representatives filled the corridors outside or nearby rooms, where the [Committee of the Whole] proceedings could be heard on closed-circuit transmission. Even at this late stage the outcome was uncertain. It was known that the final package had support from numerous States, particularly like-minded States, but there was still a silent majority whose views were not known. Moreover, any efforts to amend aspects of the Draft Statute could precipitate a cascade of votes on a variety of issues, with unpredictable results.[197]

The finale started when the world's second-most populous country reintroduced a potentially killer amendment. India moved to include a prohibition on possession of nuclear weapons.[198] Its proposal had been decisively rejected earlier.[199] India desired to have its security threat from neighboring Pakistan, rising economic achievements, huge population, distinctive culture, and military strength recognized. Sensing the gravity of the situation, Norway—one of the leading members of the Like-Minded Group—moved to table the amendment; tabling is a non-debatable motion. The proposal was supported by Malawi and Chile, indicating "the depth of the opposition to India among the non-aligned countries."[200] The formal vote proved lopsided. The Norwegian proposal was accepted, by a 114–16 vote; twenty countries abstained.

197. Kirsch & Robinson, *supra* note 155, at 76.
198. To skeptical observers, this proposal seems odd, inasmuch as India was the first developing country after China to explode a nuclear device. However, its archrival Pakistan—with which it fought three major wars—also possessed atomic bombs. (India was the first of them to explode a nuclear weapon, less than two months prior to the Rome Conference. Its action opened it to the obvious charge of hypocrisy). India justified its development of nuclear energy on the need for electricity generated from non-fossil fuels. It naturally also wanted to highlight its scientific expertise.
199. According to Glasius, "most NGOs were a bit stand-offish about the weapons issue"; India was the most avid proponent of inclusion of nuclear weapons as a crime. Ultimately, the final Statute bans four types of weapons: 1) poisonous or poisoned weapons; 2) asphyxiating, poisonous or other gases and analogous liquids, materials or devices; 3) expanding bullets; and 4) weapons which may be added in the future and listed in the annex. Glasius, The International Criminal Court, *supra* note 71, at 102, 105. As Glasius noted in another context, the Non-Aligned Movement adopted a position a month before Rome that "made explicit prohibition of nuclear weapons one of its key objectives for the ICC." *Id.* at 101. "However, while India continued to pursue this objective, the unity of the NAM was much weakened at the Rome Conference by the defection of many states to the Like-Minded Group." *Id.* at 102. *See also* Glasius, *Expertise in the Cause of Justice*, *supra* note 88, at 140.
200. Advocacy Project, *A Court is Born*, On the Record (OCC) (17 July 1998), *available at* http://www.advocacynet.org/resource/378. India's stance was considered particular hypocritical in light of its recent nuclear tests. *India Hits Nato, Gets Flak Itself*, Terra Viva 22, 14 July 1998, *available at* http://www.ips.org/icc/tv140702.htm.

The United States then put forward a proposal that had been turned down earlier in the conference and that similarly threatened to torpedo the elaborate diplomatic consensus that had been painstakingly constructed. Washington was deeply concerned about several issues, and its positions hardened during the negotiations.[201] American Ambassador David Scheffer called to amend the draft text of the Rome Statute to achieve one of two goals: either to require that both countries involved in a dispute that would come before the Court must have ratified the treaty; or, minimally, require only the consent of the state of nationality of the perpetrator be obtained before the Court could exercise jurisdiction. In Washington's eyes, such a step would be essential to prevent multinational peacekeeping forces not party to the treaty from being prosecuted for their involvement in internal conflicts. This step seemed totally opposed to the spirit of international co-operation that almost all other delegations and the overwhelming majority of NGOs favored. Had the exemption been approved, the compromises made during the conference might collapse. Norway repeated its successful tactic. By voice vote, the Committee of the Whole loudly rejected the American proposal. When Scheffer surprisingly asked for a formal roll-call vote, the US amendment went down to a stunning 120–7 defeat.[202] (Twenty-one countries abstained.) The United States was joined primarily by marginal or pariah states.[203] Their cajoling and threats notwithstanding, American leaders were routed. Although numerous adjustments had been made in the course of the conference itself in response to US pressure, many delegations felt that

201. A detailed official statement of them came from Ambassador David Scheffer, chief US representative at Rome, in testimony to the Senate Foreign Relations Committee a week after the Rome Conference concluded. CICC, *available at* http://www.coalitionfortheicc.org/documents/USScheffer_Senate23July98.pdf. The Council of Foreign Relations summarized four major reasons for American opposition: 1) danger lest US military personnel be brought before the ICC for political reasons; 2) the limited degree of Security Council control over prosecutions initiated by the Court's prosecutor (recall *proprio motu* and the Singapore compromise); 3) the ambiguity of crimes over which the ICC exercised jurisdiction, particularly aggression (although this was not included in the Rome Statute and was deliberately left for possible later discussion); and 4) the relationship between the Court and national judicial processes (despite the complementarity principle included in the Statute). See the careful analysis prepared by the Council on Foreign Relations. Council on Foreign Relations, Toward an International Criminal Court? (1999).

202. Many delegations resented the role played by the United States. Many factors contributed: the mammoth shift in global power with the United States as the military hegemon, the perceived triumphalism of US foreign policy with its outright promotion of democracy US-style, strong advocacy of capitalism North American-style (rather than the social democracy favored in much of Europe), and high degrees of the government's economic involvement almost everywhere in the world.

203. The results were not officially released because the United States called for an 'unrecorded vote', but other nay-sayers probably included China, Iraq, Israel, Libya, Qatar, and Yemen. Interview with William R. Pace, Convenor, CICC, in N.Y. (15 Oct. 2010) [hereinafter Pace Interview IV].

nothing would fully satisfy the negotiators from Washington. It seemed as though they wanted to keep shifting the goalposts.

The international community spoke; all contributed to the discussions; and the overwhelming majority accepted the results. The Rome Statute had been adopted. And, to recognize the importance of their action, delegates broke into ten minutes (!) of sustained rhythmic applause.[204]

C. The Impact of the LMG and the CICC on the ICC

Why did the efforts undertaken in parallel by the Like-Minded Group and the CICC succeed? Three factors stand out, aptly summarized in the CICC objectives: establishing an entity that would be *fair, effective,* and *independent.* For each of these, the Coalition utilized Keck and Sikkink's four "politics": accountability, information, linkage, and symbolic.

Fairness. First, perceptions matter. In order to persuade undecided governments to join with the LMG and move toward the Coalition's position, they had to be convinced that the proposed Court could and would act fairly. This sense developed in several ways. Judges would be selected by ratifying countries, not by the General Assembly or Security Council, according to strictures set out in the draft treaty.[205] The states parties would "take into account" different legal traditions and major geographic regions in electing judges. They would also seek certain types of expertise, balancing backgrounds in prosecution and criminal law with more academic understanding of international legal processes. One of the most significant changes came in requiring gender balance—a clear reflection of the systematic crimes against women highlighted at Rome by the women's caucus.[206]

204. Glasius, The International Criminal Court, *supra* note 71, at 15, citing Fanny Benedetti and John Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,* 5 Global Governance 1 (1999).

205. In this respect, the International Criminal Court exists at the side of rather than within the UN system as a whole. For example, the Court is financed by States Parties, not the general assessments that support the United Nations. Independence for the Court to ensure that its actions are not politically influenced (with the obvious exception of Article 16, permitting Security Council deferral of consideration of cases on an annual basis) is crucial to the Court's effectiveness and fairness. A parallel exists with the World Bank and IMF, which also are parallel to but not subordinated to the United Nations political structure.

206. Rome Statute, *supra* note 18, art. 36, explicitly sets these forth in the criteria the states parties use in selecting them. Geographic representation would be "equitable," while gender balance would be "fair." Given the recent horrendous use of child soldiers and sexual violence as a means of warfare, the Statute calls explicitly for the need to "take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."

The prosecutor and deputy prosecutors would also be chosen by an absolute majority of the states parties.[207]

Effectiveness. Second, members of the LMG and CICC found common ground in wanting an *effective* Court. The Court had to be endowed with sufficient power in its jurisdiction, and assured of cooperation from governments. In theory, agreement and jurisdiction could be reached for crimes already well established in international law, whether customary or treaty-based. Genocide, crimes against humanity, and war crimes fell in this category. Others were more controversial or less significant. Including aggression as a prosecutable crime was bound to arouse huge controversy if pressed. International agreement on defining aggression had yet to crystallize by mid-1998. The January 1998 draft left it out entirely. Despite the problems defining aggression, the crime was still included in the Rome Statute, albeit with a yet-to-be-determined status. In 2002, the Assembly of State Parties established a Special Working Group on the Crime of Aggression (SWGCA) in an attempt to create a definition of the crime that will allow for a consensus.[208]

Independence. Third, the new court had to prove its independence in deciding what cases to examine, which to adjudicate, and what penalties it would hand down. Three aspects were involved: the office of the prosecutor; organizing the Court to maximize its efficiency; and the conscious utilization of different legal traditions.

An independent prosecutor required legal capacity to operate on his or her own initiative. The Office of the Prosecutor would function "as a separate organ" of the Court, free of influence from any particular state. The prosecutor could investigate matters *proprio motu*—in other words, based on available information—without formal prior approval by states. He or she could not be barred permanently from pressing concerns, although the Singapore compromise allowed the Security Council to preclude adjudication on a year-by-year basis.[209]

The Court itself would be divided into Chambers, as was being utilized in the International Tribunals for Rwanda and Yugoslavia.[210] The pre-trial

207. *Id.* art. 17.
208. Ferencz, *Ending Impunity for the Crime of Aggression*, *supra* note 44, at 284.
209. Rome Statute, *supra* note 18, art.16.
210. These included: 1) the Pre-Trial Chamber, which would examine material submitted by the Prosecutor to determine whether a reasonable basis to proceed with an investigation existed, and that the case appeared to fall within the jurisdiction of the Court (Article 15.4), 2) the Trial Chamber and 3) an Appeals Chamber (Article 82). The Pre-Trial Chamber includes "not less than six judges," the Trial Chamber "not less than six judges," and the Appeals Chamber "the President and four other judges." "The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience." (Article 39.1). *Id.*

chamber would examine evidence presented by the prosecutor and determine whether a proposed case should in fact proceed to trial. An appeals chamber would handle appeals of decisions reached in the trial chamber. Finally, following the Nuremberg pattern, different legal traditions and expertise would be respected and represented through the election of judges representing different types of expertise, legal philosophies, geographic region and, a first in international treaties, an explicit requirement for balance between both sexes.

The CICC results-oriented structure unquestionably facilitated acceptance of the Rome Statute. The dozen issue-based groups were complemented by ones explicitly shadowing the states' own working groups. Four to eight organizations would monitor the open sessions of the working groups. Government to NGO contacts and trust—or at least frank dialogue outside the formal halls, and often within it over coffee—occurred as a result. The prior emergence of and cooperation with the LMG eased the tasks: trust grew, as did willingness to compromise.

Pace's adroit leadership of the Coalition was complemented by equally effective chairs, from Zutphen through the conclusion of the Rome Conference as a whole, Dutch judge and diplomat Adriaan Bos[211] and Canadian international lawyer Philippe Kirsch. Both were highly respected by their peers. Perhaps more important, they always kept in mind the enormity of the tasks confronting the conference. Strong guidance from them helped move the delegations jaggedly toward their 17 July deadline.

Now the Coalition and governments faced a new set of issues: gaining the necessary number of formal signatures by midnight 31 December 2000,[212] and the requisite sixty ratifications thereafter. In short, challenging tasks remained. This article shall conclude by examining how both the International Criminal Court and the CICC have undertaken their twenty-first century challenges.

VII. CONCLUSION: THE COALITION POST-ROME

With the triumph of July 1998 behind them, Coalition members confronted a fundamental question: should the CICC remain in existence? On the one hand, it had engineered a seemingly-impossible triumph, working closely with the LMG, in completing successful negotiations for the International

211. Bos is a former legal advisor to the Netherlands Ministry of Foreign Affairs. This was the basis for his large role at the Rome Conference. Pace Interview IV, *supra* note 203. Bos is currently a highly-regarded Dutch professor of law. Among his books are Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen (Adriaan Bos & Hugo Siblesz eds., 1986); Reflections on the International Criminal Court, *supra* note 156.
212. Rome Statute, *supra* note 18, art. 125.

Criminal Court. Why not "quit when you're ahead?" On the other hand, challenging tasks remained. Most important was gaining ratifications. Sixty had to be obtained before the Rome Statute could go into effect.[213] Once the treaty became operative, the prosecutor and judges of high quality had to be elected. Actions by the prosecutor and the Court required monitoring. Gaps in the Rome Treaty that had been deliberately papered over had to be addressed in order to strengthen and continue expanding the scope of international justice. The Coalition obviously had strong interests in all these matters. Hence, rather than disband, it remained in existence, but faced new definitions of its major functions. It moved from major cheerleader and coordinator of NGOs to being a semi-inside critic.

The small staff of the Coalition[214] and its constituent NGOs felt great pride in their accomplishment at Rome, feeling that global civil society had made a difference, despite the vested interests of powerful states. Was this in fact a realistic view? Huge tasks remained. An essentially new, major global institution had to be created, for which the immediate predecessors—the tribunals at Nuremberg and Tokyo and the International Tribunals for Yugoslavia and for Rwanda—offered mixed messages. The budget had to be set and funds collected. Court officials had to be nominated and elected. Suitable headquarters would be needed. Above all, the Court needed to develop procedurally tight cases for hearing and eventual adjudication.

