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# Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court

Valerie Oosterveld  
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# *Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court*

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Philippe Kirsch, Q.C., and Valerie Oosterveld\*

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The authors review the decades of discussion and years of negotiation that led to the adoption of the *Statute of the International Criminal Court* in 1998. By placing the creation of the International Criminal Court in its historical context, they emphasize the significance of the statute and the Court for international law. The lecture discusses various provisions of the statute, highlighting controversial aspects such as the jurisdiction of the Court and the crime of aggression. The statute reflects the compromises struck throughout the negotiations, compromises that are a necessary part of multilateral diplomacy. Though it was not possible to reconcile fully the concerns of all states, the authors point out that the statute achieves an important balance that allows for widespread support from the international community while establishing an institution that has the power to punish those responsible for the most serious crimes in international law. That this balance is a success is, in the authors' view, reflected in the ever-growing levels of support for the Court. They detail the challenges faced by the Preparatory Commission in transforming the Court from a statutory model to a working judicial institution. Finally, the authors examine the positive impact that ratification and implementation of the statute is having on reform of domestic laws criminalizing genocide, crimes against humanity, and war crimes.

Les auteurs passent en revue les décennies de discussions et les années de négociations ayant mené à l'adoption du *Statut de la cour pénale internationale* en 1998. En situant la création de la Cour dans son contexte historique, ils soulignent son importance pour le droit international avant d'aborder certains des aspects les plus controversés du Statut, tels la compétence de la Cour et la définition du crime d'agression. Bien que le Statut reflète des compromis inévitables dans le cadre de négociations multilatérales, et qu'il fût impossible de concilier complètement les inquiétudes de toutes les parties, le Statut constitue un instrument équilibré qui s'est attiré un large appui parmi la communauté internationale tout en établissant une institution ayant le pouvoir de punir les responsables des violations les plus graves du droit international. Les auteurs font ensuite état des défis pratiques auxquels a dû faire face la Commission préparatoire pour transformer le modèle tiré du Statut en une institution judiciaire en état de fonctionnement. Finalement, ils examinent l'impact positif de la ratification et de la mise en application du Statut sur les réformes des lois nationales criminalisant le génocide, les crimes contre l'humanité et les crimes de guerre.

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\* Philippe Kirsch, Chairman, Committee of the Whole at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court; Chairman of the Preparatory Commission for the International Criminal Court; presently Canada's Ambassador to the Kingdom of Sweden; former Legal Adviser, Department of Foreign Affairs and International Trade. Valerie Oosterveld, Legal Officer, Department of Foreign Affairs and International Trade, member of the Canadian delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court and the Preparatory Commission for the International Criminal Court. This lecture was delivered by Ambassador Kirsch at the McGill Faculty of Law on 13 March 2001 as the keynote address of the *McGill Law Journal Alumni Lecture Series / les Conférences des anciens de la Revue de droit de McGill*.

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**Introduction****I. The Road to Rome: Adoption of the *Rome Statute*****II. Provisions of the *Rome Statute*****III. A “Reality Check”: Evaluating the *Rome Statute* in Context****IV. Post-Rome Developments: Growing Support for the ICC****Conclusion: A New Institution for the Twenty-First Century**

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## Introduction

Since the adoption of the *Statute of the International Criminal Court*<sup>1</sup> in 1998, there has been discussion of whether it is a success or a failure in international law, and whether certain aspects of the statute “strengthen” or “weaken” the International Criminal Court (“ICC”). Evaluation of this kind is understandable. There are certain provisions within the *Rome Statute* that caused controversy when they were adopted, and there are others that many greeted warmly. Discussion of them can be useful, for example, in identifying areas for consideration at the ICC’s first Review Conference.<sup>2</sup> Analysis of the *Rome Statute* should be done, however, in context—the context of multilateral diplomacy. The form and content of the statute are the direct result of the decision to found the ICC by treaty. The treaty approach had necessary consequences, and it is in light of these necessary consequences that any evaluation of the *Rome Statute* should take place.

### I. The Road to Rome: Adoption of the *Rome Statute*

Before discussing the *Rome Statute* itself, it is important to reflect on the fact that it was adopted after decades of unsuccessful attempts. Crimes such as those described in the *Rome Statute* have been committed throughout the long history of war and have led repeatedly to calls for punishment. While examples date from as far back as 1474,<sup>3</sup> many commentators begin their discussion of the modern history of international prosecution with World War I. World War I brought many fundamental changes in the forms of warfare used, including chemical weapons and the targeting of civilians. The Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties concluded that “[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”<sup>4</sup> The *Treaty of Versailles* addressed this issue, providing for an international court to prosecute the German kaiser and national

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<sup>1</sup> 17 July 1998, UN Doc. A/CONF. 183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

<sup>2</sup> The first Review Conference will take place seven years after the entry into force of the *Rome Statute*, to consider any amendments to the statute. The *Rome Statute*, *ibid.*, art. 123, specifically provides for the Review Conference, and states that the list of crimes in art. 5 may be revisited.

<sup>3</sup> Morris & Scharf use the example of the trial of Peter von Hagenbach in 1474 for crimes ordered during his governorship of Breisach. See V. Morris & M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. 1 (New York: Transnational Publishers, 1995) at 1.

