

## Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law

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# Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law

Zoe Pearson†

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## Introduction

The interaction of nongovernmental organizations (NGOs) with other players in international law is complex. Globalization stories promise much in terms of greater opportunities for emerging “global civil society”

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actors such as NGOs in international law. There remains a lack of agreement about the benefits of this evolving phenomenon despite the growing presence of NGOs at the international level. This article takes the often-polemical discussion of the interactions of NGOs in international law as a starting point. I contend that criticism of the involvement of NGOs in international law is due partly to disagreement over the appropriate role of NGOs in the international arena, and partly to the way in which traditional state-centric ideology continue to narrowly define the involvement of transnational actors. As a result, increased global civil society participation in international law does not fit easily into the structures and processes of traditional theories of international law.

By examining the participation of NGOs in a particular international lawmaking exercise—the multilateral negotiations to establish the International Criminal Court (ICC)—this article explores claims that NGOs influence the formation of international law. The case study of the ICC negotiations gives us some idea of the extent to which NGOs impact the development of international law. It indicates that certain aspects of NGO involvement played a significant role in the ICC negotiations; NGOs established themselves as experts in critical areas and were important sources of information for the state parties to the negotiations. The NGOs coordinated to form a network structure, which was essential to their visibility at the negotiations and was also responsible for the extent of NGOs' interactions with states. Observations of NGO interactions in the ICC negotiations serve to elucidate some of the complexities and subtleties of evolving international lawmaking processes.

However, the ICC negotiations also demonstrate the difficulties NGOs face as a result of traditional assumptions as to their role vis-à-vis states in international law. The insights gained from this case study enable me to conclude that, while traditional state-centric models are still important to inform our understanding of the international system, such models tell only part of the story. I observe that NGO activity can contribute to international lawmaking processes in a number of specific ways. However, this participation remains ad hoc and contingent, and is characterized by many conflicting viewpoints. This case study highlights the ways in which traditional constructions of international law are deeply entrenched and continue to limit the possibility of involving global civil society actors. I argue that the existing structures and processes of international lawmaking are struggling to accommodate the diversity of global civil society actors that are emerging in the international arena and the fluidity that these actors bring to the process.

In exploring how the experience of the ICC negotiations contributes to our understanding of the interactions of NGOs in international law, this article concludes that if we are to move beyond the contestation that characterizes discussions about the role of NGOs in international law, we need to refocus the debate. Greater emphasis should be placed on understanding how NGOs *might* contribute to the development of international law, rather than focusing on what their roles *should* be in an arena traditionally

dominated by states. This refocusing acknowledges the enduring role of the state in international law, but encourages recognition of the value of a diversity of actors in the development of international law. Such refocusing might then allow for the evolution of frameworks that encourage NGOs to reposition themselves both inside and outside international lawmaking, allowing the energies of a diversity of actors to shape and enhance international law.

## I. NGOs in International Law: A Contested Presence

There is little doubt that NGOs are a growing phenomenon in international law and policy development.<sup>1</sup> While this sort of assertion may seem starry-eyed to traditional international lawyers, the longevity of NGOs in the international realm and the increase in the number of NGOs traceable at the international level over the last fifty years speaks for itself.<sup>2</sup> "NGO activities encompass virtually every area of international concern,"<sup>3</sup> and they now work broadly within the international legal and political system.<sup>4</sup> Within the context of international law, groups categorized under the

1. See, e.g., JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 497-99 (2000); HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 940 (2000); John Boli & George M. Thomas, *INGOs and the Organization of World Culture*, in *CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875*, at 13, 22-24 (John Boli & George M. Thomas eds., 1999); Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT'L L.* 183, 184-85 (1997); Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 579, 579-81 (1999); Jackie Smith, Ron Pagnucco & George A. Lopez, *Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s*, 20 *HUM. RTS. Q.* 379, 386 (1998).