A. Campaigning for Ratification

The Rome Statute, in keeping with standard practice, both set a deadline for states to sign (thereby indicating their willingness to ratify according to their own domestic procedures) and established a threshold level to enter into force. Article 125 set New Year's Eve 2000 as the deadline for signatures,[215] with sixty ratifications required for the International Criminal Court to officially come into existence.[216] No less than 139 countries had signed the Rome Statute by 31 December 2000, representing almost all the states that had attended the conference. The momentum achieved during the conference carried over into the ratification process. By late spring 2002, the requisite sixtieth country had approved.[217]

The CICC's efforts for global ratification utilize a state-by-state strategy. Each month, a non-ratifying country is chosen as a target. Civil society groups in it work in conjunction with the Coalition for formal acceptance. Campaigns for implementation in individual countries follow paths appropriate to local circumstances, consistent with overall Coalition policy.

Marked variations exist when comparing rates of ratification across the six regions of the world (Africa, Asia and Pacific, Eastern Europe, Latin America and Caribbean, North Africa and Middle East, and Western European and other). Far and away most striking is the almost total absence of Middle Eastern countries. Furthermore, few Muslim-majority states had ratified the Rome Statute, as of late-2009.[218] Almost all the states parties in Asia (with the exception of Japan and Korea) were relatively marginal island countries. China and India were conspicuous by their absence, but they were far from the only states in this category. Given that a majority of the world's population lives in Asia, this lacuna presents a tremendous challenge not only to the CICC, but also for all global advocates of human rights.

Table 3.

Group	*Ratifiers*	*Total size of group*	*Percentage*
Africa	31	53	58.5
Asia and Pacific	14	33	42.4
Eastern Europe	16	23	69.5
Latin America and Caribbean	24	33	72.7
North Africa and Middle East	1	18	5
Western European and others	25	27	92.6

Source: http://www.iccnow.org/documents/RATIFICATIONSbyRegion_18_August2010_eng.pdf; http://www.iccnow.org/?mod=region&idureg=13.[219]

213. *Id.* art. 126.
214. The Coalition functions with a budget of approximately $3 million per year. This supports its mid-town Manhattan office and the European headquarters located in The Hague. It also supports several regional offices. According to the Coalition's website, "Regional Coordinators [are] based in Belgium, Benin, Jordan, the Philippines and Peru [to] serve as focal points for the coordination of the efforts of members, the national coalitions, and regional networks." This expansion in geographical extent was complemented by an increase in staff. When the Coalition began to form in 1995, there were only three part-time staff formally on board with additional effort being expended by employees of the World Federalist Movement. As time progressed, the staff of the Coalition continued to grow, and by the time of the Rome Conference in 1998 there were staff formally on board in addition to several interns. As of 2010, the Coalition employed 40 people full-time plus additional part-time staff, "not including the numerous interns and volunteers who donate their time. Staff members come from all continents, combining knowledge and skills to ensure that the campaign for the ICC is efficiently coordinated." CICC, *available at* http://www.coalitionfortheicc.org/?mod=stafflist.
215. Rome Statute, *supra* note 18, art. 125.
216. *Id.* art. 126. The treaty as a whole went into effect sixty days after the sixtieth instrument of ratification or accession was deposited.
217. Senegal was the first country to ratify (summer 1999). Several states submitted their ratifications in a bunch in the early summer of 2002. They were counted simultaneously, so that no single country could claim honor of having put the Statute over the top.
218. Muslim majority ratifying countries include (in Africa) Chad, Djibouti, Gambia, Guinea, Mali, Niger, Nigeria and Senegal); (in Asia and Pacific) Afghanistan, Jordan and Tajikistan; and (in Eastern Europe) Albania and Bosnia-Herzegovina.
219. The newest ratifications include Seychelles and St. Lucia. Both ratified the treaty in August 2010.

All member states of the European Union, as well every South American country, had accepted the Court's jurisdiction by mid-2009.[220] One hundred ten countries had formally accepted the Court's jurisdiction by late 2009.[221] Some governments did not convert their signatures into official ratification, however. They needed to adopt formal implementing language to insure complementarity—one of the principle features of the Rome Statute.

B. Post-Rome: Pro-Entry into Force Activities of the Coalition

Between the adoption of the Rome Statute in 1998 and its entry into force in 2002, the Coalition developed several campaigns and continued to push for developments that would ensure that the Court's launch in 2002 would be without issue. One of the key contributions was the CICC's push for the creation and funding of an "Advance Team." The goal of this Advance Team was to ensure that the ground work was laid for the Court. Part of this was organizing the search for judicial candidates, as well as setting up the Office of the Prosecutor and working on the budget of the Court.[222]

Five follow-up PrepComs were squeezed into the period between the adoption of the Rome Statute and the 31 December 2000 ratification deadline. In a sense, the "miracle on the Tiber" produced a 128-article skeleton to which muscles, sinews, organs, circulation and nervous systems, and the like had to be added. The Coalition joined with governments, notably with representatives from the Like-Minded Group, to ensure that the results met the major objectives of both: a fair, effective, and independent Court. The integrity of the treaty had to be preserved, particularly against attack from the United States. During an intense period of barely two years, the Coalition and its members worked as expert advisers (their "most prominent role"),[223] advocates,[224] publicists, and documentarians. In the process, it developed

220. The Rome Statute in the World: 110 States Parties, 38 Signatories, 46 Non Signatories, CICC Factsheet, 39 Int'l Crim. Ct. Mon. 10 (Nov. 2009), *available at* http://www.iccnow.org/documents/Signatures-Non_Signatures_and_Ratifications_of_the_RS_in_the_World_November_2009.pdf.

221. Countries signing the Treaty totaled 139, while two others had "unsigned" (see below). According to the Coalition's count, this meant only forty-six governments had yet to sign the Rome Statute. *See* CICC, *supra* note 220.

222. *Commemorative Message on the Occasion of the Tenth Anniversary of the NGO Coalition for the International Criminal Court*, A letter from Luis Moreno Ocampo (Feb. 2005). *See* CICC, *available at* http://www.iccnow.org/documents/10thAnnCommemMessages10Feb05.pdf.

223. Pace & Schense, *supra* note 168, at 713.

224. The authors aptly note that advocacy sometimes involves confrontation with governments. Compromises and negotiations become necessary, because "Coalition members often set forth optimum language in position papers, keeping in mind what language is minimally acceptable; opinions on the latter almost always vary even among NGOs." Extensive informal consultation was essential, with both member NGOs and governments, especially LMG participants. *Id.*

sophisticated, easily accessible means of electronic communication and an excellent library of relevant material.

C. Liaison with the Court and Member NGOs

The CICC meets twice per year with the Registry, the Prosecutor's Office, and the Chamber.[225] These private sessions allow the Coalition and human rights NGOs around the world to bring their views to the Court, and for ICC officials to interact as they may wish with members of the Coalition. Since it staffs a full-time office in The Hague, equal in status with the New York office, communications within the Coalition and with its members (especially in Europe) are eased.

In order to facilitate links among the far-flung members of the Coalition, it also maintains project offices in Argentina, Belgium, Benin, Democratic Republic of the Congo, Jordan, Peru, the Philippines, and the United Kingdom.[226] Offices within its eight sections have kept up pressure on governments by encouraging participating NGOs to put pressure directly on their own, providing logistical support, showing a domestic "presence" and "relevance" to the Court's concerns, and reaching out to the public as a whole, to the media, and to their own members. These regional centers ease communication in several respects: among participating NGOs; between them and the Coalition's International Secretariat (co-located in New York and The Hague); and with governments in the particular region. Meetings, held every six months, rotate among the regional offices. They deal with issues of ratification, strategy (feeding into annual sessions on general strategy), ongoing Coalition campaigns, and the effectiveness of the Court as a whole.[227]

Furthering facilitation between the Coalition and different regions are over eighty national Coalitions for the International Criminal Court. These coalitions "are typically comprised of a diverse range of civil society groups working within a single country or region, including NGOs, academics, lawyers, bar associations and others."[228] These entities exist to further communication between regional NGOs and the CICC. They also aid in carrying out the goals of the CICC by campaigning for ratification within their respective areas and by educating individuals and groups about the ICC and its goals.[229]

225. Having an office in The Hague facilitates these contacts. Pace Interview I, *supra* note 145.

226. *Together for Justice*, CICC, *available at* http://www.iccnow.org/documents/ID_brochure_web.pdf.

227. Interview with Tanya Karanasios, Program Director, CICC, in New York (14 Mar. 2007).

228 CICC, Regional and National Networks, *available at* http://www.iccnow.org/?mod=networks.

229. *Id.* According to CICC: "By 2009, there were 14 national coalitions in Asia and the Pacific, 14 in Europe, 32 in Africa, 11 in the Middle East and North Africa, and 9 in the Americas, for a total of 80 national coalitions."

D. Cheerleader and Critic

The Coalition shifted roles again once the Court was established. At Rome, it had "led the charge" among NGOs for creation of a fair, effective, and independent Court. Its role was thus largely one of rallying support, coaxing participating groups to support the three common points, working with the Like-Minded Group countries, and maintaining cohesion among Coalition members—all at the same time. Bill Pace and his colleagues thus served as "cheerleaders," pressing on as many fronts as possible for successful negotiation of the Rome Statute. With its adoption, the major functions of the CICC started to change somewhat. It remains close to the International Criminal Court, physically and in terms of purpose. Most fundamentally, the CICC wants the Court to succeed. It tends (in the eyes of critics) to trumpet the Court's accomplishments more than shortcomings.[230]

In terms of criticism, the Coalition walks a narrow line. The multifaceted nature of the CICC and its continued commitment to a fair, effective and independent Court mean it must temper praise and encouragement with recommendations for change. As the Coalition's head indicated, symbiosis exists between it and the Court, a "partnership with mutual reliance to avoid adversarial criticism."[231] In the privacy of the biennial meetings, and as relations have evolved with the Registry, the Office of the Prosecutor, and the Chambers, the CICC has offered suggestions. All are intended to strengthen the Court.

Individual NGOs may take more critical stances, although they continue to support the Coalition and the Court. Richard Dicker of Human Rights Watch expressed this view:

> Such support doesn't mean we aren't critical publicly and privately where the International Criminal Court or its officials are failing to implement the mission and the mandate of Rome Statute. Human Rights Watch assists the court at the same time as it's critical of it. Our criticism would also extend to fairness if there was lack of even-handedness. The Coalition secretariat quite properly doesn't get involved in particular country situation investigations, but does have a very important role in the mechanism and harness for NGO work.[232]

230. Among critical commentators are KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA (2009); TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY (2006); Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF. J. (2009); *available at* http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html. We are grateful to Marlies Glasius for these references. E-mail to Claude Welch (25 June 2010).

231. Pace Interview I, *supra* note 145. He went on to add, "We've been very critical but constructively critical."

232. Dicker, *supra* note 190.

E. Assisting with Elements of Crimes

Although seemingly technical matters, the definition of the "elements of crimes" and elaboration of the Court's rules of procedure were important tasks. The Coalition for the International Court took on significant responsibilities in this process, as Pace and Schense have documented.[233] According to them, trust grew between the UN Secretariat and the PrepCom's bureau on the one hand and with the Coalition on the other. The Coalition in turn carried out informal consultations to help delegates regarding obligations that ratification entails; briefed delegates and NGOs on progress toward entry in force; planned for activities at national and regional levels; and facilitated work of UN Secretariat to accelerate the statute's entry into force. Some sixty to eighty groups participated in the NGO sessions, many fewer than at Rome, but clearly significant as an indication of the importance of the matter. New members could attend orientation sessions. The Coalition also prepared advocacy papers (which included both issues and proposed solutions), organized daily strategy meetings, and utilized caucus teams to follow developments.

F. Selecting Judges

One of the most controversial areas of interaction between the newly-created Court and the Coalition came with the selection of judges. Who would be best qualified for the complex tasks that lay ahead? As should be expected, NGOs and states parties differed in their points of view. While ratifying governments cast the ballots, civil society groups sought to influence the outcome, emphasizing qualities they considered important. The Rome Statute provides for the election of its eighteen members, drawn (like the proverbial Chinese menu) from two lists by the Assembly of States Parties.[234] List

233. Pace & Schense, *supra* note 168, at 716–24.

234. Rome Statute, *supra* note 18, art. 36. As its name implies, the Assembly of States Parties includes all countries that have ratified the Rome Statute. Non-ratification does not remove a country from the potential reach of the Court—a matter of great concern to the United States. Owing to fear lest its political and military personnel be liable to prosecution, even if operating on behalf of internationally-approved multi-national operations, American leaders worked strongly at Rome to circumscribe the Court's jurisdiction. Before the ink was scarcely dry on the treaty, they started to negotiate BIA's— Bilateral Immunity Agreements—with a variety of countries. These arose under Article 98 of the Rome Statute: "Cooperation with respect to waiver of immunity and consent to surrender." The convoluted language of this article precludes the Court from mandating the transfer of indicted individuals. To quote directly, no transfer "which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." *Id.* art. 98.

A includes candidates who have "established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings." List B is comprised of individuals with "established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court." At least nine of the judges must come from List A (guaranteeing individuals with "real life" experience in court rooms), while no less than six must be drawn from List B (thereby insuring that knowledge of international human rights, humanitarian law, and the like exists). They serve in three divisions: pre-trial, trial, and appeals.

Guaranteeing qualified judges was not the only responsibility of the Court, however. The Court also had to ensure that all of the countries who were party to the statue had an equal opportunity to be represented on the panel of judges. To ensure this, minimum voting requirements were established. These requirements meant that states must "vote for a minimum number of candidates from each regional group, legal expertise, and gender."[235] The Coalition itself was responsible for the greatest push for the addition of gender to these minimum requirements.[236] It should be noted though that this procedure is not a quota system and does not ensure a certain number of seats to any region or gender.