<sup>4</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report to the Preliminary Peace Conference* (1920) 14 A.J.I.L. 95 at 117.

military courts of the victor states to prosecute others. If a person had committed crimes affecting more than one state, the affected states could convene a joint tribunal.<sup>5</sup> These aspects of the treaty were never implemented because, as is often the case, political accommodation was easier than enforcement. The kaiser fled to the Netherlands and was never tried. While twelve people were ultimately prosecuted in the "Leipzig trials", only a few were convicted of war crimes and they received light sentences.<sup>6</sup> Those who were convicted soon escaped.<sup>7</sup>

Immediately following World War I, the League of Nations discussed creating a permanent international criminal court (the "High Court of International Justice") to try "crimes against international public order and the universal law of nations".<sup>8</sup> Ultimately, the idea did not receive support within the league, even though discussions continued at academic and other levels.<sup>9</sup> In 1934 the issue arose again when France pressed for the adoption of an international terrorism convention in conjunction with the creation of an ICC. A *Convention for the Prevention and Punishment of Terrorism* and a *Convention for the Creation of an International Criminal Court* were adopted in 1937, but they never entered into force, as the former only received one ratification and the latter none at all.<sup>10</sup>

World War II resulted in the creation of the International Military Tribunals in Nuremberg and Tokyo, as well as war crimes tribunals in Allied states. The International Military Tribunal was established in Nuremberg "for the just and prompt trial and punishment of the major war criminals of the European Axis" and had jurisdiction over crimes against peace, war crimes, and crimes against humanity.<sup>11</sup> The *Charter of the International Military Tribunal for the Far East* (also known as the Tokyo

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<sup>5</sup> See *Versailles Treaty*, arts. 227-29, quoted in B.B. Ferencz, *An International Criminal Court, A Step toward World Peace: A Documentary History and Analysis*, vol. 1 (New York: Oceana Publications, 1980) at 32 [hereinafter *An International Criminal Court Vol. I*].

<sup>6</sup> *An International Criminal Court Vol. 1*, *ibid.* at 33.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at 36.

<sup>9</sup> *E.g.* the Inter-Parliamentary Union decided in 1925 that "offences against public international order and the law of nations" should be tried by a chamber of the Permanent Court of International Justice, and the International Law Association concluded in 1926 that the establishment of an ICC "is not only highly expedient, but also practical". See H. von Hebel, "An International Criminal Court—A Historical Perspective" in H. von Hebel, J.H. Lammers & J. Schukking, eds., *Reflections on the International Criminal Court* (The Hague: TMC Asser Press, 1999) 13 at 17.

<sup>10</sup> *Ibid.* at 18.

<sup>11</sup> *Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280, arts. 1, 6, reprinted in *An International Criminal Court Vol. 1*, *supra* note 5, 456 [hereinafter *Nuremberg Charter*].

Charter)<sup>12</sup> was based largely on the Nuremberg Charter. Both tribunals were not ICCs, as they were ad hoc in nature and targeted to specific countries.

Following World War II, the United Nations General Assembly adopted the *Convention for the Prevention and Punishment of the Crime of Genocide*, which provides that persons charged with genocide may be tried by national courts where the crime was committed or “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>13</sup> The International Law Commission (“ILC”) was assigned to study the issue of an international penal tribunal to try genocide and other crimes. A draft statute was submitted in 1951,<sup>14</sup> but discussions on the desirability of creating such a court were divided, and the issue languished during the cold war.

The cold war brought about decades of inaction on the creation of an ICC. There were several reasons for this impasse. First, many assumed that aggression would fall within the mandate of an ICC, as in the Nuremberg and Tokyo Charters. The major powers could not agree, however, on a definition of aggression, which prevented the completion of the *Code of Offences Against the Peace and Security of Mankind*, which in turn hindered the establishment of the jurisdictional basis of the ICC. Second, the creation of any international institution requires states to surrender a bit of sovereignty, however small, and the mutual suspicions of the major powers were not conducive to surrendering *any* control. Third, conflicts were often considered de facto wars between the major powers. Allowing an international court to try crimes committed during any of these conflicts was seen as trying the major powers themselves. There was, therefore, no support for restarting the discussion to create an ICC.

Trinidad and Tobago returned the issue of establishing an ICC to the international stage in 1989. By that time, the end of the cold war had changed the situation. Trinidad and Tobago requested the study of the idea of an ICC, but with a view to trying drug traffickers. The General Assembly requested that the ILC consider the issue, and

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<sup>12</sup> 19 January 1946, reprinted in R.J. Pritchard & S.M. Zaide, eds., *The Tokyo War Crimes Trial*, vol. 1 (New York: Garland, 1981).

<sup>13</sup> 9 December 1948, 78 U.N.T.S. 277, art. VI, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*]. *International Convention on the Suppression and Punishment of the Crime of Apartheid*, GA Res. 3068(XXVIII), UN GAOR, 28th Sess., Supp. No. 30, UN Doc. A/9030 (1973) 75, provides in art. V, in almost the same words as the *Genocide Convention*, for trial by an international criminal tribunal.

<sup>14</sup> *Report of the 1951 Committee on International Criminal Jurisdiction*, UN GAOR, 7th Sess., Supp. No. 11, UN Doc. A/2136 with draft *Statute for an International Criminal Court*, 31 August 1951, reprinted in B.B. Ferencz, *An International Criminal Court, A Step toward World Peace: A Documentary History and Analysis*, vol. 2 (New York: Oceana Publications, 1980) 337.

in 1992 the ILC requested and received the mandate to elaborate a draft ICC statute from the General Assembly.<sup>15</sup>

In 1993 the United Nations Security Council established an ad hoc tribunal to try those who had committed breaches of international humanitarian law in the Former Yugoslavia.<sup>16</sup> One year later a similar tribunal was also established to deal with crimes committed in Rwanda.<sup>17</sup> The creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda ("ICTY" and "ICTR", respectively) sent a strong signal to the international community. There was some recognition that an international court was necessary, even if it had to be established on an ad hoc basis. In addition, the creation of the two tribunals gave a working model, showing that an ICC was intellectually *and* procedurally possible. Finally, the creation of the two tribunals also demonstrated that the political will lacking throughout the cold war was now present. This last development recognized a shift from the cold war assumption that international and domestic politics would always prevail over international law and justice.

