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# THE NEGOTIATION OF THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL LAWMAKING IN THE 21<sup>ST</sup> CENTURY

John Washburn<sup>1</sup>

In Rome, on the night of July 17-18, 1998, there was an international epiphany.<sup>2</sup> The world community agreed by 120 votes that the Rome Statute for the International Criminal Court should be adopted.<sup>3</sup> In so doing, diplomats abandoned themselves to cheers and chants, tears and embraces, and rhythmic stomping and applause. In this moment of celebration and recognition, many of them saw the future of international law transformed.<sup>4</sup> The International Criminal Court

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<sup>1</sup> John Washburn, is co-chairman of the Washington Working Group on the International Criminal Court and a former U.S. Foreign Service officer and United Nations official. He attended most of the meetings of the United Nations Preparatory Committee on the International Criminal Court and all of the Diplomatic Conference on the International Criminal Court in Rome. Much of the author's argument in this note was developed in the course of his experience of working with Fanny Benedetti on their article: Fanny Benedetti and John L. Washburn, *Drafting of the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, (Jan. – Mar. 1999). He is grateful for her expertise and insight as lawyer, observer, analyst, and co-author. Any errors here, however, are entirely his own.

<sup>2</sup> “[E]piphany . . . 3a: (1) a usually sudden manifestation or perception of the essential nature of something. (2) an intuitive grasp of reality through something (as an event) usually simple and striking. (3) an illuminating discovery. 3b: a revealing scene or moment.” MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 390 (Frederick C. Mish ed., 10<sup>th</sup> ed. 1993).

<sup>3</sup> See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2 (1998) [hereinafter *PrepCom Report*]. Since the conference report, this final text at Rome has had many technical corrections. At the time of writing, the most complete version is available only through the United Nations web page (visited Oct. 15, 1999) <<http://www.un.org/icc/statute/rome/fa.htm>>.

<sup>4</sup> The author attended all of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in Rome, Italy, during 15 June – 17 July, 1998. This account is based on his discussions with numerous participants from governments, the United Nations officers of

(ICC) and its statute would fundamentally change the application and enforcement of international criminal law. In addition to its effect on the substance of international criminal law, the negotiations of the Rome Statute, which began as traditional treaty making, had become a very different kind of multilateral legislation by parliamentary diplomacy.

This article discusses this process and the impact it may have on the future of international lawmaking. Part I describes the process leading to the Rome Statute. Part II compares the process to national lawmaking in parliaments and legislatures. Part III discusses the difficulties of the participation of the United States in the ICC negotiations. In conclusion, Part IV considers the final form of the negotiation to create a charter of the ICC as a model and precedent for international lawmaking in the Twenty-first century.

#### PART I: HISTORY OF ROME STATUTE

Negotiations for the establishment of a permanent institution that would be responsible for trying the gravest breaches of humanitarian violations began in 1995 with a United Nations General Assembly resolution convening the United Nations Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).<sup>5</sup> The purpose of the PrepCom, as mandated by the General Assembly, was to create a text that could later be adopted by States. The PrepCom had "to prepare a widely acceptable consolidated text of a convention for an international criminal court."<sup>6</sup> The PrepCom began with a preliminary text of sixty-eight articles from the International Law Commission. After nineteen weeks of formal meetings to draft a comprehensive statute, the PrepCom sent to

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the Conference, and non-governmental organizations. *See also* Giovanni Conso, *Looking to the Future*, in *THE INTERNATIONAL CRIMINAL COURT – THE MAKING OF THE ROME STATUTE* 471, 473 (Roy Lee ed., Kluwer Law International 1999) [hereinafter *MAKING OF THE ROME STATUTE*].