2. For example, the 2001-2002 edition of the Yearbook of International Organizations records 6,743 intergovernmental organizations and 47,098 nongovernmental organizations, for a total of well over 50,000 international organizations. 4 *YEARBOOK OF INTERNATIONAL ORGANIZATIONS: GUIDE TO GLOBAL CIVIL SOCIETY NETWORKS* app. 3 (2002). Similarly, the number of NGOs in consultative status with the United Nations Economic and Social Council (ECOSOC) has grown exponentially: from 40 NGOs in 1948, to 1,184 in 1997, to 2,719 in 2005. U.N. ECOSOC, *Number of NGOs in Consultative Status with the Council by Category*, [http://www.un.org/esa/coordination/ngo/slides/ngochart\\_01.pdf](http://www.un.org/esa/coordination/ngo/slides/ngochart_01.pdf) (last visited Apr. 19, 2006); see also Boli & Thomas, *supra* note 1, at 22 ("[B]y 1947 over 90 [NGOs] a year were being founded, a pace that was maintained and even surpassed through the 1960s."); STEINER & ALSTON, *supra* note 1, at 940; Smith et al., *supra* note 1, at 386 ("About one fourth of all the international human rights NGOs . . . were formed prior to 1969, and one half of all the NGOs were formed after 1969."). See generally Anne Bichsel, *NGOs as Agents of Public Accountability and Democratization in Intergovernmental Forums*, in *DEMOCRACY AND THE ENVIRONMENT* 234 (William Lafferty & James Meadowcroft eds., 1996). Data for 2005 indicates that 2,719 organizations have consultative status with ECOSOC, and an additional 400 NGOs have consultative status with the Commission on Sustainable Development (an ECOSOC subsidiary). U.N. ECOSOC, *NGO-Related Frequently Asked Questions*, <http://www.un.org/esa/coordination/ngo/faq.htm> (February 18, 2006).

3. Nowrot, *supra* note 1, at 589-90.

4. See, e.g., Boli & Thomas, *supra* note 1, at 42-43 (analyzing the distribution of NGOs by social sector); Peter Willetts, *From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN*, 6 *GLOBAL GOVERNANCE* 191-92 (2000) (concluding that consultative relationships with NGOs have gradually

umbrella term “NGO” demonstrate a vast range of activities, roles, structures, motivations, geographic locations, and funding sources.<sup>5</sup> Many NGOs are highly visible in international law context: their activities are well-marketed and funded, and their technical expertise has led to recognition of their growing “professionalism.”<sup>6</sup> These NGOs are developing reputations for providing credible, compelling information, enabling them to activate public opinion, and to pressure state and business actors on particular issues using both local citizen mobilization, and informal methods of shaming and opprobrium at the national and international level.<sup>7</sup> While NGOs are not officially recognized as participants in processes of international law norm creation under article 38 of the Statute of the International Court of Justice,<sup>8</sup> NGOs are increasingly able to use their reputations to influence the behavior of states and international organizations through the use of “soft power.”<sup>9</sup>

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shifted U.N. policymaking from a state-centric model to one of “pluralistic global governance”).

5. Charnovitz, *supra* note 1, at 185–86; Leon Gordenker & Thomas G. Weiss, *Pluralizing Global Governance: Analytical Approaches and Dimensions*, in *NGOs, THE UN AND GLOBAL GOVERNANCE* 17, 18–19 (Thomas G. Weiss & Leon Gordenker eds., 1996). It proves difficult to find a generally accepted definition of NGOs, as the term is often used loosely to describe a number of diverse groups with differing characteristics in a variety of circumstances. The diversity of groups classified as NGOs can therefore create ambiguities as to meaning. While a single definition is problematic, it is possible to identify some important characteristics of NGOs that are generally accepted. Broadly, a NGO is an independent, cooperative association of people working for common purposes, which are neither state nor market-oriented. See Willetts, *supra* note 4, at 82. NGOs involved in international law and policy share additional characteristics specific to that legal environment. See, e.g., Consultative Relationship Between the United Nations and Non-Governmental Organizations, ECOSOC Res. 1996/31, ¶¶ 1–3, U.N. Doc. E/RES/1996/31 (July 25, 1996) (requiring all NGOs in consultative relationships with the U.N. ECOSOC to adopt aims and purposes consistent with the U.N. Charter and the work of the United Nations, particularly the ECOSOC); see also Christine Chinkin, *Global Summits: Democratizing International Law-Making?*, 7 *PUB. L. REV.* 208, 209–10 (1996) (describing shared goals for international policy change); Nowrot, *supra* note 1, at 589–90 (noting shared activities, concerns, and a collective interest in furthering NGO participation); Martha L. Schweitz, *NGO Participation in International Governance: The Question of Legitimacy*, 89 *AM. SOC'Y INT'L L. PROC.* 415, 418 (1995) (describing common mechanisms of participation in policy-making).