Over time, the elections of judges have become less politicized and more routine. As of mid-2009, four elections have taken place. In February 2003, the Assembly of States Parties chose the first bench of eighteen judges from a total of forty-three candidates. Given powerful elements of national pride and the inherent conditions of a "first-time" selection, the fact that forty-three ballots were required for the initial round should come as no surprise.[237] Following this first election, the eighteen judges were randomly

235. Procedures for the election of judges to the International Criminal Court. CICC , Factsheet, (10 May 2010), *available at* http://www.iccnow.org/documents/CICCFS-ElectionsProcedures_10May10_en.pdf.

236. Pace Interview IV, *supra* note 203.

237. Possibly the major reason the 2003 elections of judges required so many ballots for one African state involved tension between France (the self-appointed patron for its former colonies) and Anglophone Africa, represented by Nigeria. Even though a French judge had already been selected and the civil law tradition was well represented, France pressed for its candidate. Arguing that French is the official or most widely spoken European language in at least fifteen African states, France supported Mali, a Francophone country with a civil law tradition and a population estimated at just under 12 million inhabitants in 2007. Nigeria is far and away Africa's most populous country, with an estimated 140 million people and a common law system.

The 2006 election proved considerably less contentious. In accordance with the Statute, one female, one African, one Asian, and two Eastern European candidates had to be chosen. In terms of geographic distribution, two each were citizens of Asian or African countries, three Latin American, and six Western. The States Parties had to vote for one female, one African, one Asian and two Eastern European candidates. These criteria were all met in the first round, in which all six judges (three men and three women) were elected. An Eastern European female took the place of a male Asian judge. In comparison with the first bench, the election resulted in one more female and Eastern European judge and one less judge from Asia. Final Results, *available at* http://www.icc-cpi.int/NR/rdonlyres/9F5E7613-DF43-4DE6-BD97-D32BFB4E645E/277232/E_judgeselected_finalresults_26jan1615.pdf.

The 2007 election involved four ballots. Those selected included a man from Europe and a woman from Japan on the first round, and a male from Anglophone Africa on the fourth. Assembly of States Parties to the Rome Statute of the International Criminal Court: Nominations for Judges of the International Criminal Court, *available at* http://www.icc-cpi.int/NR/rdonlyres/1A306C85-5B10-486C-8644-9F16E7476C56/277125/Nominations_of_JudgesResultsFirstRound30Nov2025.pdf . The November 2009 election involved selecting one judge from the Latin America and Caribbean group and one from Asia, to fill two years of a former judge's term. The successful candidates, both women, came from Argentina and Japan, Results of the Fourth Election of the Judges of the International Criminal Court *available at* http://www.icc-cpi.int/Menus/ASP/Elections/Judges/2009_2/Results/Final+Results.htm.

238. Dicker, *supra* note 190.

assigned terms of three, six or nine years. Those who served for three years were eligible for re-election in 2006, with formal balloting occurring in 2007. Interim balloting took place when judges resigned or died while in office. The most recent cycle of elections occurred in 2009.

The eighteen judges represent the visible side of the Court. Dressed in somber black robes with dark blue silk closures and white jabots, their chairs physically elevated above other parts of the room, they represent the majesty of the law and the gravity of the issues with which the ICC deals. Everyone concerned with the Court—whether states parties, relevant NGOs, indictees standing trial, those arguing cases, and the like—naturally wanted fair judges. States parties formally elect them at staggered intervals. What input would civil society enjoy? The CICC benefited from a privileged opportunity prior to the first election: selected members joined government representatives in interviewing candidates. According to one participant,

> We determined that we wanted to have some influence of selection of the best possible candidates for judges, not just go along with traditional vote-swapping of the UN. The high point of process was conducting both written and verbal interviews with judge candidates in late 2002-early 2003. We talked to people who were mighty unhappy being in a room with NGOs' asking questions. They realized how influential the NGO community could be. Some bit their tongues and talked with us. This was done under CICC auspices. The meetings took place in missions and elsewhere. There was also a written questionnaire. Only a few organizations actually opposed particular candidates. It made sense since some good LMG states revealed their fangs, in attempting to put enormous pressure on us to see their candidates were elected. This showed support of states is necessary and must be on-going.[238]

Since that first election, the CICC has continued as part of the interview process. Representatives from the CICC submit questionnaires to prospective judges and interview them. Questions explore judges' backgrounds, qualifications, language abilities, and legal knowledge. In 2009, the Coalition also asked candidates about their legal expertise with regard to violence against women. This line of questioning appears to be an effort on the Coalition's part to recognize the ongoing effort to address the continuing marginalization of the grave abuses suffered by women in situations of armed conflict.

G. The Coalition as an Organization

What lies in the future for the organization? Most simply, 1) continued day-to-day watchfulness, ensuring that governments fulfill their obligations, 2) building citizens awareness, 3) finding sufficient funds to remain active, and most delicate of all, 4) walking a line between support for the Court and commenting on or criticizing its shortcomings. Eternal vigilance remains a major task of NGOs. The CICC plans to stay on the scene for many years, pressing the Court to develop its jurisprudence through prosecuting cases effectively and utilizing its member NGOs to exert pressure on their respective governments.

The first area of tension lies in the Coalition's role vis-à-vis the Court's daily functioning. Should the CICC serve primarily to rally support for an institution that is new, fragile, relatively untested, and marginal in world politics? Or should it act as an informed critic, prodding the Court to undertake change as necessary, in order to strengthen its impact? Obviously, the CICC needs to carry out both, but achieving and maintaining an appropriate balance requires consummate diplomacy.

A second issue involves location. How much of the Coalition's activities will be based in The Hague, thereby enhancing its potential ability to influence the Court directly, contrasted with New York City, where it would be better able to impact the United Nations, global media, and world political opinion? In the end, after internal debate following the Rome Conference, the CICC decided to maintain co-equal headquarters in both, as well as a series of regional bureaus.

In addition, how should the Coalition best utilize its budget, given the myriad of demands on it? Responses to these questions will not be easy to work out. They will vary from situation to situation, depend heavily on available budget, and will evolve over time. Nonetheless, the early actions of the Coalition and of some of its major constituents merit discussion.

Within a few years, the International Criminal Court has moved from its "establishment" to its "operational" phase.[239] This does not mean that all kinks have been ironed out. Even with its judges selected, rules of procedure worked out and adopted, and a few individuals indicted and standing trial, the Court still faces formidable issues.

Since the start of the millennium, the Coalition has revised its major campaigns periodically, adjusting to changed political circumstances. Its initial foci concentrated on 1) achieving global ratification and effective implementation of the Rome Statute; 2) the United States and the Court; and 3) the United Nations and the Court. By early 2010, the campaigns' titles had changed somewhat, but their intent was unchanged. They were labeled "Delivering on the Promise of a Fair, Effective and Independent Court," "Making Justice Visible," and "A Universal Court with Global Support."

H. Countering American Opposition

The CICC has sought to counter American opposition to the Court, which was manifested exceptionally strongly in the first administration of President George W. Bush. Well before then, however, US administrations had been at best lukewarm. Michael Scharf expressed the perspective as of late 1993:

> By the time the ILC's proposed statute came up for discussion in the United Nations Sixth (Legal) Committee in October 1993, the Clinton Administration had decided to take a more supportive approach to the creation of an ICC and to become actively involved in the effort to resolve the remaining obstacles. Thus, in his speech before the Sixth Committee on October 27, [1993] State Department Legal Adviser Conrad Harper stated:
>
> "My government has decided to take a fresh look at the establishment of [an international criminal] court. We recognize that in certain instances egregious violations of international law may go unpunished because of a lack of an effective national forum for prosecution. We also recognize that, although there are certain advantages to the establishment of ad hoc tribunals, this process is time consuming and may thus diminish the ability to act promptly in investigating and prosecuting such offenses. In general, although the underlying issues must be appropriately resolved, the concept of an international criminal court is an important one, and one in which we have a significant and positive interest. This is a serious and important effort which should be continued, and we intend to be actively and constructively involved."[240]

239. *Id.*
240. Michael P. Scharf, *Getting Serious About an International Criminal Court*, 6 PACE INT'L L. REV. 103, 108–09 (1994).

With the massive evidence of the Bosnian and Rwandan genocides in front of him, President Bill Clinton appeared to support creating the Court.[241] Early rhetorical statements did not mean that his administration could or did press strongly for adoption of the Rome Statute, however.[242] "Advise and consent" were the operative words. President Clinton was weakened by the Democrats' loss of control in the 1994 elections and his impeachment trial. Jesse Helms, Republican Chair of the Senate Foreign Relations Committee, implacably objected to the Court. His opposition alone would have been sufficient to torpedo legislative consideration, since he could use a variety of parliamentary maneuvers to keep the treaty from coming to the Senate floor. Support within the Executive branch, to the extent it existed, pitted favorable voices in "Foggy Bottom" against negative views in the Pentagon. The latter clearly came out on top. And with the 2000 election of George W. Bush, any Presidential support from Washington for creation of the International Criminal Court or American participation in it disappeared totally. Even more marked hostility emerged with events of 11 September 2001.

If the "benign opposition" of President Clinton was constructive, President Bush's opposition was self-destructive. The Bush administration simultaneously moved to have the genocide in Sudan referred to the Security Council, but continued to deny the Court jurisdiction over itself. This made the United States appear hypocritical and helped to sour the support of many countries. It is clear that the Bush administration would have had a stranglehold on the Court had the timing [of the Rome Conference] been different.[243]

241. As President Clinton observed,

> By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law. This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg, a permanent international court to prosecute such violations. And we are working today at the United Nations to see whether it can be done.

Remarks at the University of Connecticut, 15 Oct. 1995, 2 Pub. Papers 1595 (23 Oct. 1995), EBSCOhost, *available at* http://web.ebscohost.com/ehost/detail?vid=4&hid=9&sid=5311893c-947a-4d91-a4c3-a9979f27e27e%40sessionmgr14&bdata=JnNpdGU9ZWhvc3QtbGl2ZSZzY29wZT1zaXRl#db=f5h&AN=9512032843.

242. For example, in his speech at the fifty-second session of the General Assembly 22 September 1997, US President Clinton expressed "strong support for the UN's war crime tribunals and truth commissions. And before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law." Worth noting is his reference to "humanitarian" rather than "criminal law." *Quoted in* Alvin Z. Rubinstein, Albina Shayevich & Boris Zlotnikov, The Clinton Foreign Policy Reader: Presidential Speeches with Commentary 161 (2000).

243. Pace Interview I, *supra* note 145.

Since American troops were highly likely to be involved in some fashion unilaterally in defense of US interests,[244] or in collective enforcement under NATO, the UN, or other international auspices, US leaders believed some form of immunity was essential. In the post-Rome PrepComs, American negotiators tried in back-door fashion to amend the Rome Statute, although revision required agreement by ratifying states and no amendment could be added until seven years had passed following the Rome Statute's entry into force.[245] US negotiators worked throughout 1999 to obtain wording or clarifications that "would exempt any officials from non-party states (read: American soldiers and leaders) from any possibility of prosecution."[246] Their concern was genuine. All the proposals for the Court and the text of the Rome Statute rejected the notion of immunity for senior leaders.[247] Those atop the military and political hierarchies were responsible should prosecutable actions be carried out by persons *under their control.* Given the concentration of global military power in the United States by the end of the twentieth century, caution should have been expected.

President Clinton pressed ahead, nonetheless, albeit reluctantly. David Scheffer, who had led the American delegation at Rome, was sent to UN Headquarters on 31 December 2000, the last day on which signatures could be affixed and signed. The evening was snowy; the Ambassador traveled via rail; and barely made it to the United Nations. After he signed the document, there were only two more signatures left to go of states that had attended the Rome conference: Iran and Israel. Both signed later that evening.[248] Although he authorized the signing, President Clinton indicated that he would not submit it to the Senate for advice and consent for ratification until the US government had a chance to assess the functioning of the Court, he nonetheless supported the proposed role of the ICC and its aims:

244. US troops had been sent to Somalia under President George H.W. Bush, while President Clinton did the same for Haiti in 1994. He authorized NATO airstrikes against Serbian targets in Kosovo and protection of airspace in northern (Kurdish) areas of Iraq.

245. Rome Statute, *supra* note 18, art. 121.

246. Additional steps made under the Clinton administration included 1) exempting "official acts" carried out abroad from jurisdiction of those territories and 2) reinterpreting Article 98.2 of the Rome Statute. Glasius, The International Criminal Court, *supra* note 71, at 17.

247. The Rome Statute, *supra* note 18, art. 27(2) explicitly rejects immunity from potential prosecution because of an individual's position. "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." Analogous wording can be found in the following article, which doubtless concerned Pentagon staffers: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be." *Id.* art. 28(1).

248. As of October 2010, Iran had yet to ratify, while Israel withdrew its signature along with the United States.

> The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor, submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.
>
> Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.[249]

As we know, President Clinton's successor felt otherwise. The United States remains outside the fold of the Court's supporters, making it the only Organisation for Economic Co-operation and Development (OECD) member except Turkey not to ratify the Rome Statute.[250]

I. Determining the Court's Fairness

Selection of cases has emerged as one of the most divisive issues in the International Criminal Court. Cases before it have arisen from referrals by the Security Council, requests by individual states, and independent action by the prosecutor—in short, from all three avenues envisaged by the Rome Statute. The selection of these cases has not been without contention, although there is concern about whether the Court is pursuing the politics of justice or just plain politics.[251]

This concern has arisen over the fact that the overwhelming majority of cases under investigation and preliminary analysis are in African countries. While there has been continental pressure for the 30 sub-Saharan[252] countries that have ratified the Rome Statute and from African Union to find "African

249. President Clinton, Statement on Signature of the International Criminal Court Treaty, Wash., D.C., (31 Dec. 2000), The American Non-governmental Organizations for the International Criminal Court (AMICC), *available at* http://www.amicc.org/docs/Clinton_sign.pdf.