<sup>5</sup> *See* G.A. Res. 50/46, U.N. GAOR, 50<sup>th</sup> Sess., Supp.No.49 at 307, U.N. Doc. A/50/46 (1995). For the background and history of the ICC issue at the United Nations, *see* *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1-35 (C. Bassiouni ed., Transnational Publishers 1998); Benedetti & Washburn, *supra* note 1, at 2-5; Roy Lee, *The Rome Conference and Its Contribution to International Law*, in *MAKING OF THE ROME STATUTE*, *supra* note 4, at 1-6.

<sup>6</sup> G.A. Res. 50/46, U.N. GAOR, 50<sup>th</sup> Sess., Supp. No.49 at 307, U.N. Doc. A/RES/50/46 (1995).

Rome a draft convention of 116 articles with 1,700 brackets containing disagreed language.<sup>7</sup>

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was to complete the negotiations, drafting, and adoption of the text within the five weeks allotted to it by the General Assembly.<sup>8</sup> It met during June 15 – July 17, 1998. The Statute adopted in Rome had 128 articles, accompanied by a Final Act and seven brief resolutions.<sup>9</sup> As requested by Resolution F of the Rome Statute, in late 1998 the General Assembly authorized the creation of the United Nations Preparatory Commission for the International Criminal Court (Commission).<sup>10</sup>

The negotiations for the Rome Statute were, therefore, a United Nations (U.N.) process from start to finish. The culture, physical location, logistics, conference practices, and Secretariat of the U.N. profoundly affected all aspects of the negotiations. These aspects included the primary individual actors; collective participants including government delegations, Bureau members,<sup>11</sup> non-governmental organizations and support staff; the schedule; and physical and financial resources.

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<sup>7</sup> See generally *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2/Add.1 (1998).

<sup>8</sup> See G.A. Res. 52/160, U.N. GAOR, 52<sup>nd</sup> Sess., Supp. No. 32, U.N. Doc. A/RES/52/32 (1997).

<sup>9</sup> See *PrepCom Report*, *supra* note 3.

<sup>10</sup> See G.A. Res.53/105, U.N. G.A.O.R., 53<sup>rd</sup> Sess., Supp. No. 105, U.N. Doc. A/Res/53/105 (1998). The General Assembly authorized the PrepCom to meet in 1999 during 16-26 February, 26 July – 13 August, and 29 November – 17 December. Two more meetings are expected in 2000 and at least one more in 2001. The PrepCom must complete recommendations on Rule of Procedure and Evidence and Elements of Crimes by June 30, 2000, and administrative and budgetary proposals before the first meeting of the Court's executive body, the Assembly of States Parties.

<sup>11</sup> The "Bureau" in UN practice includes all elected officials of a UN body or conference. These are members of government delegations. Closely associated with these officials, and often included in broader use of the term, are members of the Secretariat assigned to assist the officials and other persons they may appoint as Conference secretaries, rapporteurs, coordinators, drafters and the like. The complete formal lists of the elected officials of all bodies of the Conference and of its UN staff appear in paragraphs 17-20 of the Final Act attached to the Rome Statute.

The status of the PrepCom and the Rome Conference as subordinate bodies of the General Assembly meant that they began with the Assembly's internal politics, traditions and parliamentary practices, rules of procedure and institutional memory. In particular, debates in the Assembly's Sixth Committee, which prepared the resolutions authorizing the establishment and annual meetings of the PrepCom and the convening of the Rome Conference, gave governments an opportunity to review the progress of the negotiations and to consider the International Criminal Court in light of broader current events. Unfortunately, they also tended to reintroduce into the negotiating process the caucus behavior and the contentious political issues of the General Assembly. Nonetheless, governments began to abandon these early in the PrepCom, and later in the Rome Conference. The Sixth Committee's discussions also inevitably put the ICC negotiations into competition with all other contenders for the limited financial, human, and space resources of the U.N.