This progress seemed to energize the discussions on the ICC within the General Assembly and the ILC. In 1994 the ILC presented a draft ICC statute to the General Assembly and recommended that "it convene an international conference of plenipotentiaries to study the draft Statute and to conclude a convention on the establishment of an International Criminal Court."<sup>18</sup> The *ILC Draft Statute* was broader than the original proposal of Trinidad and Tobago, covering the crimes of genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and treaty crimes (such as drug trafficking, apartheid, and the use of torture).<sup>19</sup> While the *ICC Draft Statute* was positively received, many states felt preparatory work was needed before convening the Diplomatic Conference. They created an *Ad Hoc* Committee on the Establishment of an International Criminal Court, which met in 1995.<sup>20</sup> A Preparatory Committee was subsequently established, the mandate of which was to prepare a draft text for ultimate consideration at a Diplomatic Confer-

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<sup>15</sup> GA Res. 47/33, UN GAOR, 47th Sess., Supp. No. 49, UN Doc. (vol. I) A/47/49 (1992) 287.

<sup>16</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993).

<sup>17</sup> *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994).

<sup>18</sup> *Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994) 29 at paras. 23-91 [hereinafter *ILC Draft Statute*].

<sup>19</sup> *Ibid.*, art. 20.

<sup>20</sup> *Establishment of an International Criminal Court*, GA Res. 49/53, UN GAOR, 49th Sess., Supp. No. 49, UN Doc. A/49/49 (1994) 293.

ence.<sup>21</sup> The creation of the Preparatory Committee was an important step, as it represented a change of attitude from studying the idea of an ICC in the abstract to drafting the ICC statute in reality. The Preparatory Committee met in six sessions from 1996 to 1998.<sup>22</sup>

From the early 1990s to 1998, there was much international discussion of the role of ad hoc tribunals versus the role of a permanent ICC. There was broad recognition that, even when international justice worked through the establishment of ad hoc tribunals, it remained inherently selective. There are, of course, differences between the various tribunals established since World War II, but the common denominator is that their mandates have been limited to specific situations. Many crimes were committed elsewhere that required justice, but about which nothing was done. By the same token, major powers and their nationals were largely sheltered from any possibility of being subject to the jurisdiction of the ad hoc tribunals. The problem of selectivity also contributed to the perception that the Security Council should not retain exclusive control over international justice.

It is important to understand this ongoing dialogue, because it affected the eventual establishment of the ICC. Most states and commentators agreed that there was a need to put an end to the long-established culture of impunity demonstrated in too many areas of the world. They also observed that existing instruments, however effective in specific situations, must be supplemented by an institution that would better reflect the needs of the international community as a whole. This led to a momentum, sustained by an increasing number of states and civil society organizations, strong enough to make the acceptance of the creation of an ICC irresistible, even on the part of states originally not supportive of the idea.

This is not to say that the ICC received only support. There were many objections expressed between 1989 and 1998, which, interestingly, were somewhat different in tone and type than the ones expressed during the cold war. While debates on sovereignty and the crime of aggression continued much as they had developed in the 1950s to 1970s, attention turned to procedural issues. First, there was the concern that one or another kind of criminal law approach would dominate the ICC. Nationalistic pride in domestic criminal law led various countries to introduce proposals that strongly resembled their national procedures. This led to debates, as substantive and procedural criminal law rules in some countries clashed with rules in other countries. This raised the related challenge of how nations would reach consensus on issues as difficult as subject matter jurisdiction, and pretrial, trial, and appeal procedures. Sec-

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<sup>21</sup> *Establishment of an International Criminal Court*, GA Res. 50/46, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/50/49 (vol. I) (1995) 307.

<sup>22</sup> 25 March to 12 April 1996; 12-30 August 1996; 11-21 February 1997; 4-15 August 1997; 1-12 December 1997; 16 March to 3 April 1998.



ond, there was concern about the cost of an ICC. While many agreed that there would be some savings in establishing an ICC as opposed to a series of ad hoc tribunals, they also feared that the cost of the ICC would be high and that the burden of paying for the ICC would not be shared fairly.<sup>23</sup> Third, reservations were expressed about the establishment of yet another international institution. Though the ICTY and the ICTR had demonstrated that effective bodies could be created within the framework of the United Nations, the previous track record for creating ineffective, excessively bureaucratic bodies caused supporters to pause.

On 17 July 1998 these obstacles were overcome and the *Rome Statute* was adopted. One hundred and twenty states voted for the statute, seven voted against, and twenty-one abstained.<sup>24</sup> The fact that the *Rome Statute* was adopted at all, after so many decades of failure and against considerable resistance, is a success in itself. It is a victory of the vast majority of states and of civil society organizations, who were convinced that selective justice was not enough, and that it was necessary to have an independent and permanent court, with a comprehensive mandate.

## II. Provisions of the *Rome Statute*

While the adoption of the *Rome Statute* was hailed around the world, many asked whether the statute itself was a success. On the one hand, it met many fundamental objectives of the vast majority of states and civil society organizations<sup>25</sup> present at the Diplomatic Conference, specifically with respect to the kinds of crimes included within the statute, the kinds of conflicts these crimes could be charged under, and the breadth of the protection of victims and witnesses. On the other hand, it also contained compromises. Some felt that certain jurisdictional provisions created loopholes that could allow war criminals to remain unprosecuted, while others felt that it contained potentially unworkable procedures or inadequate provisions.

The *Rome Statute* covers the major international crimes: genocide, crimes against humanity, and war crimes.<sup>26</sup> These were consistently referred to as “core crimes” throughout the negotiations, as they were considered to represent the most serious crimes of concern to the international community as a whole. It was understood that

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<sup>23</sup> This concern was linked to the failure of the United States to pay the majority of its assessed UN dues.

<sup>24</sup> By request of the United States, the votes were not recorded against country names. While the votes were non-recorded, three states declared publicly that they had voted against the *Rome Statute*: China, the United States, and Israel.