250. While the United States signed and then "unsigned" the Rome Statute, Turkey has neither signed nor ratified it. The list of Organisation for Economic Co-operation and Development (OECD) members, *available at* http://www.oecd.org/document/1/0,3343,en_2649_201185_1889402_1_1_1_1,00.html; a list of signatory and ratifying states of the Statute is *available at* http://www.iccnow.org/documents/Signatures-Non_Signatures_and_Ratifications_of_the_RS_in_the_World_November_2009.pdf; http://www.iccnow.org/documents/RATIFICATIONSbyRegion_18_August2010_eng.pdf.

251. Marlies Glasius, *What is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations*, 31 Hum. Rts. Q. 496, 497 (2009).

252. Some Muslim-majority states south of the Sahara have ratified the Rome Statute, such as Mali, Niger, Nigeria, and Senegal.

solutions for African problems," the specter of neo-colonial interference or Western paternalism can be raised by critics of OTP examination. But many of the countries under ICC investigation were dealing with serious internal issues that seemed beyond the scope or willingness of the respective national governments or other African states to deal with effectively. The international community, in most instances, stood on the sidelines.

One example is the Democratic Republic of the Congo (DRC), whose eastern area was plagued by spillover from the 1994 Rwanda genocide and the decades-long plundering of the state by its former dictator, Mobutu Sese Soko. The OTP began to analyze the situation in July 2003. By September that year, the prosecutor determined that he was ready to request authorization to investigate, but decided that a "referral and active support from the DRC would assist his work."[253] By April 2004, the OTP received a letter from the transitional government that "referred 'crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC' to the prosecutor."[254] By late June 2004 the prosecutor announced his decision to open the first investigation of the ICC.[255] As of April 2010, the OTP had issued four arrest warrants related to the investigation—three of which have proceeded to trial.[256]

In December 2003, Ugandan President Yoweri Museveni decided to take action, similar to DRC President Joseph Kabila, and request assistance with respect to the Lord's Resistance Army (LRA).[257] The chief prosecutor, following up on the referral, decided to open an investigation on the situation in Northern Uganda in July 2004. In 2005, the OTP issued five arrest warrants. Four of these indictees remain at large, while the remaining indictee died in 2006.[258]

The Central African Republic (CAR) called for OTP assistance in December 2004.[259] The prosecutor did not pursue the referral as quickly as he

253. International Criminal Court (ICC), Press Release, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (6 June 2004), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation?lan=en-GB.

254. Glasius, *What is Global Justice*, *supra* note 251, at 498.

255. *See* ICC, Press Release, *supra* note 253.

256. The case of *The Prosecutor v. Thomas Lubanga Dyilo* began on 26 Jan. 2009; the case of *The Prosecutor v. Germain Katanga and Mathiew Ngudjolo Chui Chui* started 24 Nov. 2009. These represent the ICC's first and second trials. International Criminal Court, Democratic Republic of the Congo, *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/.

257. *See* ICC Press Release, *supra* note 253.

258. ICC, Uganda, *available at* http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/.

259. ICC, Background Situation in the Central African Republic, 22 May 2007, *available at* http://www.icc-cpi.int/NR/rdonlyres/B64950CF-8370-4438-AD7C-0905079D747A/144037/ICCOTPBN20070522220_A_EN.pdf.

had in the DRC and Uganda cases. He deferred pursuing the matter in order to see if the country's central court of appeal proved able to deal with the "scale and complexity of the crimes."[260] This appears to be an example of the prosecutor attempting to defer to a state solution and to utilize national avenues as far as possible. The CAR court proved to be unable to deal with the issue, however, and the OTP officially opened up an investigation in May, 2007.[261] One arrest warrant was issued and the indictee has appeared before Pre-Trial Chamber III.[262]

Unlike the previous countries, the situation in Darfur, Sudan was not referred to the Court by the country itself, but rather by the Security Council.[263] The Security Council determined in March 2005 that the situation was so serious that it constituted a "threat to international peace and security."[264] On 4 March 2009, Pre-trial Chamber I issued an arrest warrant for incumbent President Omar Hassan al-Bashir.[265] This was the first time that the Court had issued a warrant against a sitting head of state.[266] Several serious questions about the Court's perceived fairness surfaced as a result. Particularly vocal are members of the African Union and the Organization of the Islamic Conference. Three other arrest warrants have been issued in relation to the case. All indictees remain at large.[267]

Kenya is the fifth African country to come under investigation by the OTP. In November 2009, the OTP sought authorization from the Pre-Trial

260. Glasius, *What is Global Justice*, *supra* note 251, at 500.
261. ICC, Press Release, Prosecutor Opens Investigation in the Central African Republic (22 May 2007), *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB.
262. ICC, Central African Republic, *available at* http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/.
263. *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court*, S.C. Res. 1593, *adopted* 31 Mar. 2005, U.N. SCOR, 5158th mtg., U.N. Doc. S/Res/1593 (2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm. This resolution illustrated the horns of a dilemma on which the George W. Bush administration was caught. Despite its undisguised distaste for the ICC, Secretary of State Colin Powell felt strongly that UN and US action were essential, and he persuaded the president to accede to his requests. The United States may have introduced the motion, but in the final 11-0-4 vote, joined with Algeria, Brazil and China in abstaining.
264. Manisuli Ssenyonjo, *The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan*, 59 Int'l & Comp. L.Q. 205, 206 (2010).
265. *Id.*
266. Although this was the first time the Court issued an arrest warrant for a sitting head of state, it was not the first time a warrant had ever been issued for a head of state. For example, an indictment was issued for Charles Taylor, president of Liberia, for his involvement in the Sierra Leone Civil War in March 2003. The International Criminal Tribunal for Yugoslavia issued an indictment for Serbia's President Slobodan Milosevic. He was arrested after resigning the presidency and turned over to the ICTY on 31 March 2001. Pace Interview IV, *supra* note 203.
267. ICC, Darfur, Sudan, *available at* http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/.

Chamber II to begin an investigation. This was the first time that the prosecutor used his *proprio motu* powers to initiate an inquiry without first receiving a referral from a government or the Security Council.[268] In March 2010, the Pre-Trial Chamber II granted the OTP's request.[269]

Several other states, while not officially under investigation, remain under preliminary analysis. This process starts when the prosecutor determines "whether the statutory threshold to start an investigation is met: there must be *'a reasonable basis to proceed.'*"[270] As of April 2010, states currently under preliminary analysis include Afghanistan, Colombia, Côte d'Ivoire, Georgia, Guinea, and Palestine.[271] Of particular interest is Côte d'Ivoire. It has not ratified the Rome Statute, but has recognized the Court's jurisdiction under Article 12(3).[272] It has been suggested that the government took such action in order to have the threat of an ICC referral in the on-going civil war, although there is no way to determine the exact impact.[273]

Yet another area involves working out the jurisprudence of the International Criminal Court, including the balance among the legal formats it is mandated to utilize, with learning pains for all. The Court (including the Office of the Prosecutor) draws upon civil and common law traditions alike. Each has its strong supporters, based upon decades of experience, training, and the like. Few countries in the world utilize both civil and criminal law systems.[274] The deliberate mixing of types for the ICC contrasts with the ICTY and the ICTR, both of which were established on the basis of civil law systems.[275] As a result, practitioners in both earlier criminal tribunals

268. CICC, Kenya, *available at* http://www.iccnow.org/?mod=kenya.
269. ICC, Press Release, ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya, *available at* http://www.icc-cpi.int/Menus/Go?id=e808c0b7-e0f8-4d56-9ced-3c724c0df81f&lan=en-GB.
270. ICC, Communications, Referrals and Preliminary Examinations, *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/.
271. ICC, The Court Today: Quick Facts, *available at* http://www.icc-cpi.int/NR/rdonlyres/ED744AD2-8FF8-4081-AE1D-7552E4B8ACB3/0/TheCourtToday_Eng_PRINT.pdf.
272. They accepted the jurisdiction in April 2003. Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 Hum. Rts. Q., 624, 639–40 (2009). But the ICC registrar did not confirm this until 2005. ICC, Press Release, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/registrar%20confirms%20that%20the%20republic%20of%20c%20_%20te%20d%20_%20ivoire%20has%20accepted%20the%20jurisdiction%20of%20the%20court.
273. Akhavan, *supra* note 272, at 640.
274. These include Argentina, Namibia, and South Africa. Information determined from map, Wikipedia, *available at* http://upload.wikimedia.org/wikipedia/commons/thumb/2/21/LegalSystemsOfTheWorldMap.png/800px-LegalSystemsOfTheWorldMap.png. This does not include small island states.
275. Pace Interview IV, *supra* note 203.

and each legal tradition lack detailed knowledge of the other. Despite the experiences from the tribunal of Nuremberg, essentially no jurisprudence, practically no cases, and a near total lack of experience. Suspicions can result. "Fairness" accordingly remains subject to debate. The tension that exists between the Coalition and the Court centers on what some observers see as Prosecutor Luis Ocampo Moreno's over-reliance on civil law traditions, in contrast with the Tribunals' more eclectic approach.[276] The Coalition takes no position on such issues, having pressed earlier to ensure that both code and civil law traditions were reflected in the Rome Statute.

Whether adjudication actually proceeds depends upon both judicial and political factors. Embarrassment can result, and has occurred, with premature indictments. The Pre-Trial Chamber of the Court determines whether a proposed case received from the prosecutor can be tried. One major embarrassment came when this Chamber determined that a case from the Democratic Republic of the Congo lacked sufficient information to go to trial—a decision reversed when additional evidence was provided. *Realpolitik* also affects what cases will be initiated. Actions by a major power, even if they clearly violate the Rome Statute, will realistically not come before the Court, certainly at this point. China, India, Russia, and the United States have not ratified, meaning they are not liable to the ICC jurisdiction. The same is true for numerous rights-abusing governments that also have not accepted the Rome Statute. No wonder, accordingly, that the ICC critics see it as a weapon wielded against the weak, insignificant, and peripheral powers on the world scene that happen to have ratified the Rome Statute or are currently unable to govern themselves peacefully.

The Court cannot sentence guilty persons to death, contrary to the Nuremberg precedent, but in line with the range of actions the ICTY and ICTR could take.[277] Capital punishment has declined significantly in its spread and utilization.[278] Although the death penalty has been eliminated in almost all developed countries—Japan and the United States are the only exceptions among OECD states[279]—it remains popular through much of the world. Anomalies exist, such as the fact that persons appearing before the ICTR face a maximum life imprisonment, while those tried in Gacaca

276. Pace Interview I, *supra* note 145.
277. Rome Statute, *supra* note 18, art. 77(b): "A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."
278. Amnesty International, Abolitionist and Retentionist Countries, *available at* http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries.
279. Prohibition of the death penalty is de facto rather than de jure in South Korea, it should be noted. *See* Infoplease, Death Penalty Worldwide, *available at* http://www.infoplease.com/ipa/A0777460.html.

courts in Rwanda may be sentenced to death. The ICC thus exemplifies recent trends in governmental attitudes, in keeping with the Rome Statute's "progressive" nature. Thus what the Rome Statute sets out and more than 110 governments have ratified suggests a disjuncture between global aspirations and local points of view.

J. Determining the Court's Effectiveness

Effectiveness most obviously requires "cutting the suit to fit the cloth." In the face of major demands, the Court cannot take action on all infractions. Nor can the Coalition urge its attention to every possible case, although its member organizations are free to do so. Matters referred from the Security Council or by states parties *must* be investigated by the prosecutor. Beyond this, the prosecutor must pick and choose, given the large number of potential infractions of the Rome Statute. However, he or she can carry out effective investigations only 1) if provided with sufficient budget and 2) if able to rely on the cooperation of significantly involved states. Exquisitely difficult choices are thus involved in selecting what cases to initiate—especially since the Pre-Trial Chamber must be satisfied that sufficient evidence exists to proceed to full Court proceedings.

Further questions remain about the prosecution of crimes of aggression. The Court still has yet to construct and pass an amendment defining the crime of aggression. There does seem to be progress though. On 13 February 2009, the Special Working Group on the Crime of Aggression published what could possibly be the amendment to finally give the ICC jurisdiction over the Crime of Aggression. The definition came up for consideration at the Review Conference held in Kampala, Uganda in May 2010.[280] At the conference, this definition was adopted as there was "no interest among States Parties existed in opening up either definition at the Kampala talks."[281] For many, the adoption of this amendment could not have come soon enough. Aggression is the "supreme international crime"[282] and the "deterrent effect, no matter how modest, is an improvement over the present immunity."[283]

280. Glennon, *supra* note 23, at 82.
281. David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, 14 Am. Soc. Int'l L. Insight, 22 June 2010, at 5, American Society of International Law (ASIL), *available at* http://www.asil.org/insights100622.cfm.
282. Ferencz, *Ending Impunity for the Crime of Aggression*, *supra* note 44, at 281.
283. *Id.* at 289.