The U.N. as a venue, institution, and community was also the primary shaper of the psychology of the negotiations. Many of the delegates, and almost all of the Secretariat officials and key Non-Governmental Organization (NGO) representatives, knew each other personally or by reputation at the start of the negotiations, remained in the negotiations through the diplomatic conference in Rome, and are now at work in the PrepCom in New York. Knowledge of each other's styles, personalities, and abilities - both strengths and weaknesses - provided confidence, predictability and mutual forbearance. The value of this confidence was demonstrated clearly when the designated chairman for the Rome Conference, Adriaan Bos, became ill in April 1998. Philippe Kirsch of Canada was easily chosen as the replacement because he was so well known in the U.N. community from his long service in many international bodies and conferences, particularly as the chairman of challenging conferences on terrorism and international humanitarian law.

Experience in the U.N. system gave many participants a strong, often emotional, commitment to the ideals and purposes of the ICC. Confidence in the process clearly came from the work of the *ad hoc* tribunals for Rwanda and the former Yugoslavia. Moreover, each of the hundreds of conflicts and the mil-

lions of lives lost in the last fifty years has been on the agenda of some part of the U.N. In their speeches in the negotiations for the ICC, countries such as Sierra Leone, Argentina, Germany, Bosnia and Sri Lanka spoke powerfully of their countries' histories of genocide, war crimes, and crimes against humanity.

For the same reasons, and for some of its own, the U.N. and its Secretary-General made an early and irreversible institutional commitment to the ICC. The Court would be a powerful expression in action of the U.N. Charter. Its creation would demonstrate the relevance and importance of the U.N. at the millennium, and its existence would open the way for the coming of other international institutions to complement and strengthen the evolving place of the U.N. in the international governance of the future.<sup>12</sup> Accordingly, and even in the face of opposition to the emerging court from powerful countries such as China and the United States, the U.N. Secretariat committed itself to the establishment of a permanent International Criminal Court.

Thus, the U.N. support group assigned to the negotiation from the Office of Legal Affairs and Codification Division could begin its work with unusual confidence in the permanent backing of the Secretariat from the top down. Nonetheless, the central importance of the work of the Secretariat to the negotiations was, as customary at the U.N., deliberately downplayed by many of the officials concerned themselves. In fact, collectively the Secretariat combined mastery of the issues, familiarity with the players, and long experience with similar negotiations in a way that could be matched by few other participants in the negotiations.

The ultimate result, the Rome Statute, was part legislation and part constitution. In providing a detailed jurisprudence to the ICC and its judges, it created a system of international criminal law.<sup>13</sup> At the same time, it was also the charter of a new international institution including its governance, administration, structure, financing, and fundamental procedures. The U.N. has long had considerable success in establishing norms and standards. It has had much less in devising institu-

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<sup>12</sup> See Benedetti & Washburn, *supra* note 4, at 23, 37.

<sup>13</sup> See Roy Lee, *The Rome Conference and its Contribution to International Law*, *supra* note 4, at 31-32.

tions to implement them. The Rome Statute, by calling on its negotiators to do both, was a venture so new that it seemed to open the future.

As finally refined in Rome, the structure, organization and operational process of the negotiations had several unique characteristics. Negotiations were always conducted on an existing ("rolling") text, not on accumulations of proposals. Thus, discussion of any particular issue could be related to a complete draft of the statute. To achieve this, each individual proposal by a State appeared as a separate U.N. document. Following negotiation of this document, a revised text was issued indicating any suggested changes that had been proposed. This made it clear to the participants that changes were encouraged and should be negotiated. In addition, this procedure led delegations to combine their ideas, thus producing documents that included the proposals of many States. As a result, States had the benefit of having support for their proposals on paper prior to formal discussions. Once the negotiation of a document was complete, a final draft would be issued and incorporated into the integral, but constantly changing draft text of the whole statute.