6. See STEINER & ALSTON, *supra* note 1, at 940.

7. See *id.*; see generally Lesley Wexler, *The International Deployment of Shame, Second-Best Responses and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 *ARIZ. J. INT'L & COMP. L.* 561, 565 (2003) (stating that NGOs used “norm entrepreneurship” and shaming campaigns to establish a norm banning landmine use, which was ultimately incorporated in the Landmine Ban Treaty).

8. Statute of International Court of Justice art. 38, June 26, 1945, 59 *Stat.* 1031, 33 *U.N.T.S.* 993.

9. See Nowrot, *supra* note 1, at 590 (“The activities of NGOs in contemporary international law can be divided into two different kinds of fields: their participation in the international decisionmaking process concerning the codification and progressive development of international law and their activities in the enforcement of international law and the promotion of the public interest.”). See also Andrea Bianchi, *Globalization of Human Rights: The Role of Non-State Actors*, in *GLOBAL LAW WITHOUT A STATE* 179, 191 (Gunther Teubner ed., 1997); Bichsel, *supra* note 2, at 248; Peter Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 *CARDOZO L. REV.* 957, 958–62 (1996) (indicating that NGOs obtain voluntary corporate

NGOs formally engage with the United Nations through article 71 of the U.N. Charter, which gives NGOs consultative status with the U.N. Economic and Social Council (ECOSOC).<sup>10</sup> This consultation is designed to enable ECOSOC to secure expert advice or information from NGOs with special competence in the subject area or to ensure that NGOs (whether international, regional, subregional, or national bodies) that represent important areas of public opinion and interests on the subject are able to express their views.<sup>11</sup> These provisions, in addition to those that particular preparatory bodies for multilateral conferences put in place, build on the reputations of NGOs and acknowledge the breadth of their expertise and their capacity to contribute to international law processes. They appear to be arrangements that can facilitate the participation of a diverse group of NGOs in international law and the work of U.N. agencies.

However, despite the promise of the ECOSOC consultative status and strong support from the U.N. for productive and effective relationships with NGOs, the presence of NGOs in international law structures and processes is controversial. The NGO presence at the international level is not a new phenomenon, but the extent and clear visibility of this presence means that it is increasingly the subject of discussion within international fora, with different views emerging as to the extent and desirability of the participation of these actors in the international arena.<sup>12</sup> Some commenta-

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compliance with global "codes of conduct" by combining the threat of consumer boycott with the ability to police corporations and respond rapidly to noncompliance).

10. U.N. Charter art. 71. There are currently 2,719 non-governmental organizations in consultative status with ECOSOC. See *supra* note 2 and accompanying text. For a detailed discussion of the role of NGOs in the U.N. system, see Peter Willetts, *NGOs and the Structure of the UN system*, in "THE CONSCIENCE OF THE WORLD": THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM app. a, at 277-89 (Peter Willetts ed., 1996) [hereinafter THE CONSCIENCE OF THE WORLD]. Building upon article 71, ECOSOC resolution 1996/31 recognizes the "diversity of the non-governmental organizations at national, regional and international levels, acknowledg[es] the breadth of [NGO's] expertise and the capacity of [NGOs] to support work of the United Nations," promotes coherence among U.N. specialized agencies regarding NGO involvement, and gives guidance as to the consultative relationship between NGOs and the U.N. through ECOSOC. Consultative Relationship Between the United Nations and non-governmental organizations, ECOSOC Res. 1996/31, pmb., U.N. Doc. E/Res/1996/31 (July 25, 1996). The ECOSOC requirements state that NGOs must be of recognized standing in their area of competence, or be of a representative nature. *Id.* ¶ 9. NGOs must also have established headquarters, have democratic processes, mechanisms of accountability and transparency, and source their funds from members or affiliation. *Id.* ¶¶ 10-13. In reality, these characteristics do not necessarily fit every NGO and the boundaries can be blurred. Gordenker and Weiss, *supra* note 5, at 20-21. These criteria are open to review by ECOSOC in recognition of the "evolving relationship" between the U.N. and NGOs, in order "to facilitate . . . the contributions of [NGO]s to the work of the [U.N.]" *Id.* ¶ 17. The Resolution is clear on the nature of consultative arrangements with NGOs. *Id.* ¶¶ 18-20. NGOs are not accorded the right to vote. *Id.* ¶ 18. Moreover, the Resolution stipulates that the extent of the consultative relationship should not be such so as to transform ECOSOC "from a body for coordination of policy and action, as contemplated in the Charter, into a general forum for discussion." *Id.* ¶ 19.