<sup>25</sup> The main civil society organization was the Coalition for an International Criminal Court, a coalition of approximately one thousand NGOs supportive of a strong and effective ICC. See online: Coalition for an International Criminal Court <<http://www.iccnw.org/>>.

<sup>26</sup> *Rome Statute*, *supra* note 1, art. 5, lists the crimes, and arts. 6-8 define the crimes.

inclusion of these three crimes would promote broad acceptance of the ICC by states, and thereby enhance its effectiveness, strengthening the credibility and moral authority of the Court. In addition, states argued that the magnitude, the occurrence, and the inevitable international consequences of these crimes necessitated their inclusion.<sup>27</sup> The *Rome Statute* also deals with important humanitarian aspects that past discussions had tended to overlook. It recognizes rape, sexual slavery, and other forms of sexual violence as war crimes and crimes against humanity,<sup>28</sup> and includes enlisting or using children under fifteen in any conflict as a war crime.<sup>29</sup>

The *Rome Statute* also covers aggression, subject to an agreement on its definition and on conditions for the exercise of the ICC's jurisdiction over that crime.<sup>30</sup> Negotiations on this crime differed from those on the other three crimes. Aggression, the subject of decades of discussion within the United Nations, had not resulted in any definitive resolution.<sup>31</sup> Despite this history, many states felt that it was important to include this crime in the *Rome Statute*. They argued that exclusion of aggression would represent a step backward from the precedent set at Nuremberg and Tokyo, since both tribunals had convicted people of this crime after World War II. Before and at the Diplomatic Conference, no individual proposal on this crime garnered wide, general support.<sup>32</sup> Near the close of the conference, when it became clear that no broad-based agreement would be reached on the crime, the non-aligned states proposed to include the crime of aggression in the statute but to leave the elaboration of a definition to a later stage. The Court would not exercise jurisdiction over this crime until a definition was agreed upon.<sup>33</sup> This proposal was taken up—and subsequently adopted—in the final package, with the addition of a provision recognizing the position of a number of other states, providing that the definition “shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>34</sup>

A widely-praised aspect of the *Rome Statute* is that it covers internal armed conflicts. Many states noted before and at the Diplomatic Conference the growth of the

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<sup>27</sup> *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995) at paras. 54, 55.

<sup>28</sup> *Rome Statute*, *supra* note 1, arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

<sup>29</sup> *Ibid.*, arts. 8(2)(b)(xxvi), 8(2)(e)(vii).

<sup>30</sup> *Ibid.*, art. 5(2).

<sup>31</sup> See von Hebel, *supra* note 9 at 25-26.

<sup>32</sup> There were differing views on the inclusion of this crime within the *Rome Statute*, the role of the Security Council, and the definition of the crime.

<sup>33</sup> *Amendments submitted by the Non-Aligned Movement to the Bureau Proposal*, UN Doc. A/CONF.183/C.1/L.75.

<sup>34</sup> For a more detailed description of the negotiations on this crime, see H. von Hebel & D. Robinson, “Crimes within the Jurisdiction of the Court” in R.S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 79 at 81-85.

number and intensity of internal armed conflicts, so that they represent the majority of wars in the world today. While a major motivation behind the creation of the Court was to address these conflicts, it was also the focus of tremendous resistance prior to and at the Diplomatic Conference.<sup>35</sup>

Many states argued that the ICC would not operate effectively if it could not deal adequately with the experiences of all victims and witnesses. They called for a holistic approach to staffing, elections, procedures, protection, and reparations. With respect to staffing and elections, many states felt that it was important to recognize the advances in “gender mainstreaming” undertaken at the United Nations since the 1995 UN World Conference on Women in Beijing, and therefore an article providing for the “fair representation of female and male judges” was adopted.<sup>36</sup> In addition, many recognized that the presence of certain expertise amongst at least some of the judges and staff would assist the Court in undertaking informed prosecutions with respect to crimes such as rape, slavery, and forced recruitment that particularly target women and children. To facilitate this, articles providing that “judges with legal expertise on specific issues, including, but not limited to, violence against women or children” should be elected to the Court and a similar direction for the staffing of the Court were included.<sup>37</sup> The specific needs of the Office of the Prosecutor in dealing with victims and witnesses of rape and other serious crimes were taken into account, with an article providing for the appointment of “advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.”<sup>38</sup> Similarly, an article was included recognizing that the Registrar’s Victims and Witnesses Unit requires “staff with expertise in trauma related to crimes of sexual violence.”<sup>39</sup> To complement these articles on the composition and administration of the Court, the *Rome Statute* includes a particularly well-developed set of provisions relating to the participation of victims and the ability of the Court to make orders against a convicted person for reparations.<sup>40</sup>

In the fundamental area of jurisdiction, the Diplomatic Conference decided that there would be different ways to trigger the jurisdiction of the Court, exceeding the expectations of many participants. Proceedings can be initiated by any state party, by

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<sup>35</sup> See e.g. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1, UN LAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) 20 at para. 78; *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, *supra* note 27 at para. 74.

<sup>36</sup> *Rome Statute*, *supra* note 1, art. 36(8)(a)(iii).

<sup>37</sup> *Ibid.*, arts. 36(8)(b), 44(2).

<sup>38</sup> *Ibid.*, art. 43(9).

<sup>39</sup> *Ibid.*, art. 43(6).