The Rome diplomatic conference was also characterized by:

- ◆ Thoughtfully aggressive chairmanship in different styles by Adriaan Bos (PrepCom) and Philippe Kirsch (Rome);
- ◆ The judicious use of papers prepared by the Bureau to propose compromises, address impasses, and restore momentum;
- ◆ Wide and intense inter-sessional activities to maximize the effectiveness of formal meetings such as: substantive conferences of all sizes and varieties to frame issues for the next formal session; organizational meetings of the Bureau and/or U.N. officials to prepare agendas, candidacies of officers, and programs for quick approval at the opening of a session;<sup>14</sup>
- ◆ During formal sessions, simultaneous work on large and small pieces of the rolling text by very numerous groups and sub-groups ranging from formal working

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<sup>14</sup> See *id* at 14-22.

groups that were part of the established structures of the PrepCom and the Rome Conference to negotiating parties of all sizes;

- ◆ The replacement of the caucuses in the General Assembly (with the partial exception of the Non-Aligned Movement), by regional and global groups that were developed and based around common interests in the ICC. The Like-Minded Group (LMG) was by far the most important of these;
- ◆ The indispensability of U.N. officials ranging from the Secretary-General to conference secretaries, who served in varied roles as intermediaries, facilitators, advisers, and energizers for the Chairman and the Bureau;
- ◆ The power and influence of non-governmental organizations: Of its 800 member organizations, the NGO Coalition for an International Criminal Court (CICC) accredited to Rome over 200 institutions with 450 representatives. The coordination and support of these by the CICC and its worldwide computer network and information system, profoundly influenced every aspect of the Conference and deserved much of the credit for its success.

U.N. officials, although originally wary that NGOs might be disruptive or irritating to delegations, quickly found reassurance in the established place of NGOs at the U.N. and the CICC's general success in inducing NGO representatives to observe meeting decorum. In the end, the U.N. support team for the bureaus of PrepCom and the Rome Conference worked with the CICC as an ally, supporter, and source of invaluable political and expert support.

Another three-way interconnection developed between the (LMG), the CICC and the bureaus. "Like-minded" groups are a familiar element in negotiations at the U.N. They are usually improvised caucuses of governments with similar views about one or a few issues and are formed by delegates in temporary negotiating situations. The LMG, however, was founded during the first session of the Preparatory Committee in 1996 and as of early 2000 is still in full operation in the Preparatory Commission. Moreover, its members shared and agreed on a set of prin-

ciples, arrived at in Rome, which expressed a detailed vision of the nature and values of the Court. The founders of the LMG soon found that they were not alone in their reactions to the twentieth century history of European atrocities and mass crimes, which created and energized their commitment to the Court. Latin American and African countries had the same feelings over their own experiences in their continents with similar crimes by dictators and colonizers and, over time, became ready to join in the same commitment.

Decisions to join the LMG by countries such as the United Kingdom and South Africa thus became important policy questions, and were taken as such in capitals by senior officials and political leaders. The LMG grew to some sixty countries with substantial membership from all areas of the world except Asia. Another twenty countries were closely in sympathy with the LMG on most issues. Its leaders were Germany, Netherlands, Australia, Canada, Argentina and (later) South Africa. The LMG became a central negotiating bloc with close and mutually supporting relations with the Dutch and Canadian chairmen of the PrepCom and the Rome Conference. At Rome, the LMG and the CICC formed an increasingly overt alliance. The two groups exchanged information, expertise, strategies, and moral support. Early in the PrepCom, individual NGOs began to cooperate with the LMG in negotiating and lobbying.<sup>15</sup>

The structure and pattern of negotiations in the PrepCom and at the Rome Conference fit well with these interactions among the principal group players. The formal working groups in both the Commission and the Conference were supported by coordinators appointed by the respective bureaus who facilitated the discussion of individual issues by the myriad working parties of all sizes. With the exception of Part Two on the jurisdiction of the Court and a few very technical issues, this system was applied to the entire Statute. Chairpersons of working groups and coordinators were held responsible to submit only agreed, unbracketed language to the Committee of the Whole for forwarding to the drafting committee.