In 2009, the Court operated on an approved budget of €101,229,900 (approximately $146 million U.S.D.),[284] supporting more than 600 staff members.[285] The Assembly of States Parties sets the budget[286] and earlier decided that the Court would scale assessments in the same fashion as the United Nations, *among states parties*.[287] Considering the number and scale of human rights abuses that could come to its attention, the amount of money devoted to the Court seems modest. By contrast, however, the limited "success" it has accomplished in terms of bringing charges, apprehending, trying, and sentencing accused individuals appears to critics as extravagant, prolonged, and removed from real understanding of the local situations.

NGOs must adjust their expectations for what the International Criminal Court can and cannot achieve. It works within the constraints of global politics. Although the Court enjoys universal jurisdiction[288] in theory and law, it

284. Take, for example, the extraordinary contrast between expenditures on the more than 100,000 peacekeeping troops under UN auspices and the International Criminal Court. The former's 2009–2010 proposed budget was $8.2 billion, Press Release, Controller Says Figure 12 Per Cent Increase over Last Budget Period; Speakers Express Concern over Rise, Express Hope Review Will Yield Savings, U.N. Doc. GA/AB/3902 (13 May 2009), *available at* http://www.un.org/News/Press/docs/2009/gaab3902.doc.htm. Taking the United Nations budget as a whole, member states ante up approximately $15 billion annually in operating expenses. See Image and Reality, Chapter 5: Is The United Nations Good Value for the Money?, *available at* http://www.un.org/geninfo/ir/index.asp?id=150#q2//US.

285. Calculated exchange rates are located at http://www.x-rates.com/. International Criminal Court: Facts And Figures From Registry (30 Apr. 2009) *available at* http://www.iccnow.org/documents/Facts_and_figures_30_April_2009_ENG2.pdf (1 Jan. 2010). The ICC accordingly receives roughly fifty times as much per year as the Coalition, employing about twenty times as many staff.

286. Rome Statute, *supra* note 18, art. 112.2.

287. Rome Statute, *supra* note 18, art. 49, requires the States Parties to set the salaries and allowances of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar. The Assembly of States Parties determines the budget (Article 112.2(d) of the Rome Statute). This budget fact gives the Court a formal independence from the United Nations, further indication of its "insulation" from political matters.

288. Amnesty International, Universal Jurisdiction: Questions and Answers (1 Dec. 2001), *available at* http://www.amnesty.org/en/library/asset/IOR53/020/2001/en/009a145b-d8b9-11dd-ad8c-f3d4445c118e/ior530202001en.pdf.

> Traditionally, states have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on its territory, regardless of the nationality of the accused or the nationality of the victim (territorial jurisdiction). However, under international law states can also enact national criminal laws which allow national courts to investigate and prosecute people suspected of crimes committed outside of the state's territory, including crimes committed by a national of the state, crimes committed against a national of the state and crimes committed against a state's essential security interests. There is, however, an all inclusive form of jurisdiction called Universal Jurisdiction which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the state where the court is located.

faces huge problems in potential application to major powers. The Permanent Members of the Security Council enjoy a privileged status with respect to Court oversight, although not nearly as great as they might wish.[289] The cases undertaken to date have not touched upon individuals or countries closely linked to a major power, and they are unlikely to do so for the foreseeable future. This poses a significant test of credibility for the Court itself.

What cases can and should be tried? A senior staff member of Human Rights Watch expressed the dilemma in this fashion:

> The Court must escape any perception that it will prosecute only weak states. This gets at the fragility and unevenness of Rome Statute, in the system of international justice at the start of 21st century. This problem must be acknowledged that the "system" we hope to help create, strengthen is fragile; it works in a way where there's both selectivity and unevenness. It isn't purely by chance that those charged by the ICC are small, undeveloped, war-ravaged African states. The ICC won't investigate senior officials in Moscow, Washington etc. This reality must be acknowledged, we must be honest. Unevenness doesn't render the Court an illegitimate part of the loaf. A partial end of impunity is better than nothing. An "everything can't be done attitude" would make the perfect enemy of the good. The challenge (for Human Rights Watch and, by extension, for the Coalition) is to keep pushing the envelope, extending the reach of international justice in national and international components to make a more level playing field worldwide. It would be short-sighted to say that the Court is illegitimate because it won't investigate Chechnya, Iraq, Afghanistan, etc. There won't be an overnight turn-around.[290]

Similar points emerged from the head of the Coalition:

> The most important task for the Coalition is to help the Court succeed in its investigations. The Prosecutor needs to work effectively without political pressures. The Registry must ensure outreach with victims and defense to make sure (the process) works. We need to pressure judges to keep their dedication to independence, not be influenced politically. (The Coalition must) continue to put pressure on governments.[291]

289. As will be recalled from earlier in this chapter, an ingenious compromise by Singapore in effect inverted the Security Council's power. Under Rome Statute, *supra* note 18, art.16, the Security Council can delay any action (including investigation or prosecution) for twelve months; this action is renewable. Given their veto power, any of the five Permanent Members could preclude the Court from taking any steps, thereby allowing significant additional crimes to occur. Such a compromise could not be avoided at the 1998 conference, although it ran counter to the common position staked out by the Coalition and the Like-Minded Group of states.

290. Dicker, *supra* note 190.

291. The powers of the Assembly of State Parties appear in Rome Statute, *supra* note 18, art. 112. However, the number of meetings is not specified, and has been reduced to a single annual session of one week at UN headquarters—insufficient time, many of those interviewed for this article asserted—although special sessions can be arranged

> The Court can't carry out arrests; this requires cooperation with anti-crime institutions and governments, which must figure out complementarity, national jurisdiction, enforcement, arrests, and dealing with the dilemma of those who didn't understand the Rome Treaty and who feel peace and justice can't be served at same time.[292]

K. Determining the Court's Independence

Independence brings attention to questions of political power. The Court must be viewed as not biased toward the interests of any single country or group of states. In a world uneasily positioned between liberal, rule-based, "idealist" international institutions, and conservative, power-based, "realist" states, the Court occupies an ambiguous position. Its unexpectedly rapid creation by treaty in the summer of 1998 and formal "entry into force" in 2002 stunned almost all observers. Sustaining the momentum has proven difficult, not least because of skeptical or hostile attitudes from many countries. Hence, keeping up interest in the Court remains a continuing challenge for the CICC and pro-Court countries.[293]

The clearest indication of skepticism comes in lack of ratification. As noted earlier, the geographic distribution of member states varies markedly. Why might this be the case? Much has been written about "Asian exceptionalism," the argument that underlying values in that area reflect different perspectives from those embodied in "international" human rights. Human rights, the argument continues, was deployed as a tool in ideological struggles, lacking sufficient balance of civil and political rights with economic, social, and cultural rights.[294] The argument can be put in tendentious terms: the Court claims to be "international," yet it cannot be "universal" without the active support of populous states such as China, India, Indonesia, and Pakistan.[295] Note has already been taken earlier in this article of the limited participation or the absence of many Asian and Pacific countries from the PrepComs. Correspondingly, the Coalition counts relatively few members from this part of the world.

Finally, Washington policy-makers took active steps to undercut the Court's applicability to the United States practically from the moment the Rome Statute was adopted. It first sought to amend the treaty through a trap door. The United States then used a variety of policy tools to develop Bilateral Immunity Agreements with other governments, which would preclude referral of any potentially justiciable matters to the International Criminal Court, and launched a global campaign to block all assistance to the ICC and to guarantee that no Americans would ever be handed over to the international court.[296] As Glasius underscored, "[t]he United States is the only state to date [2006] that has pursued an active policy of opposing the Court."[297] It is worth noting that recently there has been an increase in active opponents of the ICC including the Sudan and several other member states of the African Union.[298] Countries that haven't ratified the Rome Statute, including such powerhouses as Russia and China, cannot be counted upon as solid supporters either: the best that might be hoped for is that they do not use their veto power in the Security Council to block referrals to the Court.

"when circumstances so require." According to the Assembly of State Parties there have been eight sessions which have lasted as follows:

1st Session: 3–10 September 2002, 3–7 February and from 21–23 April 2003
2nd Session: 8–12 September 2003
3rd Session: 6–10 September 2004
4th Session: 28 November–3 December 2005, 26–27 January 2006
5th Session: 23–25 November and 27 November–1 December 2006; 29–31 January 2007
6th Session: 30 November–14 December 2007 and 2–6 June 2008
7th Session: 14–22 November 2008; 19–23 January and 9–13 February 2009
8th Session: 18–26 November 2009 and 22–25 March 2010

CICC, Assembly of States Parties, *available at* http://www.iccnow.org/?mod=aspsessions.

Far and away the most important meeting thus far has been the Kampala Conference held in Uganda from 31 May to 11 June 2010. This was the Assembly of States Parties' first review conference on the Rome Statute. It thus constituted "a special meeting of states parties to the ICC, distinct from the annual Assembly of States Parties (ASP) . . . to consider amendments to the Rome Statute and to take stock of its implementation and impact." AMICC, Basic Information about the Review Conference of the Rome Statute of the ICC, 31 May–11 June, *available at* http://www.amicc.org/docs/ReviewConferenceBasics.pdf.

292. Pace Interview I, *supra* note 145.
293. *See* CICC, Regional and National Networks, *supra* note 228.

294. For a succinct statement, see Bilahari Kausikan, *Asia's Different Standard*, 92 Foreign Pol'y 24 (1993). Also see articles from *The Straits Times* (Singapore), *cited in part in* International Human Rights in Context: Law, Politics, Morals 545–47 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).
295. All rank within the ten most populous countries in the world. (They are joined by the United States, Brazil, Nigeria, Bangladesh, Russia, and Japan. Bangladesh, Brazil, Nigeria, and Japan have ratified the Rome Statute), About.com: Geography, *available at* http://geography.about.com/cs/worldpopulation/a/mostpopulous.htm.
296. Benjamin Ferencz, *Misguided Fears about the International Criminal Court*, 15 Pace U. L. Rev. 223, 236–40 (2003).
297. Glasius, The International Criminal Court, *supra* note 71, at 17. She adds that other states perceiving infringements on their sovereignty "have been satisfied merely not to ratify the treaty and to stay away from further negotiations." *Id.*
298. Glasius e-mail, *supra* note 103. In a recent meeting where President Omar Al-Bashir met the delegation of the governing party in the Ivory Coast, Al-Bashir and his delegation denounced the acts of the ICC as targeting Africa and African leaders. The Republic of Sudan Ministry of the Cabinet Affairs Secretariat General, *available at* http://www.sudan.gov.sd/en/index.php?option=com_content&view=article&id=596:the-president-of-the-republic-field-marshal-omar-al-bashir-meets-the-delegation-of-the-governing-party-in-ivory-coast-peoples-front-party&catid=45:2008-06-06-15-26-14&Itemid=73. Looking back, it would seem that Al-Bashir's indictment served as a catalyst for this opposition to the ICC. Bassiouni, *The Arab States and the ICC*, *supra* note 121, at 18.

In one of his many writings about the Court, Ferencz summarized a variety of objections. These included fear of an unrestrained prosecutor (despite the safeguard of the Pre-Trial Chamber), protection of US constitutional rights, impairment of US sovereignty, and the unenforceable nature of international law. He also noted the willingness of powerful individuals, for example Senator Jesse Helms, to take coercive measures against the United Nations and Court supporters.[299] American opposition to the International Criminal Court reached what historians will likely see as its height early in the new millennium. In an act unprecedented in international law, President George W. Bush "unsigned" the Rome Statute.[300] John Bolton, his outspoken UN representative, stated that "[m]y happiest moment at State was personally 'unsigning' the Rome Statute that created the International Criminal Court."[301]Many governments and NGOs around the world expressed dismay. According to Pace, "no one could remember" such an action.[302] Richard Dicker, Human Rights Watch's leading authority on the Court, spoke as follows:

> This set a low mark in history of U.S. respect for rule of law up to that point. The decision was announced early in early 2002, in a note from John Bolton sent to (UN Secretary-General Kofi) Annan, saying that the U.S. had no intention of submitting the Rome Statute to Senate and being bound by its provisions.[303]

299. Helms introduced legislation to prohibit and penalize any cooperation with the International Criminal Court; the US would repudiate its signature on the Rome Treaty, all American funds that would aid the Court would be cut off, and US forces would be withdrawn from UN peacekeeping missions unless they were given absolute legal immunity from foreign prosecution. AMICC, *available at* http://www.amicc.org/docs/Helms_Sign.pdf.
300. According to persons who were interviewed for this chapter and selections that were read, Bush's action was not illegal strictly speaking, but clearly totally opposed to how international relations had been conducted for centuries, under the time-honored idea of *pacta sunt servanda* (obligations must be met by countries formally agreeing to them). However, since the United States had not ratified the treaty, it arguably was not bound by its provisions. Israel also unsigned.
301. JOHN BOLTON, SURRENDER IS NOT AN OPTION: DEFENDING AMERICA AT THE UNITED NATIONS AND BEYOND 85 (2007).
302. Richard Dicker of Human Rights Watch couldn't say it was unlawful, but noted that it was "an unprecedented and shameful act by the US government, which will be long remembered." Dicker Interview, *supra* note 190.
303. This reads:

> Dear Mr. Secretary-General:
>
> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.
>
> Sincerely,
>
> S/John R. Bolton
>
> (released 2 May 2002; U.S. Department of State Archive, *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

> This can hardly ever been found: there aren't such procedures in international law, (since) states don't have to sign or to ratify (after participating in a treaty-drafting conference). The Bush administration wanted to make a political and ideological point, (namely) that they were on a crusade against the ICC. That was the real message behind the unsigning. It was thus significant that (American representative to the United Nations John) Bolton said it was the proudest and happiest moment in his government service.[304]

Such blanket opposition to the Court was eventually recognized as an embarrassing diplomatic gaffe. This became obvious not only because of outcry from some of the United States' strongest allies with respect to the Bilateral Immunity Agreements, but also due to conflict between US resistance to the Court and US foreign policy goals. The latter became manifest when the US moved in the Security Council to refer alleged genocide in Sudan to the Court—but then abstained from voting on its own motion![305] With respect to the former, in March 2006, Secretary of State Condoleezza Rice admitted that the US position on Article 98 BIA agreements was "sort of the same as shooting ourselves in the foot."[306]

Even with the end of the Bush presidency, it seems highly unlikely that the United States will change its skepticism—probably more accurately, its opposition to joining the International Criminal Court—within a decade or less. Such caution may be wise in some respects. The Court has yet to become firmly established. More important, strong political support from major states is required for most *but not all* major advances in international human rights protection, as advocated by NGOs. A majority of Security Council members remain opposed, since only France and the United Kingdom have ratified the Rome Statute.[307] Lack of action by China and Russia, as well as US hostility for several years has undercut the treaty's significance. At the very least, the prosecutor would be highly unlikely to initiate or be able to complete steps for an indictment against a Permanent Member of the Security Council.