11. ECOSOC Res. 1996/31, *supra* note 10, pmb., ¶ 5.

12. See, e.g., The Secretary-General, *Report of the Secretary-General, Strengthening of the United Nations: an Agenda for Further Change*, ¶¶ 134-41, delivered to the General Assembly, U.N. Doc. A/57/387 (Sept. 9, 2002) (acknowledging the benefits of increased

tors welcome greater participation by a broad global civil society in international legal processes;<sup>13</sup> they present a very rosy picture of the nature and extent of NGO influence on international law, though often with little empirical evidence to substantiate their claims. One example is the idea of a “partnership”—suggesting power-sharing, cooperative, and consultative arrangements between NGOs and states or international organizations—which some see as “the central element in the new template envisioned for international law-making.”<sup>14</sup> Others contest the legitimacy and significance of this involvement and express unease about the involvement of NGOs at the international level. These commentators question, for example, the representative nature of NGOs and their legitimacy as participants in a democratic U.N. system.<sup>15</sup>

The controversy over NGO participation at the international level renders their position unclear, and the continuing presence of NGOs feels at once fragile and defiant. The reason for the controversy is, in part, a consequence of our assumptions about which actors are legitimate participants in the structures and processes of international law. Traditional interna-

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NGO participation at the U.N., as well as the need for guidelines and accreditation procedures). An example is the establishment of the Secretary-General’s Panel of Eminent Persons on Civil Society and U.N. Relationships, set up in 2003 “to review past and current practices and recommend improvements for the future in order to make the interaction between civil society and the United Nations more meaningful.” *Id.* ¶ 141. See generally United Nations, The United Nations and Civil Society, <http://www.un.org/issues/civilsociety/sitemap.asp> (last visited February 18, 2006) (summarizing the U.N.’s continuing relationship with global civil society).

13. See, e.g., Isabelle Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT’L L. 211, 227-34 (1991) (arguing that nonstate actors should participate equally with states in developing customary international law, subject to qualifications modeled on the ECOSOC requirements).

14. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations, and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 109 (2000). See also ALAN FOWLER, *STRIKING A BALANCE: A GUIDE TO ENHANCING THE EFFECTIVENESS OF NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL DEVELOPMENT* (1997) (illustrating the increasing significance of effective partnerships between governments and NGOs, even at the level of international development and aid); Marina Ottaway, *Corporatism Goes Global: International Organizations, Nongovernmental Organization Networks, and Transnational Business*, 7 GLOBAL GOVERNANCE 265, 272-73 (2001) (recognizing increased NGO participation in transnational business, via lobbying, confrontation, and—most recently—formal partnerships with decision makers); Willetts, *supra* note 4, at 208 (concluding that the shift from “consultative” to “partnership” in language describing interactions between NGOs and the U.N. reflects the emergence of a multi-actor U.N. system).