Both the LMG and the CICC had coordinators and teams, which were counterparts to those on the Conference system. In

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<sup>15</sup> See Philippe Kirsch, *The Development of the Rome Statute*, *supra* note 4, at 15. See also Benedetti & Washburn, *supra* note 1, at 18, 20-21, 30-31.

several cases, the coordinators for the Conference and LMG were the same.<sup>16</sup> These formal and informal negotiating processes in the Conference, and their somewhat less elaborate forerunners in the PrepCom, enhanced the effectiveness of the LMG as a negotiating bloc and promoted its growth. They offered many avenues for the formidable expertise, written and oral, of the CICC members and helped them to respond timely to twists and turns in the negotiations.

In the special case of Part Two, the interaction, partly tacit and partly deliberate, between the LMG, the CICC and the Bureau including its U.N. support staff, made all the difference. From the very beginning of the ICC negotiations, all parties recognized that the final form of this section of the Statute would determine the eventual effectiveness and viability of the Court. They also agreed that it contained the hardest and most intractable political and substantive problems in the Statute, which could only be settled by the senior representatives of governments at the Rome Conference. This forecast proved to be painfully true. Part Two remained a challenge and a threat throughout the Rome Conference, which ended with a dramatically unsuccessful effort by the United States to restrict further the provisions in Part Two on the ability of states to bring cases directly to the Court.

In the final Statute, Part Two, in sixteen articles, covers these definitive aspects of the Court: the crimes it may try and their basic elements, the limited ways that cases may reach it, the place of the Security Council in its work, the duties and prerogatives of the prosecutor, and rules and procedures for the Court's determination of the admissibility of cases. The negotiations on Part Two had to address these issues individually and in their complex interconnections with each other.

The Bureau concluded in the first two weeks of the Conference that the differences between delegations on major sections of Part Two were too great to be resolved in the coordinator-working group process. These differences also raised the likely prospect that there might have to be a vote on the Statute. Confronted by these challenges, many other chairpersons of U.N. negotiations might have sought another session of the diplo-

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<sup>16</sup> Author's personal observations.

matic conference, negotiated privately for a consensus, asked a group of "friends of the chairman" to prepare an alternate draft, or tried some combination of these approaches. Instead, in an impressive display of his deft and thoughtful aggressiveness, Chairman Kirsch took charge of the negotiations on Part Two. On July 5, he convened a meeting of twenty-eight countries representing all major factions and regions to consider an informal paper, which did not leave the meeting. On July 6, the Bureau issued a comprehensive discussion paper. On July 9, Kirsch opened a debate on Part Two in the Committee of the Whole in which delegations were asked to confine themselves to answers to a few specific questions presented by the Bureau.<sup>17</sup> While the Bureau and many delegations kept private tallies of those answers, the newsletter of the CICC published these overnight after the close of the debate as "virtual votes." From these events it became clear to all that a particular package for the Statute could receive the votes of a large majority, that the core of this majority was the LMG, and that the minority in opposition would be very small. In short, this version of the Statute could win a majority so large and so representative of most regions and of most categories of countries that it would be almost as good as a consensus.

With this established, Kirsch moved rapidly to create the "package" and to retain control of it in draft and in final form. All negotiation on Part Two was kept in plenary sessions of the Committee of the Whole, and only the Bureau prepared consecutive drafts. In a move shocking to some and criticized by many, Kirsch also kept drafts of Part Two out of the Drafting Committee. The Drafting Committee, adroitly chaired by Cherif Bassiouni, had won praise and admiration for its success in assimilating random agreed bits of provisions into smooth, well-organized and skillfully integrated stretches of the text. Kirsch nonetheless succeeded in keeping the Committee of the Whole from referring Part Two to the Drafting Committee. Late on the second to last day of the conference, he allowed the Drafting Committee to look at, but not act on or keep, a temporarily circulated final text of Part Two.

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<sup>17</sup> See Elizabeth Wilmshurst, *Jurisdiction of the Court*, *supra* note 4, at 135.