L. Reducing the Limits of the Security Council's Powers

The Rome Statute established the International Criminal Court as a distinct entity—separate from the United Nations. Defining the relationship between

304. Dicker, *supra* note 190.
305. ASIL, *U.S. Policy Toward The International Criminal Court: Furthering Positive Engagement* (Mar. 2009), *available at* http://www.asil.org/files/ASIL-08-DiscPaper2.pdf.
306. Mark Mazzetti, *U.S. Cuts in Africa Aid Hurt War on Terror and Increase China's Influence, Officials Say,* N.Y. TIMES, 23 Jul 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E02E6DC143FF930A15754C0A9609C8B63&pagewanted=all.
307. Pace Interview IV, *supra* note 203. The head of the CICC suggested though that it would be highly unlikely that neither France nor the UK would vote to ratify the Rome Statute in today's tumultuous political environment.

the Security Council and the proposed Court was one of the greatest challenges at the Rome Conference, as many countries loathed the idea of ceding any power to this new entity. The US, in particular, considered subordination of the Court to the Security Council a *sine qua non*.

NGOs, on general principle, were opposed to this concept—indeed they were opposed to any involvement by the Security Council at all. They believed that Security Council involvement would mean interference by a political body in what needed to be an independent judicial institution. In order to prevent this possible political interference, many NGO's thought that any reference to the Security Council should be avoided. Members of the LMG generally shared this point of view.

It was hard to ignore the Security Council and the Permanent Powers, however. As political powerhouses, their votes were important to the proceedings. Thus, the Singapore Compromise was proposed. This compromise gave the Permanent Powers of the Security Council the ability to suspend the Court's consideration by a year, but denied them the power to veto potential actions by the Court. This compromise resulted in Article 16 of the Rome Statute.[308]

This was a huge accomplishment and was fundamentally a challenge to the long-standing structure of the United Nations. Actions in the Court, unlike in the United Nations, would not be by driven by the political powerhouses. The relationship defined in the Rome Statute between the Court and the Security Council has become extremely important as permanent members of the Council—such as the UK and France—backed away from their previous stance of support. Bill Pace suggested that, had the Rome Statute not defined the relationship between the Security Council and the Court, the Security Council would have eventually "overridden" the Court's independence, leading to disastrous results.[309]

M. Strengthening International Cooperation and Judicial Assistance

Part IX of the Rome Statute, "where the rubber of state sovereignty hits the road of court jurisdiction," is "far too weak" a set of provisions for a court with a mandate as significant as that of the International Criminal Court.

308. According to Rome Statute, *supra* note 18, art. 16, "Deferral of investigation or prosecution."

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

309. Pace Interview IV, *supra* note 203.

It was worked out through complicated negotiations and represented "one compromise too far." This will impede the work of the Court from proceeding as effectively as it should, this specialist asserted.[310] Few would disagree.

The Court must work in conjunction with national authorities. What happens, however, when and if they are incapable of maintaining basic law and order? Indeed, the cases which the Court has been called upon to address to date are located in poor, war-torn countries, where crimes of any sort could be committed with little risk of punishment. Richard Dicker of Human Rights Watch, for example, singled out conducting efficient investigations in unstable, remote areas as the first of many problems the Court faces.[311]

Closely related is the issue of finding, deposing, and protecting witnesses. According to Bill Pace, it "takes hundreds of people to conduct investigations and to protect witnesses. This is a "huge enterprise."[312] Once evidence has been gathered, apprehending those indicted and trying them *in ways the affected populace can understand* does not follow easily either.[313] Internationally accepted rules of procedure and appropriate protection of the rights of the accused count for a great deal in The Hague, but seem far removed from "popular" concerns for rapid, effective justice carried out through local institutions, or for penalties (such as death) barred by the Rome Statute.

Also open to discussion will be the effectiveness of staff members. Just as judges for the Court are elected in accordance with geographic balance, similar formulas exist within the United Nations for recruitment. Competence may be subordinated to regional considerations, critics assert. Early years of the International Tribunal for Rwanda were marked by significant corruption and professional ineptitude, for example, providing a sobering object lesson.

Ensuring a smooth, procedurally fair transition from investigation to trial will not prove simple. The same holds true for providing the accused with

310. Rome Statute, *supra* note 18, Pt. 9 (arts. 86–102) deals with international cooperation and judicial assistance to the Court. Vitally important provisions appear here, notably the obligation on States Parties to provide information, protect and furnish witnesses, and deliver an indicted person to another state or to the Court, depending on the particular indictment. The country in which the crimes occurred must agree to send the individual for trial (art. 98(2)). Non-ratifying states cannot avoid this obligation, given universal jurisdiction, unless the Security Council acts. Dicker, *supra* note 190.

311. Dicker, *supra* note 190.

312. Pace Interview I, *supra* note 145. Pace observed that there were four investigations going on simultaneously.

313. Much the same point emerges in the lengthy 2008 report by Human Rights Watch, Courting Justice, authored primarily by Dicker. One of its most significant messages is the need to develop greater popular understanding of what field investigators wish to do. They are not meant to be political cronies of the powers-that-be, but independent judicial officers. Yet in turbulent settings, investigators require protection, which only the government potentially implicated in human rights abuses can provide. The fact that field work must be (or at least has been to date) carried out in remote areas among peoples highly distrustful of outsiders has no impact. Human Rights Watch, Courting Justice (2008).

all internationally-guaranteed protections within a framework focused on justice. A temptation will surely exist in which political expediency, such as the need to establish and maintain peace, could affect Court procedures.

Finally, the Court must make itself and its proceedings meaningful in the communities most affected by the crimes it has jurisdiction over. This issue poses challenges equal in magnitude to the others. Even in highly developed countries with strong frameworks of law, the International Criminal Court remains physically and psychologically remote. Its procedures, penalties, rules of evidence, and the like resemble those found in well-developed legal systems, but differ markedly from those found "on the ground" in more traditional settings—in short, in the majority of areas to which Court proceedings are most likely to pertain.

Still other problems can be identified. Luis Moreno-Ocampo, the current prosecutor, has pursued a vigorous program of investigation, but lacks sufficient staff. According to Pace, it is "short-sighted" to downplay this. Efforts to move toward prosecution must examine both sides simultaneously, rather than investigate one side before looking at the other. Such an approach leads to perceptions of partiality, to "huge appearance issues." The complex, seventeen-page questionnaire individuals must fill out in order to apply to the victims' compensation fund may also serve to distance the Court from the individuals it purports to serve.

The Court over time will utilize the research and advocacy of major human rights NGOs, at least as mediated through the Office of the Prosecutor and potentially independently. Richard Dicker of Human Rights Watch offered this judgment:

> They are respecting and utilizing (our reports). (The Court has) made public reports available, (and has also drawn on the) expertise of country and regional researchers in advising Court officials (the Registry and Office of the Prosecutor). There is appreciation and respect for that, but also tension since we are independent, not a consultant hired by them. We will criticize the Court when necessary. There is tension and at moments anger and resentment. . . . The relationship (between Human Rights Watch and the Court) has had difficult moments when the expectation was that we were supporters of the Court but wouldn't say anything else. This shows a lack of familiarity with the way we work. Sometimes when the Court's approach or policy is explained to us, we aren't bound to agree with or support it. The relationship has had difficult moments. We need to understand each other and appreciate each other better.[314]

Any assessment of the Court's effectiveness must be rooted in the nature, extent, and degree of cooperation by states. Governments may quite simply lack capacity.[315] Unless they in fact have some degree of effective control

314. Dicker, *supra* note 190.
315. Investigations in the eastern Democratic Republic of the Congo unquestionably have been hampered by the Kabila government's general lack of control throughout the area.

and legitimacy in war-torn areas, investigations will be hampered at a minimum.[316] Reference of problems to the International Criminal Court cannot resolve underlying problems of political order. Looking at the positive side, however, the Court is conducting investigations in four countries, three of them instances referred by the governments themselves.[317] What Pace called "growing pains" must be separated from more fundamental problems that can, and hopefully will, be addressed in coming years. "Flaws in vision" cannot be resolved immediately.

By August 2010, 113 countries had ratified the Rome Statute. They include all but Turkey and the United States of the thirty OECD members. Furthermore, almost every European state except the Holy See has accepted the Court's jurisdiction.[318] Ratification is close to hemisphere-wide in the Americas, and includes every country in South America. Not ratifying are three of the five permanent members on the Security Council. Also *not* ratifying—or in many cases not even signing—are many Asian countries, practically all Middle Eastern states, and several small island nations.

Whatever may be said, the International Criminal Court has been established, decades ahead of what all but the most sanguine prognosticators might have predicted up to mid-1998. An extraordinary confluence of events, people, alliances and setting made the Rome Statute possible. Dreams of earlier individuals were realized, yet there is much that remains to be done. The election of eighteen judges and the indictment of a handful of Africans do not in themselves "prove" that the Court has become a significant factor in global politics. Indeed the International Criminal Court has a long way to go before becoming an accepted facet of the international justice system. In order for the ICC to become an accepted facet, the Court must continue to review the Rome Statute and monitor its effects. Such was the goal of the recent 2010 Mandatory Review Conference that was held in Uganda.[319]

316. For example, investigations of the Lord's Resistance Army required that members of the Prosecutor's office be accompanied by members of the Ugandan military—scarcely a recipe for seeming impartiality.
317. Pace Interview I, *supra* note 145.
318. Europe and the Central Asian Republics today have forty-one states parties, plus seven signatories (Armenia, Kyrgyzstan, the Kingdom of Monaco, the Republic of Moldova, the Russian Federation, Ukraine, and Uzbekistan) and six non-signatories (Azerbaijan, Belarus, Kazakhstan, Turkmenistan, Turkey, and the Holy See) to the Rome Statute. State Parties to the Rome Statute of the ICC, *available at* http://www.iccnow.org/documents/RATIFICATIONSbyRegion_21_July_20091.pdf.
319. This was the purpose of the 2010 review conference as stated by the CICC. CICC, Factsheet, *available at* http://www.iccnow.org/documents/CICCFS_ReviewConference_April2010.pdf.

N. Kampala 2010

From 31 May to 11 June 2010, the Review Conference of the Rome Statute of the International Criminal Court convened in Kampala, Uganda.[320] This mandatory Review Conference held special significance for supporters of the International Criminal Court as it was the first instance in which a special meeting of state parties to the ICC was held to "consider amendments to the Rome Statute and to take stock of its implementation and impact."[321] The session, lasting a mere two weeks, examined some of the most important compromises made at Rome. This included:

1. The revision of Article 124 of the Rome Statute;
2. The Crime of Aggression;
3. The inclusion of the certain weapons as war crimes in non-international armed conflict.[322]

The reason for the delay in consideration of these compromises is because Article 121 of the statute states that the earliest amendments can be considered is seven years following entry into force of these changes. Additionally, Article 123 mandates a "Review Conference" for the purpose of debating changes. The framers recognized that some issues were politically too sensitive to resolve in the heat of July 1998 and needed to be reviewed at a later date. The crime of aggression stood at the head of this list. Besides the examination of amendments, the purpose of the conference was to take stock and examine the impact and the successes of the Rome Statute to date. This was an important consideration given that actual operation of the Court had highlighted many problems that needed to be addressed. Set to be analyzed at this conference were:

1. Impact of the Rome Statute system on victims and affected communities;
2. Complementarity;
3. Cooperation; and
4. Peace and Justice[323]

320. Scheffer, *supra* note 281.
321 CICC, Questions & Answers: Review Conference of the Rome Statute (Apr. 2010), *available at* http://www.iccnow.org/documents/CICCFS_ReviewConference_April2010.pdf.
322. CICC, *CICC Background Paper in Preparation for the Review Conference*, 4 (31 May—11 June 2011), *available at* http://www.iccnow.org/documents/CICC_Review_Conference_Background_Paper.pdf.
323. Different State Parties were "appointed for each of these four items to facilitate preparations for the discussions, in particular, to decide on their format and expected outcomes. CICC, Questions & Answers, *supra* note 321.

It was hoped that raising these issues at the Conference would allow different actors—such as victims in the communities affected by the Court's work, states parties officials, and NGOs—to come forward and share their experiences and views on the Rome Statue in the hopes of improving the system.[324] In general, the Conference was an opportunity for governments to express their views, whether it was in reviving initiatives rejected or not acted upon in 1998, or in voicing concerns about the Court's on-going operations.