<sup>40</sup> *Ibid.*, art. 75.

the Security Council, and notably, by the prosecutor of the Court.<sup>41</sup> The *Rome Statute* provides for automatic acceptance of the Court's jurisdiction by state parties without any need to make a second decision in the context of specific situations (with the exception of article 124, discussed below). The ICC is not subordinated to the Security Council in the way that was anticipated in the draft prepared by the ILC, which would have prevented the Court from exercising jurisdiction if the Security Council dealt with a particular matter.<sup>42</sup> Under the *Rome Statute*, the Security Council can only delay proceedings in restricted circumstances. The decision by the Security Council is limited to the possibility of delaying a proceeding, so that any veto to such a proposal, instead of blocking jurisdiction, means that the case proceeds.<sup>43</sup> Also, the *Rome Statute* does not permit reservations, and there is no statute of limitations.<sup>44</sup>

The *Rome Statute* did not meet all the expectations of those who wanted a strong framework. For example, certain crimes were not included, most notoriously the use of chemical or biological weapons.<sup>45</sup> Certain qualifications were added to the introduction to crimes against humanity and war crimes, as well as to specific acts listed within these crimes.<sup>46</sup> Certain defences were accepted that many felt did not represent the current state of international humanitarian law.<sup>47</sup> The fact that aggression could not be included in the same way as other crimes created intense dissatisfaction because many consider it to be the "crime of all crimes". The many safeguards introduced throughout the *Rome Statute* led some to worry that the process created could slow down the Court's functions unduly or become Byzantine. Other provisions have also raised concerns for the future, such as the amendinent provisions.<sup>48</sup>

The most criticized provisions are probably in the area of jurisdiction included near the end of the Diplomatic Conference. Article 124, giving state parties the possi-

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<sup>41</sup> *Ibid.*, art. 13.

<sup>42</sup> *ILC Draft Statute*, *supra* note 18, art. 23(3).

<sup>43</sup> *Rome Statute*, *supra* note 1, art. 16.

<sup>44</sup> *Ibid.*, art. 120.

<sup>45</sup> The exclusion was based on the controversial issue of whether or not to include nuclear weapons in the list of prohibited weapons. See von Hebel & Robinson, *supra* note 34 at 113-16.

<sup>46</sup> See *ibid.* at 92-98 on the crimes against humanity chapeau, at 98-103 on the inhumane acts listed within crimes against humanity, at 107-108 on the war crimes chapeau, and at 108-21 on the acts listed as war crimes.

<sup>47</sup> See *Rome Statute*, *supra* note 1, art. 30, on grounds for excluding criminal responsibility, which underwent very difficult negotiations; *e.g.* there were very divergent views on the extent, if at all, to allow voluntary intoxication as a defence. The use of self-defence was also strongly debated. As well, art. 33 on superior orders was discussed at length. See A. Eser, "Article 31" in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) 537; O. Triffterer, "Article 33" in *ibid.*, 573.

<sup>48</sup> *Rome Statute*, *ibid.*, art. 121.

bility to refuse the jurisdiction of the Court over war crimes committed on their territory or by their nationals for a period of seven years after entry into force for those states, is a case in point. Another example is the jurisdictional system generally, under which, except in cases where the Security Council refers a situation to the Court, the Court exercises jurisdiction only with the consent of the state of the nationality of the accused or the state of the territory where the crime was committed.<sup>49</sup> This, it has been said, is far from the regime of universal jurisdiction many hoped for, or even a variation thereof.<sup>50</sup> The two grounds of jurisdiction selected are the classical grounds in international criminal law, but this system makes it more difficult for the Court to exercise jurisdiction, particularly in situations that do not have an international element. That is, of course, until there is widespread ratification of the statute. Those criteria would then lose their importance because a majority of state parties would meet them.

### III. A “Reality Check”: Evaluating the *Rome Statute* in Context

If you look at the *Rome Statute* in the abstract, from the perspective of an “ideal” model, you find elements that could be better. It is useful, however, to have a “reality check” or two.

First, one must remember that the point of departure is the draft prepared by the ILC, only four years earlier. One observes that, contrary to the trend in many other negotiations, in which the original draft is often watered down, the *Rome Statute* is much stronger than the ILC draft. For example, under the ILC draft: (1) automatic jurisdiction is contemplated only for the crime of genocide, while state parties could pick and choose for other crimes;<sup>51</sup> (2) the Court could not proceed unless it had the acceptance of the territorial state, the custodial state, and any other state seeking to exercise jurisdiction;<sup>52</sup> (3) the Security Council had extensive control over the docket of the ILC;<sup>53</sup> and (4) only certain state parties or the Security Council were allowed to initiate proceedings, not the prosecutor.<sup>54</sup> The ILC approach was also reflected in the many drafts leading to the Diplomatic Conference.

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<sup>49</sup> *Ibid.*, art. 12(2). Germany had made a proposal based on universal jurisdiction, while the Republic of Korea, sensing the need for compromise, proposed that a jurisdictional nexus would be required from one of four states: the territorial state, the state of nationality of the accused or the victim, or the custodial state. See UN Doc. A/CONF.183/C.1/L.6 (18 June 1998) [mimeo restricted]. The Korean proposal received wide support, but also strong opposition from some states that wanted a much narrower list.

<sup>50</sup> Such as the proposal made by the Republic of Korea.

<sup>51</sup> *ILC Draft Statute*, *supra* note 18, art. 21.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, art. 23.

<sup>54</sup> *Ibid.*, arts. 23, 25.

The second factor to consider is that the *Rome Statute* was adopted by treaty in an international conference and was, therefore, the result of many years of multilateral negotiations. Satisfactory as the statute is, critics contend that it could have been stronger, judging by its provisions alone. We believe this conclusion is correct but incomplete; it looks at the *Rome Statute* as an academic product, without taking into account either the current state of international relations or the current structure of the international community. Indeed, one cannot isolate the provisions of the statute from the realities of multilateral diplomacy.

Multilateral negotiations have been described as “a process of mutual persuasion and adjustment of interests and policies which aims at combining non-identical actor preferences into a single joint decision.”<sup>55</sup> In some ways, this definition presupposes a conflict of interest, because, without it, there is nothing about which to negotiate.<sup>56</sup> It also presupposes that complementary interests exist—that there is something for which to negotiate.<sup>57</sup> This duality informs every decision necessary to the negotiation process. The complicating factor is that common ground not only needs to be found among hundreds of states, but also between groups of states.