## PART II: COMPARISON TO DOMESTIC LEGISLATION

The ICC negotiations inevitably invite comparison to national parliamentary and legislative processes. The many differences are readily obvious. The caucuses were temporary alliances for the single question of the ICC without the permanence and ideological commitments of national political parties. The PrepCom and the Rome Conference were not standing bodies and had to invent themselves, especially as, bit by bit, they abandoned much of the template of the General Assembly. Moreover, they had no business other than the ICC. Finally, as frequently remarked, the delegates were non-elected diplomats accountable to governments, not to constituents.<sup>18</sup>

However, as the negotiations progressed, some of their aspects began to look more and more like national parliamentary practices. Complex domestic legislation usually has to be negotiated in fragments with the entire bill understood by most legislators only when submitted to the whole chamber. The Rome Conference found that only this method, although unusual in normal diplomatic practice, could deliver the statute in five weeks.

National constitutions frequently require a legislature to produce periodic national laws, such as budgets. The legislature's speaker or president is often held responsible for ensuring that this requirement is met. The leadership of the PrepCom and the Rome Conference, including the U.N. officials involved, strongly felt that a similar responsibility was imposed on them by the authorizing General Assembly resolutions. Accordingly, their conduct of the negotiations, especially in Rome, increasingly resembled the work of a leader of a national legislature driving hard to pass a mandatory bill before its deadline.<sup>19</sup>

Voting is discouraged at the U.N. It is thought to promote confrontation and to further weaken resolutions that in most cases are not binding anyway. This was the practice also at the

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<sup>18</sup> See generally Alfred P. Rubin, *A Critical View of the Proposed International Criminal Court*, 23 FLETCHER F. WORLD AFF. 139 (Fall 1999).

<sup>19</sup> Author's personal observations and notes. See also Philippe Kirsch, *The Development of the Rome Statute*, *supra* note 4, at 451; Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 5-6, 9-11(1999).

PrepCom and during the early part of the Rome Diplomatic Conference. However, as it became clear on the eve of presenting the complete text to the whole conference that only a tiny minority would oppose it, a final vote became not only thinkable but also essential. Again, the meeting began to feel like a domestic parliament.

Moreover, India and the United States offered what would be called in the United States Congress, "killer amendments."<sup>20</sup> These are amendments designed to make it impossible for a piece of legislation to pass. In response, and through a tacit understanding with the Bureau, Norway made no-action motions (equivalent to a congressional motion to lay on the table). Vigorously exercising his discretion, Chairman Kirsch put these to the vote. Norway and its supporters made the familiar legislators' argument that a complex package, very carefully and painstakingly negotiated, should not be altered so as to lose its chance of passage. Both motions prevailed, and the final vote on the statute was a foregone conclusion in favor.<sup>21</sup>

Extraordinary scenes of tension and jubilation followed in the Committee of the Whole. As U.N. staff moved swiftly through the crowded aisle counting hand votes, tension mounted. Some delegates tried to make sure that the U.S. delegation would be unable to see their votes. The defeat by enormous majorities of the amendments offered by India and by the U.S. insured the passage of the Statute and were greeted by uproarious celebrations. In a bow to U.N. tradition, the procedural motion to refer the Statute to the final plenary session of the full Conference was taken by consensus.

A feature of the negotiations, which the future will see again, is the overlap and interconnection, as in domestic legislatures, between the main players in the negotiations. NGO experts turned up in government delegations, often with the support and at the urging of the CICC or its members. The elected officials of the Bureau had long experience with NGOs. Moreover, the later General Assembly resolutions authorizing PrepCom sessions and the Diplomatic Conference specifically

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<sup>20</sup> See *U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/c.1/L.94 and 95 (1998), and U.N. Doc. A/CONF.183/c.1/L.90 (1998).