15. See Anderson, *supra* note 14, at 118-19 (arguing that NGOs are pressure groups; their value to the international system as legitimate “partners,” or as representatives of civil society bringing democratic legitimacy to international law, is largely overestimated); Jeffrey Hartwick, *Non-Governmental Organisations at United Nations-sponsored World Conferences: a Framework for Participation Reform*, 26 LOY. L.A. INT’L & COMP. L. REV. 217, 217 (2003) (arguing that NGOs advocate radical agendas which are detrimental to the development of international law). Hartwick further argues that “lessening the rightful primacy of states,” *id.* at 217, to give recognition “to legally unaccountable entities [such as NGOs] would create a sense of anarchy . . . .” *Id.* at 221. But see Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT’L L. 197 (2002) (arguing that NGOs are held accountable by unique mechanisms that traditional, state-based conceptions simply fail to recognize).

tional law circumscribes the involvement of state and transnational actors, privileging state control over the structures, processes, and content of international law, and the actors in the international arena. The presence of NGOs does not fit easily into the resulting state-centric structures and processes of international law, and their participation is inevitably prescribed, limited, and under the control of states. This is reflected in the contingency of ECOSOC consultative status;<sup>16</sup> the ad hoc arrangements for involvement of NGOs in various U.N. agencies and bodies; and the variation in opportunities NGOs encounter in these fora.<sup>17</sup> A tension therefore exists between the aspirations of NGOs—participation in the governance of the international system—and the formal structures of international law that privilege state-focused mechanisms of governance. As a result, NGOs and the broader global civil society occupy an uneasy place in the international system, limiting opportunities for change and preserving the status quo. Our understanding of what NGOs might contribute to international law is observed through a state-centric lens, which constructs for us the parameters of how and what NGOs (as “non-state” actors) may contribute, creating “blind spots” in our imagination.<sup>18</sup>

These blind spots also contribute to a lack of clarity in the roles NGOs play in developing international law. Because of the way in which our traditional assumptions construct the roles of NGOs, much of their actual potential is unclear and obscured. These observations suggest that further empirical analysis is necessary to more completely understand the actual extent of NGO involvement and influence in international law. It is clear that global civil society actors have a presence, and are able to participate in international law and in global governance in a myriad of ways and roles. However, the ways in which NGOs participate in international law are growing more quickly than the structures in which they seek to act are changing. Further analysis of their present roles would add a useful

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16. The ECOSOC provisions have themselves been criticized for being susceptible to state hostility and politicization towards NGOs, emphasising the contingency of NGO access opportunities at the U.N. See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 89 & n.176 (2000) (noting that the U.N. refused to accredit certain women's NGOs for the Fourth World Conference on Women based on state hostility towards their mandates or countries of origin, and stripped the International Lesbian and Gay Association of ECOSOC consultative status in response to pressure from the United States); Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 116-17 (1996) (demonstrating that politics influence the ECOSOC accreditation process itself: for example, “[s]tates who have been criticized by human rights NGOs continue to attempt to block accreditation”).

17. There are differing opinions about both the desirability and level of NGO participation among U.N. agencies. Compare U.N. Development Program (UNDP), UNDP and Civil Society Organizations, <http://www.undp.org/cso/> (last visited Feb. 28, 2006), with U.N. Conference on Trade and Development (UNCTAD), *UNCTAD and Civil Society*, <http://www.unctad.org/Templates/StartPage.asp?intItemID=3455&lang=1> (last visited Jan. 27, 2006). While there is significant information available regarding the interaction of NGO partners with UNDP, UNCTAD appears from the information available to have limited contact with NGOs.

18. David Kennedy, *Background Noise? The Underlying Politics of Global Governance*, HARV. INT'L REV., Summer 1999, at 52 (1999).



dimension to our understanding of the potential of NGOs, including diverse ways of interacting in international structures to influence states, and working with U.N. agencies. Descriptions of these evolving relationships would be useful to evaluate the accuracy of the “partnership” concept as applied to NGOs, states, and the U.N. . When we have a greater understanding of some of the realities and subtleties of NGO participation in international law, further effort can usefully go into exploring how this new geography of international law may be acknowledged and accommodated in the traditional map of the international legal system. How international law can be further developed by reliance on the energies of global civil society actors remains open to debate. As Schweitz argues:

We need to find some intelligent way to deal with these challenges, to discover principles upon which to found claims of legitimacy or illegitimacy. This is not the story of good NGOs confronting evil governments . . . . This is the story of humanity assuming responsibility for its own future, through increasingly representative forms of political organization and through a fully engaged civil society. From the perspective of world order, it is about finding the proper level (local through supranational) at which to make different sorts of decisions, and who (among government, business and the so-called “third sector”) should make them. It is the story of promoting the unity of humankind while at the same time cherishing its diversity.<sup>19</sup>

## II. NGO Involvement in the ICC Negotiations

### A. Significance of the ICC Negotiations

A useful way to move forward is to explore the realities of a contemporary example of NGO participation in international lawmaking processes. The adoption and entry into force of the Rome Statute of the International Criminal Court is a much-applauded development in international law.<sup>20</sup> The International Criminal Court (ICC) negotiations exemplify the involvement of a range of global civil society actors in an international conference

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19. Schweitz, *supra* note 5, at 417.

20. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF/183/9 (*entered into force* July 1, 2002) [hereinafter Rome Statute]. The statute was adopted and opened for signature by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998. United Nations, *Multilateral Treaties Deposited with the Secretary-General: Rome Statute of the International Criminal Court*, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty11.asp> (last visited Feb. 18, 2006). As of July 5, 2005, there were ninety-nine state parties to the Rome Statute and 139 Signatories. *Id.* The Rules of Procedure and Evidence (RPE) and the Elements of Crimes (EC) texts assist in the application of the Rome Statute. See Preparatory Commission for the ICC, *Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (June 30, 2002) and Preparatory Commission for the ICC, *Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (June 30, 2002). Both documents are available at Documents of the Report of the Preparatory Commission, <http://www.un.org/law/icc/prepcomm/report/prepreportdocs.htm> (last visited Apr. 19, 2006).

or lawmaking process.<sup>21</sup> NGO participation in the ICC negotiations has been offered as an example of the crucial impact of NGOs on international policy-making,<sup>22</sup> and regarded by some as heralding a “new diplomacy.”<sup>23</sup> The ICC negotiation process provides a useful case study to analyze the impact of NGOs on international lawmaking processes and assess possible implications for the future.

At the outset, it is important to understand a little of the background in which the negotiations were situated, and the significance of the ICC for international law. This provides context for consideration of the broader negotiating process and the role of NGOs as part of that process. The mobilization for the establishment of a permanent ICC evolved from international horror at the atrocities committed during the twentieth century.<sup>24</sup>

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21. While NGOs are not the only transnational actors comprising “global civil society,” they are one of the most numerous and prominent, particularly in the international realm. For this reason, this article focuses its analysis on NGOs as global civil society actors in international law. NGOs have influenced the content of a number of international agreements. See, e.g., Anderson, *supra* note 14 (Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (“Ottawa Convention”)) (1997); Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137 (1990) (Convention on the Rights of the Child (1989)); Helena Cook, *Amnesty International at the United Nations*, in *THE CONSCIENCE OF THE WORLD*, *supra* note 10, at 181, 189–93 (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)); Kenneth R. Rutherford *The Evolving Arms Control Agenda: Implication of the Role of NGOs in Banning Antipersonnel Landmines*, 53 WORLD POL. 74 (2000). NGOs also contributed to the 1972 United Nations Conference on the Human Environment, Sally Morphet, *NGOs and the Environment*, in *THE CONSCIENCE OF THE WORLD*, *supra* note 10, at 116, 120–28, the 1992 U.N. Conference on Environment and Development, *id.* at 137–40, and the 1989 defeat of negotiations to establish the Convention on the Regulation of Antarctic Mineral Resource Activities. J.M. Spectar, *Saving the Ice Princess: NGOs, Antarctica & International Law in the New Millennium*, 23 SUFFOLK TRANSNAT’L L. REV. 57 (1999).

22. M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 26 n.135 (1998) [hereinafter BASSIOUNI, *STATUTE OF THE ICC*]; LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 1–7 (2002).

23. William R. Pace, *The Relationship Between the International Criminal Court and Non-Governmental Organizations*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT* 189, 205–08 (Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking eds., 1999) [hereinafter Pace]; William R. Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 705, 733–34 (Roy S. Lee ed., 2001) [hereinafter Pace & Schense, *Coalition for the ICC*].