All of this was true in the context of the ICC. Over the years, several negotiating blocs emerged sharing a common theory or position; for example, the Like-Minded group, the Arab group, the Non-aligned Movement, the European Union, and the Southern African Development Community. The formation of these groups assisted in the resolution of many difficult issues, as hundreds of different state approaches were reduced to a handful of proposals, and representatives of each proposal worked with the others to come up with an acceptable result. When evaluating the *Rome Statute*, one must realistically examine the outcome based on the multilateral negotiation model, which achieves resolution of issues through joint search for common ground. If states were not willing to resolve the various contentious issues in the ICC statute by looking for common ground, the result would have been a stalemate. Either the *Rome Statute* would never have been adopted, or the statute would only have been adopted and supported by certain groups, setting the stage for future failure and undermining the ultimate goal of universal application. In the ICC negotiations, the vast majority of states were committed to finding the common ground, and in doing so, respecting the progress made over the past decade in international humanitarian law.

Another aspect of the multilateral process to understand is the interplay between politics and law, which can be both predictable and unpredictable. The domestic po-

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<sup>55</sup> See V. Rittberger, “International Conference Diplomacy: A Conspectus” in M.A. Boisard & E.M. Chossudovsky, eds., *Multilateral Diplomacy, The United Nations System at Geneva: A Working Guide*, 2d rev. ed. (The Hague: Kluwer, 1998) 15 at 17.

<sup>56</sup> *Ibid.* at 18.

<sup>57</sup> *Ibid.*

litical concerns of a country may shape its approach to international law. Take, for example, the discussions on procedures to be adopted by the Court. Some countries introduced proposals that would, in essence, recreate certain national procedures within the ICC. Sometimes, this approach was taken for political reasons, nationalistic pride,<sup>58</sup> or for legal reasons, because there was a lacuna in international law. Sometimes, the reasons were mixed political-legal. The search for common ground must address both legal and political positions, as the provisions adopted on the exercise of jurisdiction best illustrate.<sup>59</sup>

The third "reality check" to keep in mind is the need for support of the *Rome Statute* once adopted. The challenge for those supporting the Court was how to create a treaty that will enjoy support as wide as possible, and therefore, will result in strong international co-operation. The lack of such support and co-operation would severely hamper the operation and success of the Court. In other words, the ICC necessarily derives its strength not only from the substance of its provisions, but also from the support it enjoys. An equilibrium had to be achieved between two undesirable extremes: on the one hand, a statute consisting of weak provisions that no state would oppose but which would make the ICC pointless, and on the other, a statute consisting of highly progressive provisions adopted by only a handful of "virtuous states". Politically, either of these alternatives would have spelled the end of the ICC project. It was thus necessary to find a balance.

In most parts of the *Rome Statute*, there is no contradiction between strength and support. The negotiating process was aimed at developing good provisions that would enjoy wide support, including reconciliation of different legal systems, and it worked in most areas. In some cases, however, choices had to be made, because the negotiating process did not result in solutions. This was particularly the case of certain elements of Part 2 of the *Rome Statute* dealing with crimes and jurisdiction. Those choices took two forms: mostly, recommendations by the Bureau of the Committee of the Whole endorsed by the conference, and voting on the last day.

Many choices made by the bureau simply followed the overwhelming trends prevalent at the conference: an independent prosecutor, automatic jurisdiction, and inclusion of internal armed conflicts. Other choices were made specifically to increase support for the Court, such as the exclusion of certain weapons from the list of prohibited weapons, despite a widespread view that they were prohibited under customary humanitarian law, and allowing states to refuse the Court's jurisdiction on war crimes for seven years. Finally, taking account of numerous divergent views required

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<sup>58</sup> This is a common issue arising in multilateral negotiations. See B. Chisholm, "How to Think and Act Internationally" in Boisard & Chossudovsky, *supra* note 55, 107 at 107.

<sup>59</sup> See *e.g.* *Rome Statute*, *supra* note 1, arts. 12, 16.

difficult choices. The sum of these choices is sometimes said to have resulted in a weaker court. This raises some questions: a weaker court than what? Than a non-existent abstract model? More fundamentally, is the ICC, with its classical jurisdiction regime that still enjoys widespread support in the international community, actually weaker than a court that would have universal jurisdiction but whose support would be restricted to a limited number of states, excluding entire regions?

Delegations knew well the limits beyond which they were not prepared to go for the sake of increasing support, and this showed in the way that proposals made on the last day of the Diplomatic Conference were rejected resoundingly. Two proposals from the same state would have made nuclear weapons illegal and would have removed any reference to the role of the Security Council from the *Rome Statute*.<sup>60</sup> Those proposals seemed to be aimed deliberately at killing the statute and the Court. Another proposal would have made the jurisdictional regime even more restrictive, by requiring the consent of the state of which the accused is a national before the Court could exercise jurisdiction whenever alleged offenders were “officials or agents of a State”.<sup>61</sup> It is interesting to note that states with fundamentally opposing views and interests, in many respects, made these proposals. Their common preference was for either a court with restricted powers and a narrow mandate, or no court at all. The conference ultimately rejected this.

The net result was the *Rome Statute*, supported by an overwhelming majority of states. Even in Rome, this was seen as a tremendous success, though it did not achieve complete universality, and the opposition of some states, including the United States, was a concern.