<sup>21</sup> See MAKING OF THE ROME STATUTE, *supra* note 4, at 23-26.

gave NGOs the right to attend them. This authorization, together with the recognition given to NGOs in the U.N. Charter, gave them a more consistent and straightforward status in the ICC negotiations than national lobbyists enjoy.<sup>22</sup>

### PART III: UNITED STATES PARTICIPATION IN THE ICC NEGOTIATIONS

The U.S. delegation had difficulties with the ICC negotiating process, both in the PrepCom, and especially in Rome. There is considerable evidence that it had neither the flexible but detailed instructions, nor the timely backstopping and responsiveness in its capital, enjoyed by other delegations from comparable countries.<sup>23</sup> Whatever the truth of this, the U.S. had certain problems, which may well recur for future American delegations in similar negotiations in any case.

Both at the Rome conference and after, the U.S. complained that it was not consulted adequately by the Bureau on its most important activities, especially in its repeated drafting of proposed texts of Part Two and the literally last-minute preparation of the final package for the complete text of the Statute. Many other countries had similar complaints, which the diffuseness of the negotiations and the hard-driving style of the chairman made inevitable.

Nonetheless, for many observers, the U.S., in fact, had a great deal of access. The U.S. was not an officer of the Committee,<sup>24</sup> but did chair one of the Committee of the Whole's working groups. The U.S. was also a vice-president of the entire conference, and a member of both the Committee of the Whole and the Drafting Committee. The U.S. attended Kirsch's meeting on July 15, 1998, where it vigorously protested being confronted

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<sup>22</sup> See U.N. CHARTER art. 71.

<sup>23</sup> Interviews by author with members of the US delegation and representatives of other countries during the Rome conference and the first Preparatory Commission session in New York, 15 – 26 February, 1999. Interview by author with a U.S. government official directly involved in activities concerning U.S. participation in the Rome conference, June 23, 1999, Washington, D. C. All of these interlocutors asked not to be identified. See also Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, THE BROWN J. OF WORLD AFF., Winter/Spring 1999, at 97.

<sup>24</sup> The Committee, apart from the chairman, had only three vice-chairmen, none of whom were from a major power, and Japan as rapporteur.

with the Bureau text on Part Two, strenuously pursued its position, and won several important concessions. The U.S. was consulted informally almost every day by Kirsch, members of the U.N. team, leaders of the LMG and of NGO's and by representatives of the various negotiating groups and caucuses.

However, the true problem for the United States was its exclusion from the constant private meetings of various combinations of the LMG, representatives of the Bureau of the Committee of the Whole, the U.N. team and the leadership of the CICC. It was through these various private meetings that the chairman was provided with essential parts of his strategy, and the discussions in them were an indispensable instrument for pursuing those strategies. The mere fact that the U.S. delegation was not a party to these discussions placed it at a clear disadvantage.

The U.S. had important interests in almost every aspect of the ICC. However, it belonged to no group or bloc in the negotiations. Thus, it had too much to cover and no friends to represent its interests in meetings it could not physically attend. Ironically, this large delegation from the remaining superpower found itself in somewhat the same situation as tiny delegations from small countries that also complained about being swamped by too many concurrent meetings. In negotiations to come as complicated and important as this, the U.S. will need to consider the priority of its interests carefully and find allies to share the burden of pursuing them. Another lesson of the ICC negotiations is that in future large-scale conferences although other delegations and the Bureau will try hard to accommodate the U.S., and will sometimes make distasteful compromises to do that, their acquiescence is not automatic.<sup>25</sup> American conference diplomacy will need to substitute discussion of real interests and concerns for demands and complaints.

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<sup>25</sup> For example, see the description of the willingness of the Conference majority to compromise substantially, but within limits, with the United States on a proposal by South Korea about preconditions for the exercise of the Court's jurisdiction. See Wilmschurst, *supra* note 17, at 133-138.