Beyond these important factors, choosing Uganda's capital represented a calculated decision to enhance Africa's participation within the process.[325] There was some question initially on the appropriateness of having a country which was being investigated by the ICC be the host country, [326] but ultimately it was decided that location would give awareness to the communities directly being affected by the Rome Statute, as well as increasing African participation in the discussions.[327] With increased participation by African nations, many hoped that this would put a "positive" face on the Court in Africa. Uganda asked to host the meeting in 2007. Its President, Yoweri Museveni, believed that holding the Review Conference in Africa was an excellent opportunity for the ICC to disabuse the unfortunate but persistent accusation that it is a court of Europeans judging Africans.[328] The fact that Uganda became the first country ever to refer a situation to the International Criminal Court bolstered its claim. Further, holding the follow-up on the continent most involved in ICC actions meant delegates could visit victims' camps in northern Uganda and a large number of African civil society groups could attend.

A positive view of the Court and increased participation of African countries are particularly important in Africa given that the overwhelming majority of cases confronting the Court came from south of the Sahara. Sudan's president was the only head of state indicted under the terms of the Rome Statute, leading to concern within both the African Union and the Arab League about purportedly "selective" Court activity. On the other hand, the government of Uganda had initiated the first request from any country for Court action, having blamed the Lord's Resistance Army (LRA) for committing war crimes and crimes against humanity in December 2003.

324. *See* CICC, *CICC Background Paper in Preparation for the Review Conference*, *supra* note 322, at 9.
325. Pace Interview II, *supra* note 126. Early in the process, Uganda had asked to host the Conference. This step was immediately endorsed by several African groups.
326. *Id.*
327. *See Kampala 2010: Civil Society Calls for a Lasting Impact from the Review Conference*, 40 ICC Monitor 5 (2010).
328. Vision Reporter, *Museveni wants Africa to Embrace ICC*, New Vision, *available at* http://www.newvision.co.ug/D/8/12/721470.

The Office of the Court issued arrest warrants for Joseph Kony, leader of the LRA, and three others in July 2005, following extensive investigation. Five years later, none of them had been apprehended; meanwhile, civilians in northern Uganda and neighboring countries (notably the Democratic Republic of the Congo and the Central African Republic) continued to suffer appalling human rights abuses caused by the LRA.

Preparation for Kampala followed the normal pattern for such assemblies, with working groups debating crucial issues and attempting to reach consensus on controversial items both prior to the formal opening of the conference and during it as well. Whether to incorporate the Crime of Aggression promised to be the most divisive issue on the agenda. Indeed, agreement in Rome had rested in part on deferring the matter until the first mandated review. Pressures to consider aggression remained powerful, however: it had been deemed the "supreme crime" at Nuremberg, but attention to it seemed to fall off the table during the Cold War.[329] The UN General Assembly labored for years to produce a definition, embodied in Resolution 3314 (XXIX) of 14 December 1974. Its complex wording, limitations, and inherent contradictions meant it did not provide a clear basis for potential action—which, in any event, would require Security Council approval.[330]

Thirty-five years of experience, which included several horrific wars between or within states, made it appropriate to revisit aggression as a crime. Many states wanted such an action, as did numerous NGOs and prominent individual advocates, such as Ben Ferencz. Accordingly, when a working group reached consensus at the Review Conference and the Plenary adopted the following definition—the sense of accomplishment was significant. Specifically, the crime of aggression was defined as "The planning,

329. Jennifer Trahan, in Podcast with Bill Pace. Episode 4 Outcome of the ICC Review Conference, Pt. 2, Global Policy Forum, GPF Podcast Series (22 June 2010), *available at* http://www.globalpolicy.org/images/pdfs/Podcast_Files/Podcast_ICC_Review_Conference_part_2.mp3.

330. The General Assembly starts clearly: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." However, the resolution subsequently became muddied, in stating

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Definition of Aggression, adopted 14 Dec. 1974, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., 2319th plen. mtg., Supp No. 19, art. 7 (1974), *available at* http://www1.umn.edu/humanrts/instree/GAres3314.html.

preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Furthermore, an Act of Aggression was defined to mean

> the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.[331]

While the addition of the crime of aggression to the Rome Statute is undoubtedly a victory for many individuals, NGOs, and states, it is not without some caveats. The Court cannot prosecute the crime until the next review conference is held and there is another vote by state parties on the amendment. The earliest this can occur is 2017. Additionally, prior to the next review conference, thirty states must ratify the amendment.[332] Once these hurdles have been jumped, there are numerous constrictions on how the Court can exercise jurisdiction over the Crime of Aggression. According to Jennifer Trahan, the final agreement creates sort of a hodge-podge of jurisdiction for the Court. In her words, the final agreement outlines the Court's jurisdiction as

> The Security Council may refer cases, but, after 6 months of Security Council non-action, the ICC's pre-trial division may alternatively provide authorization after prosecutor or state referral, with certain caveats. These caveats are significant: (1) the nationals of non-states parties (such as the U.S.) may not be prosecuted, nor crimes committed in the territory of a non-state party; (2) even for states parties who ratify the aggression amendment, they may "opt out" of jurisdiction for the crime of aggression; and (3) the Security Council may stop an aggression case from proceeding under its Chapter VII powers, something already provided for in Article 16 of the Rome Statute.[333]

Such an outcome for jurisdiction is not surprising given the contentious nature of the issue. The other—far less contentious—amendment issues were dealt with in a relatively straightforward manner. Prior to the Review Conference, a variety of weapons were subject to the Court's jurisdiction when used in international conflicts. At Kampala, an additional amendment was added so that the use of these specific weapons would henceforward be considered prosecutable if committed in internal conflicts. This was seen by some as long overdue, as they felt it should have been included in the original statute.

331. Scheffer, *supra* note 281.

332. Jennifer Trahan, The New Agreement on the Definition of the Crime of Aggression, UBC Blogs, *available* at http://blogs.ubc.ca/ligi/files/2010/06/aggression-Kampala-op-ed.trahan.pdf.

333. *Id.*

The final amendment examined at the Kampala Conference was Article 124 of the Rome Statute that allows states to opt out of liability for War Crimes for seven years after entry into force of the statute. The purpose of this article is to encourage states to join the ICC. However, this statute is seen by CICC members as weakening the jurisdictional regime of the ICC and as incompatible with the purpose of the Rome Statute.[334] Others feel that the importance of the provision is exaggerated by NGOs—only France and Colombia have ever taken advantage of Article 124. Bill Schabas states:

> Arguably, Article 124 helped smooth the ratification of two States parties. If it can do this trick again over the next five years, then it will be worth leaving it in the Statute. And if it cannot prompt further ratifications, then how can it be claimed that any harm was done?[335]

The success of the stocktaking exercises in Kampala is not as clear as that of the Amendments. According to Trahan of Human Rights Watch, Kampala should be regarded as "tremendously successful" in its focus on stocktaking. During the conference "debates focused on the impact of the Rome Statute on victims and affected communities, complementarity, cooperation, and peace and justice, issues truly central to the system's fair, effective, and independent functioning."[336] These discussions were facilitated by the CICC which had "substantive input and helped to shape the discussions on the stocktaking items."[337] On the other hand, the Amendment issues seemed to dominate not only the conference, but post-conference publications. Schabas goes so far as to say that the conference failed in its stocktaking responsibilities. He suggests that "perhaps Kampala was not the right place for stock-taking on the activities, results, and operations of the Court."[338]

Both the rhythm and ambience at Kampala differed significantly from those in Rome a dozen years earlier. The first week's activities at Rome had proven relatively unproductive in the sense of substantive negotiations: individual governments set forth their positions, often at length, with limited substance and significant overlap. After years of debate, no confidence existed that discussions would result in any changes. By contrast, delegations in Kampala polished an existing institution and treaty. The International Criminal Court had become a reality, something that appeared unlikely for most of the Rome conference.

334. *See* CICC, *CICC Background Paper in Preparation for the Review Conference*, *supra* note 322.
335 Posting of William Schabas to The ICC Review Conference: Kampala 2010 blog (17 June 2010 05:09), *available at* http://iccreviewconference.blogspot.com/.
336. CICC, Review Conference of the Rome Statute, *available* at http://www.iccnow.org/?mod=review.
337. *See Kampala 2010*, *supra* note 327, at 5.
338. Schabas, Blog Post, *supra* note 335.

The scope and extent of civil society involvement also differed. Rome was more accessible for developed countries and NGOs based within them. Kampala drew more heavily on two groups less represented in 1998, African organizations (200–300 of which attended) and international justice experts. Attendance at the Review Conference was unprecedented with international justice experts from 120 countries, specialized tribunal personnel (such as registrars, president, prosecutors, and judges) the OAS, the AU, the EU, and over 600 NGOs.[339] Most of these NGOs were Coalition members who "played a central role in enhancing the dialogue on the Rome system and ensured that the voices of civil society were truly heard through a number of debates, roundtables and other events."[340]

The role of NGOs at the Kampala Conference was not as clear as it was at the Rome Conference. Schabas, in his blog, said that "[o]ne striking difference with the Rome Conference was the relative absence of the NGOs [in formal dialogue] at Kampala."[341] Schabas claimed that this absence was due to the fact that many NGOs "were quite indifferent to the incorporation of aggression into the Statute."[342] So although many NGOs were physically there, they were not as active in formal discussions as at the Rome Conference.

Regardless of their degree of participation, it is inarguable that they played a role in facilitating discussions outside of the formal conference. Numerous NGOs hosted informal side events every day. These side events helped facilitate debates and discussions, allowed organizations and individuals to express opinions, and provided information that might have otherwise gone to the wayside. Some of these events were directly related to the events of the Kampala Conference. For example, the side event hosted by Parliamentarians for Global Action (PGA) on "Respecting Existing Norms of Public International Law & Protecting the Integrity of the Rome Statute" was focused on the ongoing debate of the Crime of Aggression. This discussion allowed for a variety of participants to present their views.[343] Other side events brought the spotlight to less prominent issues. An example is the side event held by No Peace without Justice and the Inter-African Committee on Traditional Practices on "Accountability for Political Violence in Guinea."[344]

It is clear that NGOs played a role at the Kampala Conference—but how big a role they played is up for debate. Despite the unprecedented at-

339. Pace Interview II, *supra* note 126.
340. *See* CICC, Review Conference of the Rome Statute, *supra* note 336.
341. Schabas, Blog Post, *supra* note 335.
342. *Id.*
343. CICC, Informal Daily Summary (7 June 2010), *available* at http://www.iccnow.org/?mod=newsdetail&news=3973.
344. CICC, Informal Daily Summary (10 June 2010), *available* at http://www.iccnow.org/?mod=newsdetail&news=3990.

tendance, the proceedings at times looked "more like an academic seminar or a political meeting than a treaty negotiation."[345] A possible reason for this was the fact that there seemed to be few hideaways in Kampala, and thus less opportunity to escape the formal conference setting. As emphasized earlier in this article, the pleasant Roman summer setting seemed to invite informal caucusing across regional, state-NGO, and other divisions.

This feeling of an "academic seminar" was particularly palpable during the first week of the conference which was dominated by the opening statements of state officials and ICC supporters, as well as a general debate where "State Parties, Observer States and international and non-governmental organizations expressed their support, commitments, and concerns about the Court."[346] The pace picked up in the second week of the conference when "intense debates" about proposed amendments were held. It was during these debates that the "conference worked through several proposals which attempted to bridge the gap between those countries seeking to limit the way ways [sic] in which aggression could be brought before the Court and those seeking a more expansive approach to the Court's jurisdiction over the crime."[347] Much like the Rome Conference, the Kampala conference ended on a dramatic note with the amendment on the crime of aggression being adopted after midnight on the final day of the conference.[348] This outcome, unexpected by all save the most optimistic, constituted the most important result of the Kampala session.

Adoption of the Rome Statute in 1998 marked a significant triumph for the Like-Minded Group and the CICC. "Rome had so many unprecedented achievements it's hard to imagine it could ever be exceeded."[349] Had the conference been scheduled in either 1997 or 1999, it is hard to imagine that the scope of accomplishment could have been matched. Relatively new approaches to issues of general, internal armed conflict and, above all, direct criminal culpability for convicted leaders, constituted enormous changes.

By contrast, updating the statute in 2010 resulted in far less sweeping changes in international law. Compromises had to be brokered, meaning that some particularly contentious issues were deferred until 2017 when the next mandatory review conference would occur. Negotiators at Kampala had to balance 1) what the UN Charter required, 2) the realities of global politics

345. Schabas, Blog Post, *supra* note 335.
346. The American Non-Governmental Organization Coalition for the International Criminal Court,Report from Kampala on the First Week of the ICC Review Conference (6 June 2010), *available at* http://amicc.blogspot.com/2010/06/amicc-report-from-kampala-on-first-week.html.
347 AMICC,Report from Kampala on the Second Week of the ICC Review Conference (11 June 2010), *available* at http://amicc.blogspot.com/2010/06/amicc-report-from-kampala-on-second.html.
348. *Id.*
349. Pace Interview II, *supra* note 126.

(including a desire to maintain the United States as an active negotiator, if not necessarily a ratifier, of the Rome Statute), 3) the interests of the approximately 92 percent of UN members not members of the Security Council at any single time, and 4) pressures from civil society groups.