#### IV. Post-Rome Developments: Growing Support for the ICC

The task of the Rome Diplomatic Conference was to adopt the statute of an ICC. For the Court to function properly, however, it required the preparation of a number of additional instruments, which the Diplomatic Conference clearly was not in a position

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<sup>60</sup> India put forward two amendments at the final meeting of the Committee of the Whole, the first to add as a war crime in international armed conflict “Employing weapons of mass destruction, i.e. nuclear, chemical and biological weapons.” Its second amendment would have deleted arts. 16, 13(b), and the words “In the case of article 13(a) or (c)” in art. 12, thereby eliminating Security Council involvement in the ICC. For the text of the amendments proposed, see A/CONF.183/C.1/L.94, L.95. Norway, supported by Chile and Malawi, succeeded by a vote of 114 in favour, 16 against, and 20 abstentions in a no-action motion called on these proposed amendments.

<sup>61</sup> For the text of the proposal see A/CONF.183/C.1/L.90. Norway again called for a no-action motion, supported by Sweden and Denmark, which succeeded in a vote of 113 in favour, 17 against, and 25 abstentions. The United States subsequently called for a non-recorded vote on the statute in the final plenary of the conference.



to do. For this reason, the *Final Act of the Rome Conference* provided for the creation of a Preparatory Commission ("PrepCom") to ensure a smooth and quick operational transition once the ICC statute enters into force.<sup>62</sup> The PrepCom makes recommendations for consideration and adoption by the Assembly of States Parties, which will have decision-making capacity. Once the Assembly of States Parties comes into being, the PrepCom will cease to exist.<sup>63</sup>

Under the *Final Act, Resolution F*, the PrepCom will draft a number of instruments:

- (a) Rules of Procedure and Evidence;
- (b) Elements of Crimes;
- (c) A relationship agreement between the Court and the United Nations;
- (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;
- (e) Financial regulations and rules;
- (f) An agreement on the privileges and immunities of the Court;
- (g) A budget for the first financial year;
- (h) The rules of procedure of the Assembly of States Parties.

In addition to its mandate under Resolution F, the General Assembly also requested that the PrepCom "discuss ways to enhance the effectiveness and acceptance of the Court."<sup>64</sup> On 30 June 2000, a deadline set in Resolution F, the PrepCom completed and adopted by general agreement two essential instruments: the Elements of Crimes ("EOC") and the Rules of Procedure and Evidence ("RPE"). The EOC are designed to elaborate on crimes listed in the *Rome Statute* for the guidance of judges. The RPE articulate the procedures of the ICC with more precision, dealing with such matters as composition and administration of the Court; investigation, trial proceedings, and appeals; penalties, co-operation of states with the Court, and enforcement of judgments; and jurisdiction, admissibility, and applicable law.

The adoption of the EOC and RPE by consensus was a remarkable achievement. This development means two things. With respect to the EOC, it reflects the fact that

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<sup>62</sup> See Resolution F in *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10 (17 July 1998) at 8 [mimeo, hereinafter *Final Act, Resolution F*].

<sup>63</sup> "The Commission shall remain in existence until the *conclusion* of the first meeting of the Assembly of States Parties" (*ibid.* at para. 8).

<sup>64</sup> See e.g. UN GA Res. A/55/155 (19 January 2001) at para. 4.

there is now general agreement on the crimes themselves, which was not necessarily the case at the end of the Diplomatic Conference; indeed, the PrepCom solved some problems left over after Rome, without deviating from the statute. More generally, overall consensus shows that states made extraordinary efforts to reach general agreement on difficult matters, such as the introduction to crimes against humanity and a rule concerning the request for surrender in cases requiring the consent of the sending state under an international agreement, designed to accommodate the United States.<sup>65</sup>

The PrepCom has worked co-operatively so far, much better than the Diplomatic Conference, despite all the difficulties it encountered. This is demonstrated by the progress made on the new instruments taken up at the November-December 2000 and February-March 2001 sessions: the *Relationship Agreement between the Court and the UN*, the *Financial Regulations and Rules*, the *Agreement on the Privileges and Immunities of the Court*, and the *Rules of Procedure for the Assembly of States Parties*.

Underlying this positive situation is the simple fact that the statute is more widely accepted today than at the end of the Rome Conference. In particular, a number of states that abstained in Rome or even voted against the statute have signed, and some of those that abstained have even ratified. They defend the text of the *Rome Statute* as an achievement that belongs to all states and refuse to alter it for any reason.

Two factors explain this change. First, most states now understand the importance of the establishment of the ICC as a tremendous historical achievement and the individual and collective benefits of its creation. Second, the *Rome Statute* and the Court are also better understood, particularly the fact that the Court has been conceived to function as a fair and effective judicial, not political, body. Third, there is no question that the Court will come into existence in the near future. The focus, therefore, has gradually shifted from theoretical discussions about past events to a thorough consideration of the *Rome Statute* and subsidiary instruments, its ratification, and implementation of its provisions.<sup>66</sup>

The *Rome Statute* received considerable support in Rome, thanks to the care that was taken to accommodate and reconcile different positions, though some opposition

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<sup>65</sup> Preparatory Commission for the International Criminal Court, *Rules of Procedure and Evidence*, UN Doc. PCNICC/2000/INF/3/Add.1 (2000), r. 195, online: United Nations <<http://www.un.org/law/icc/statute/rules/rulefra.htm>> (date accessed: 10 March 2001).

<sup>66</sup> This does not mean that the Court is yet universally accepted. In particular, the U.S. remains concerned about the possibility that U.S. "agents of the state", i.e. soldiers and officials, might be brought before the ICC. This is a difficult problem to resolve because a blanket exception of that kind would also give exemption to most offenders. This concern, and the broader concern of possible political use of the Court, are also seen by many as being unfounded because of the principle of complementarity and the many safeguards that have been built into the statute and the supplementary instruments.

remained. Since then, the PrepCom's work has confirmed the judicial, non-political character of the ICC and has developed a series of subsidiary instruments taking account of, again, a wide variety of views. This has further increased support for the Court, including many states that initially had strong reservations. Even though acceptance is not yet universal, this represents considerable progress in two years, and greatly increases the potential effectiveness of the Court, which needs widespread acceptance to be effective.