PART IV: THE ICC NEGOTIATIONS AND THE FUTURE OF  
INTERNATIONAL LAWMAKING

The most important realization in the Rome experience is large, yet simple: the international community is, in fact, capable of negotiating to agreement complicated international legal instruments, which both codify existing law and create institutions to implement them. Such future negotiations will carry a much lighter burden of incredibility. What had seemed to be impossible had, in fact, been achieved and other negotiations will be encouraged by this example.

Moreover, in the last twenty years, the traditional conduct of a diplomatic conference as a highly formal event conducted by government representatives alone, has been changed by various conferences and meetings, many of which were sponsored by the U.N. This traditional conduct was definitively altered by the negotiations in the PrepCom and in Rome. Innovations in the ICC negotiations were the combined result of experience from the past, wise and courageous decisions in response to the realities of the process, and perhaps some half-conscious borrowings from national parliaments. In particular, it is now permanently established that at the U.N., small agreed pieces of complicated multilateral legislation can be combined like a mosaic into a final document to be adopted as a whole.

The briefly convened sessions of negotiating bodies must be prepared and supported by intense work between meetings to frame administrative decisions and to organize, nominate, strategize and to consult groups and leaders. Interim meetings of the U.N. staff and the Bureau, both of them together and with key governments, settled in advance much of the work organizing conferences which, otherwise, often leads to wrangling as they start. A pre-Rome meeting of the PrepCom bureau and the newly nominated officers of the diplomatic conference achieved agreement on its basic structure and procedures. When Adrian Bos, the expected chairman of the Committee of the Whole, unexpectedly fell ill just before Rome, the U.N. team was able, in informal consultations, to use the atmosphere of understanding created in Courmayeur to win a smooth agreement by its participants that Philippe Kirsch should replace him. As a result, the participants of the Rome conference agreed on all of the organizational arrangements without de-

bate on its first day. Many of those present saw this as a good omen for the rest of the Conference.

Inter-sessional meetings convened by NGOs and governments, and including representatives of all principal actors, are essential to draft working papers, argue issues down to the points which only inter-governmental negotiation can resolve and identify unconscious premises and previously unspoken assumptions. This kind of relaxed discussion, free of formal official positions, is especially important in bridging gaps between different cultures. For the ICC negotiations, this was essential in dealing with different legal systems whose representatives first had to understand each other's priorities and legal philosophies, and then agree to hybridize them.

No single main collective actor in a negotiation like this can act by itself; each has strengths, resources, and motives not shared by the others and which they need to succeed. NGOs have expertise that the other actors often underestimate. They gain this expertise through their staff and their staff's volunteers and supporters, collective capacities, a reach into national governments and an increasing reach into domestic public opinion.

The U.N. has the broadest worldview, the largest multilateral experience and special, rare technical expertise on international lawmaking. Thus, although the U.N. always has its own institutional interests in negotiations for which it is responsible, it must project objectivity. The U.N. was unusually willing to reveal its own interests regarding the ICC.

NGOs often fail to understand the reality of the U.N. as an inter-governmental organization and the limitations imposed upon it. Governments still have dispositive power despite the worldwide changes in the meaning and functions of sovereignty. The spread of basic democracy means that a majority of governments in the U.N. are more representative than either the NGOs or the secretariats of international institutions.

As for the elected officials of negotiating bodies, they can take heart from the ICC experience that vigorous chairmanship can be both acceptable and productive, but only if bold initiatives are preceded, accompanied, and followed up by endless patient consultation. They must have excellent political wisdom

of their own, and get as much more of it as they can from the other actors and especially from U.N. officials.

The ICC negotiations were made possible, sustained, and brought to completion by their powerful psychology and by compelling emotions, which were constantly renewed by current events. Other negotiations will not have this advantage. However, they will gain another advantage from the ICC experience: the knowledge that tired people in small groups haggling over paragraphs can assemble historic international charters; that skill, will and insight can bring success to international legislators, and that governments and peoples want some kinds of international law and courts badly enough to do well in making them.