That consensus was reached in Kampala surprised several observers, although their amazement could not match that of 1998. The final product appeared to include "livable" compromises for nearly every affected group. The Security Council retained its power to refer cases, and the prosecutor's power of *proprio motu* remained unchallenged. Non-state parties and their nationals continued to be exempt from the statute's provisions (unquestionably an outcome welcomed by the US government and disappointing to many others). States parties could also easily opt out of falling within the new definition of aggression by sending a declaration to the Court's Registrar. These developments suggest that some retreat occurred relative to Rome; and, come 2017, it is conceivable that particular governments could press to review the entire statute.[350]

Should the review conference be considered "successful"? Broader attention was necessary to how international justice was functioning as a whole, which would broaden beyond the International Criminal Court itself to ad hoc, mixed, or other special tribunals. Without them, "massive impunity gaps" would exist.[351] For most of the conference it appeared as if any achievements would be minor and inconsequential. William Schabas observed that "until about 10:30 PM Friday night, I could not find anybody prepared to wager a significant sum of money on the likelihood of a positive outcome." [352] However, early Saturday morning as the conference was coming to a close, the crime of aggression amendment was adopted. The adoption of this amendment was a stunning accomplishment. Overall, the review conference provided a "much-needed shot of legal adrenaline to the International Criminal Court."[353]

O. Looking Toward the Future

The improbable success at Rome does not guarantee an equally successful future for NGOs committed to international justice through the International Criminal Court. Yet the playing field has been altered dramatically. What repercussions might the Coalition's and the Court's existences have for fu-

350. Episode 4 Outcome of the ICC Review Conference, Part 5 Global Policy Forum, GPF Podcast Series (22 June 2010), *available* at http://www.globalpolicy.org/images/pdfs/Podcast_Files/Podcast_ICC_Review_Conference_part_5.mp3.
351. *Id.*
352. Schabas, Blog Post, *supra* note 335.
353. *Id.*

ture activities of international human rights NGOs generally? What policy choices confront the Coalition as a whole? How have the challenges of a Court-in-being started to transform its functioning?

Creation of the Court meant, for example, a significant shift in Human Rights Watch's policies. A "strategic shift" in focus occurred in 2002. It wrapped up work on ratification and implementation of the International Criminal Court, since "other actors are working in that vineyard." Human Rights Watch will focus instead on the Court's policy toward victims (reparations), investigations, and the like.[354]

That the Coalition has remained alive and active stands as yet another accomplishment. The CICCs role comes up as a question at the group's annual retreats. The answer every year has affirmed the importance of continuing to work for the Court's more effective functioning and for wider support for it from governments, NGOs, and the general public.[355] Having strong roots in civil society through its member organizations and a well-maintained website remain principle concerns for the Coalition. Although it is the most prominent NGO identified with the International Criminal Court, organizations such as Redress, the International Center for Transitional Justice, and other NGOs have become more involved in publicizing what the Court seeks to do.[356]

"Growing pains" inevitably have marked relations between the International Criminal Court and the CICC. "We don't want to criticize it in public but want it to be received favorably," the Coalition's program director told the senior author.[357] Private consultation must be balanced with other factors. At the same time, although the support of global networks is "unquestioned," governments and the Court must move more vigorously to end impunity. States lack the energy shown in creating the Rome Statute, or the people involved in its creation have moved on. Most want to focus states parties on technical discussions instead of arresting indictees.

Consistent through the Coalition's history has been its campaign for ratification and implementation. It has given increased attention to working with national groups, through its regional coordinators. Meetings with NGOs in the various regions are held every six months, rotating from one area to another and dealing with "institutional and ratification issues." Five regional coalitions have been created: Africa, Asia/Pacific, Europe, Latin America/Caribbean, and Middle East/North Africa. These are complemented by fourteen national coalitions in Asia and the Pacific, fourteen in Europe, thirty-two in Africa, eleven in the Middle East and North Africa, and nine in the Americas,

354. Dicker, *supra* note 190.
355. Interview with Tanya Karanasios, CICC Program Director (14 Mar. 2007).
356. Glasius e-mail, *supra* note 103.
357. Karanasios Interview, *supra* note 355.

for a total of eighty national coalitions.[358] Instead of getting together two to three times per year as a total organization, the entire Coalition now assembles only once annually. As the Court has become increasingly active, the Co-Secretariat in The Hague has received greater attention. Coalition members are more focused now on how to codify the nature of the steering committee. Duties of membership and policy on taking positions are among the major issues. The regional groups are complemented by six thematic caucuses, which are lineal descendents of those active at Rome: Women's Initiatives for Gender Justice, Victims' Rights Working Group, Faith and Ethics Network for the ICC, Universal Jurisdiction Caucus, Children's Caucus, and Peace Caucus. Each of these includes a variety of constituent groups.

Additionally, in pursuit of ratification, the CICC has recently created the Global Advisory Board. This board is comprised of twelve members[359] who are "world leaders and eminent persons."[360] It is believed that together these individuals can help to "broaden support for international justice" and "provide strategic input on key issues."[361] The Advisory Board will act as a leader in establishing support for the CICC and its mission.

Overall, the CICC and its mission are guided by the integrity of the Rome Statute; the Rome Statute has been integral in the formation of the Coalition's mandate, so integral that it has been suggested the CICC should really be called: "Coalition for Rome Statute."[362] The CICC's original mission was to support its ratification and implementation. Following its entry into force the CICC wanted to fulfill the purpose of the Rome Statute, increase public support for the Court, and ensure that the Court is both fair and effective.

358. CICC, Regional and National Networks, *available at* http://iccnow.org/?mod=networks.
359. Its members include The Honorable Kofi Annan, Chair, Former Secretary-General of the United Nations and Nobel Laureate; His Excellency Bruno Stagno Ugarte, Vice-Chair, Minister of Foreign Relations of Costa Rica; His Royal Highness Prince Zeid Ra'ad Zeid Al-Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America; The Honorable Louise Arbour, Former UN High Commissioner for Human Rights and current President & CEO International Crisis Group; The Honorable Lloyd Axworthy, Former Minister of Foreign Affairs of Canada and current President, University of Winnipeg; The Honorable Justice Richard Goldstone, Former Chief Prosecutor, International Criminal Tribunals for Rwanda and the former Yugoslavia; Ms. Hina Jilani, Former UN Special Representative of the Secretary-General on Human Rights Defenders and current Advocate, Supreme Court of Pakistan; Mr. Juan Méndez, Special Adviser on Crime Prevention at the ICC, Office of the Prosecutor and President Emeritus, International Center for Transitional Justice; Mr. William R. Pace, Convenor, Coalition for the International Criminal Court; Dr. Sigrid Rausing, Publisher, Granta and Founder & Chair, The Sigrid Rausing Trust; Ms. Darian Swig, President, Article 3 Advisors; and the Honorable Patricia Wald, Former Chief Judge for the United States Court of Appeals for the District of Columbia and Judge for the International Criminal Tribunal for the former Yugoslavia.
360. *Coalition Launches Global Advisory Board*, 40 Int'l Crim. Ct. Mon. 20 (2010), *available at* http://www.iccnow.org/documents/monitor40_english_web.pdf.
361. *Id.*
362. Pace Interview II, *supra* note 126.

According to Tanya Karanasios, Program Director for the Coalition, "We must consult members on any new position or policy." The CICC doesn't take a position on potential or actual cases undertaken by the prosecutor or Court. This sometimes "ties our hands," because news media will come out with inaccurate representations of the facts on the ground. "It's hard for us not to come out and viscerally support ICC to counter misinformation." Issues are "much more nuanced," as witnessed by internal struggles within human rights groups. In Ms. Karanasios' view, the primary goal of the Rome Statute and the International Criminal Court is prosecuting crimes against humanity; advocating anything short of this is "hard" for Coalition members. The CICC also influences how judges have been elected. It takes no position on any candidates, but wants "the best-qualified," given recognition of region and gender. The initial election was a "very heated period." Thus, the Coalition has "moments when it expresses strong support for the Court and its principles, others less so." In her view, the Court will come to respect NGOs as it comes to know they have lots to contribute (more than money, ego, and the like). The Court initially expected unfettered support from the CICC and didn't expect criticism from it.[363]

The "limited communications outreach" of the Court is "by far" the strongest critique made by the CICC. Those whose lives are being protected "know nothing" or "worse know only government propaganda." Hence, the Court's identity is being framed by its opponents, a lesson learned from problems of the ICTY and ICTR. The ICC's communication and outreach are "very difficult." People must realize that very few persons or cases will be tried. They also need to know what kinds of crime are being dealt with.[364]

Financial problems continue to confront the Court. NGOs lobbied hard for it to get the necessary budget. Again in Ms. Karanasios' view, the Court did not hire very competent outreach people in its early stages and failed to make their case to states parties for funding. Hence, it became harder for NGOs to support greater funding early in the Court's history, before efforts by the prosecutor started to bear fruit. NGOs lobbied the Assembly of State Parties from cutting the ICC budget.

Other examples of CICC and NGO influence were mentioned earlier with respect to the Rome Statute: the victims fund, witness protection, and equitable geographic representation of staff (monitoring by NGOs). The Women's Initiative for Gender Justice gives a regular "report card" to the Court.[365]

Scrambling for funds represents a continual issue for the CICC. With a budget under $3 million annually, supporting a staff of nearly thirty plus numerous volunteers and unpaid interns, the Coalition lacks steady sources

363. Karanasios Interview, *supra* note 355.
364. *Id.*
365. This is separate from the Women's Caucus active at Rome.

of income. Major support comes from foundations (particularly important in its early years) and from governments. Unlike Amnesty International, which draws its funds almost entirely from individuals paying annual dues, or Human Rights Watch, which relies heavily on generous donors and foundation support, the CICC seeks and obtains direct government contributions. Among the most generous givers have been the European Union, Finland, Belgium, Sweden, the Netherlands, and Norway.[366] More than half the budget goes into personnel. The "public" face of the Coalition comes through its extensive website (http://www.iccnow.org/)—perhaps the easiest and most complete website to navigate of many related to the International Criminal Court—and through its *ICC Monitor*, a sixteen to twenty page publication appearing every four months both electronically and in glossy print versions. Web-savvy young employees mark the CICC as a twenty-first century international NGO, with face-to-face contacts and political pressures important through its more than 2,000 organizations in every region of the world.

In terms of physical location, the Coalition's offices seem well-placed. Headquarters are located in New York City, with another in The Hague. While the former can coordinate more readily with NGOs and governments, most notably when the General Assembly meets each autumn, the latter provides information to and about the Court itself and, not incidentally, allows for closer links with European governments and NGOs. Entering the New York office, located close to Grand Central, a visitor is struck by the youthfulness of the employees and volunteers (many of them college interns). The Coalition occupies an entire floor, with only nine private offices. A glassed-in conference room provides space for regular briefings and staff sessions. The cream-colored walls are covered with posters depicting campaigns by the Coalition—e.g. "Ratify the Rome Statute" or "Resist US Bilateral Immunity Agreements (BIAs) NOW!" Although English is the working tongue, Spanish and other languages can frequently be heard, with practically all the staff and interns able to handle additional languages. Given the overlapping groups that occupy the space (the CICC remains organically tied to the World Federalist Movement), an outsider finds it difficult to determine who may be working on what. Bill Pace continues to develop new areas of concern that affect international peace, such as environmental justice. In short, the Coalition remains small and poised to respond to new challenges.

Situated at 99A Bezuidenhoutseweg,[367] the Coalition's European co-headquarters has a totally different "feel" to it than the Manhattan office. The former lies in what doubtless was a high-class family's home in the

366. Karanasios Interview, *supra* note 355; Pace Interview IV, *supra* note 203.
367. This literally means on the other [south] side of the park. It's less than ten minutes walk from the city's main railroad station. The building itself was constructed in 1889. However, the Coalition plans to move into new quarters closer to the International Criminal Court itself when the latter's new building has been completed.

late nineteenth century. The CICC occupies three of four floors in a mixed residential-office area. In typical Dutch economizing fashion, the maximum width is about 15 meters, meaning that three to four staff members share each office (two or three on most floors). Bill Pace's desk is somewhat larger, bearing a picture of Albert Einstein, one of his personal heroes. A terrace on the second floor, next to the kitchen, overlooks a garden and brick-paved parking area, providing staff a retreat for informal lunches. Most important, the Coalition's office is situated within an easy walk of the Court, both its current temporary location and the planned permanent site.

Functions differ slightly between the two locations. Contact with European funders and governments occur through The Hague, while New York handles US contacts. While New York deals somewhat more with "political" issues, given its proximity to the United Nations and several major media outlets, The Hague tends to concentrate on "legal" matters, appropriate given its proximity to the Court and ability to monitor developments there. Contacts with the all-important national and regional coalitions are maintained primarily through New York. The same holds true for publications, with the single full-time communications specialist in The Hague, who is responsible for preparing timely updates of developments at the Court. The six hour difference between the two locations helps persons in the United States start their days with handy summaries.

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What lies in the future for the Coalition and its hundreds of member NGOs? Most simply, four focuses can be suggested. The first involves continued day-to-day watchfulness, ensuring that governments fulfill their obligations, whether or not they have ratified the Rome Statute.[368] Next comes building citizens' awareness of what are usually abstruse issues. What do (fictional) Kojo Busia, Juan Mendoza or Dong van Diem know about "exhaustion of local remedies," "*non bis in idem*," or other parts of the convention? Third, the Coalition must continue to find sufficient funds to remain active. As intimated above, a young, dedicated, and volunteer or underpaid professional staff makes an extraordinary difference. Extensive use of electronic networks, Skype connections and the like also keep costs low. Finally, and most delicate of all, the CICC must continue to walk a line between support for the Court and comment or criticism about its shortcomings. Eternal vigilance has long stood as a major task of NGOs. The CICC will likely remain on the scene for many years, pressing the Court to develop its jurisprudence through prosecuting cases effectively.

368. Many of the crimes covered by the Rome Statue have become customary international law, such as the prohibition against genocide, major war crimes (despite the continuing problems in defining aggression, shades of contemporary forms of slavery, or potentially torture.