Second, it is fair to conclude that, even though the vast majority of states consider additional support for the *Rome Statute* an important objective, they do not accept the pursuit of support at any price. This was particularly visible at the June 2000 session of the PrepCom, and subsequently in the debate in the Sixth Committee of the General Assembly on the ICC. States have emphasized time and again the need to preserve the integrity of the *Rome Statute*, and more specifically, the need to ensure that the jurisdictional system is not weakened. It is clear that the question of whether the statute is a success must be considered from both perspectives together, not separately.

### Conclusion: A New Institution for the Twenty-First Century

By the expiration of the deadline of 31 December 2000, the ICC statute had received 139 signatures, far more than the number of positive votes in Rome. Those signatures should be treated seriously. The *Rome Statute* is not a treaty that states sign lightly. States know that becoming a party to the statute normally requires significant changes to their domestic legal system. Signature in itself entails certain obligations<sup>67</sup> and reflects a political commitment to support the Court. It is important to note that the signatures come from all regions of the world and countries representing all legal traditions.

As for ratifications, there are now thirty-six.<sup>68</sup> Concern has been expressed in the past over the relatively slow pace of ratifications. One must keep in mind, however, that before ratifying, most states must ensure that their domestic legislation will enable them to comply with their international obligations under the statute. That in itself is a complex process which often involves amending their constitution, notably in the area of immunities, extradition of nationals, and length of imprisonment. Since many of these processes are taking place simultaneously, there is likely to come a time when large numbers of ratifications occur together. There were only seven ratifi-

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<sup>67</sup> Signature obliges states not to defeat the object and purpose of the treaty. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, art. 18 (entered into force 27 January 1980).

<sup>68</sup> The Netherlands became the thirty-seventh state party to ratify on 17 July 2001. For an updated list of ratifications see online: Coalition for an International Criminal Court <<http://www.iccnw.org>>.

cations at the end of the March 2000 session of the PrepCom, almost two years after the Diplomatic Conference. This number more than tripled in only a few months. There is clearly a strong momentum towards entry into force, and a genuine commitment by states to pursue the process to completion. Today, no one talks of ten or fifteen years before entry into force, as was commonplace immediately after the Diplomatic Conference. The pessimists think of three years, the optimists of the end of 2001.

It is necessary to recognize the positive domestic consequences of the principle of complementarity. The Court is complementary to national judicial systems, meaning that it only takes jurisdiction when states are unwilling or unable to bring transgressors to justice.<sup>69</sup> This is different from the two ad hoc tribunals, which have priority jurisdiction over domestic systems. States that decide to take advantage of complementarity undergo an important process of internal evaluation of laws and policies on prosecuting those who commit genocide, crimes against humanity, and war crimes. This examination often involves policy-makers, officials, legislators, politicians, and members of civil society, all of whom must confront the persistent problem of impunity.<sup>70</sup> Simply put, states do not want to be in a position where the Court could determine, to borrow the terms of the statute, that they are “unwilling or unable genuinely to carry out an investigation or prosecution.”<sup>71</sup> Before the ICC even begins its first investigation, the *Rome Statute* will have had a significant educational and inspirational impact—in addition to spurring the creation of a worldwide network of domestic war crimes law.

Many people evaluate the ICC by discussing whether it has been “weakened” by this or that provision or omission. This kind of comment, while intuitively understandable, reflects a perspective that is historically inaccurate. By definition, the Court could not be “weakened”. The point of departure was not a substantively strong court which regrettably got eroded, but a non-existent court that had to be built out of nothing, against strong resistance and concerns. The only instrument that could serve as a point of reference was the *ILC Draft Statute*, and from that perspective, the *Rome Statute* is unquestionably stronger. In this respect, we should view the *Rome Statute* as an incredible success for diplomacy. It is not often that the end result of multilateral negotiations is much stronger than the original proposal.

In addition, we should view the *Rome Statute* through the lens of international relations. The ICC will never be a perfect court. A perfect court would be a strong

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<sup>69</sup> *Rome Statute*, *supra* note 1, art. 17.

<sup>70</sup> See D. Robinson, “The Rome Statute and its Impact on National Law” in A. Cassese, ed., *International Criminal Law: A Commentary on the Rome Statute for an International Criminal Court* [forthcoming, Oxford University Press].

<sup>71</sup> *Rome Statute*, *supra* note 1, art. 17.

court with universal support. This does not reflect the reality of the world today. We still face a world composed of states dealing with each other bilaterally and multilaterally, which has a corresponding impact on what can realistically be achieved in negotiations. Right or wrong, the balance found in the *Rome Statute* is the direct result of the decision taken to adopt the statute by treaty. That approach had necessary consequences. The interesting aspect is that, despite the drawbacks of treaty negotiation, the end result is a document that received increasing support over time and has a positive influence on the domestic application of international humanitarian law.

In sum, the substantive negotiations in Rome produced what was probably the best balance achievable. Those results have since been strengthened through work at the PrepCom, the signature and ratification process, the development of domestic legislation by states, and more generally, widespread efforts on the part of many, including civil society organizations, to sensitize governments and institutions not only to the Court, but also to the need to replace a pervasive culture of impunity with one of accountability. The results of that more general *démarche* can be seen in many areas, from the case of General Pinochet and the indictment of ex-President Milosevic to the proposed establishment of additional tribunals in Sierra Leone and Cambodia.

The work is not over, and success so far can and should be built upon further in different forms: continuation of positive work at the PrepCom, widespread accessions, strengthening of national legislation as a result of complementarity. Later, there will be a need to demonstrate that the Court functions fairly and effectively, creating both increased acceptance of the institution and a deterrent effect. Later still, hopefully, some of the provisions of the *Rome Statute* can be reinforced through the Review Conference. Still, we can be satisfied with the creation of an institution of truly historic importance, something difficult to have been imagined, let alone achieved, only a few years ago.

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