24. The establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) was a crucial catalyst in the movement to establish a permanent international criminal court. BASSIOUNI, *STATUTE OF THE ICC*, *supra* note 22, at 19 (“[The experience with the ICTY, ICTR] and other factors combined to create a new international climate that compelled governments to support the establishment of a permanent international criminal court.”); Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 1, 6 (Roy S. Lee ed., 1999). See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 573 (1999) [hereinafter BASSIOUNI, *CRIMES AGAINST HUMANITY*] (“[T]he venter of international criminal law has thickened since 1945 through the ICTY, The ICTR and the Statute of the ICC . . .”); Jonathon Charney, Comment, *Progress in International*

Academics, practitioners, and NGOs alike regarded a permanent international criminal court as important to the promotion of a culture of accountability, enforcement, and punishment.<sup>25</sup> The contemporary demand for an international criminal court drew on longstanding debates and focused on the need for an independent, impartial, and fair international institution, with effective dispute resolution and enforcement mechanisms to deal with violations of human rights.<sup>26</sup> Commentators wrote optimistically that a permanent international criminal court would lead to the development of international criminal law and its progressive codification, and promote peace and stability within the international community through notions of accountability and justice.<sup>27</sup>

However, despite the supportive context in which negotiations were undertaken, the negotiations to establish the ICC were complex and often contentious. The Rome Statute reflects the political compromises that were required to accommodate conflicting state requirements.<sup>28</sup> Various academic commentaries highlighted concerns about the heavy reliance necessarily placed on the willingness of states to support the ICC, and reminded us not to take the success of the ICC as a foregone conclusion, "as if the creation of the institution is the end in itself."<sup>29</sup> Others, however, have had a more optimistic point of view, focusing on the implications for the evolution of particular areas of international law,<sup>30</sup> and developments in ideas

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*Criminal Law?*, 93 AM. J. INT'L L. 452, 453-54 (1999) (noting that the Rome Statute built upon prior international tribunals to create an "unprecedented . . . court of global reach"); Mary Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 329 (2000). Penrose further suggests that the ICC should also be assessed in light of the shortcomings of "predecessor judicial bodies" such as the ICTR and ICTY. *Id.* at 352.

25. For an abbreviated account of many volumes of past commentary, see BASSIOUNI, *STATUTE OF THE ICC*, *supra* note 22, at 3-4 & n.12. Some commentators regarded the establishment of a permanent international criminal court as more desirable than the continued establishment of ad hoc tribunals, which have been criticised for arbitrary and selective prosecution, delay, and failure to build "institutional memory and competence." *See, e.g.*, SADAT, *supra* note 22, at 31.

26. BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 24, at 576.

27. *Id.* at 576-77; Lee, *supra* note 24, at 1; Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 710-11 (1996).

28. States advocated for an ICC of limited jurisdiction on a number of grounds. *See, e.g.*, Bert Swart & Göran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at 91, 91-92 (inconsistent with notions of state sovereignty); Charney, *supra* note 24, at 455 (noting that states prefer to retain control over highly political matters); Benedict Kingsbury, Foreword, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 686 (1999) (arguing that the ICC's design is inconsistent with the constitutional approach to lawmaking).

29. Timothy L.H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELB. U. L. REV. 635, 667 (1999). *But see* Philippe Kirsch, *Introduction* to REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 23, at 1, 8 (noting that compromise, while imperfect, was necessary given that "[t]he strength of the court will ultimately depend on both the provisions of the Statute and the support of States for this new institution").

30. *See, e.g.*, *id.* at 646-47 (promoting individual responsibility for human rights violations); WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT*

of the fundamental values and morality of a broad international community.<sup>31</sup> The ICC is also significant as a means to develop international legal structures and institutions to maintain international peace and security and to protect human rights.

Many commentators view the establishment of the ICC as a defining moment in international law.<sup>32</sup> In addition to the potential that this new international institution has for the promotion and enforcement of international values and law, a variety of international actors and commentators regard the ICC negotiations themselves as significant. Some state and global civil society actors believe that the ICC negotiation processes herald a new form of “diplomacy” at the international level.<sup>33</sup> This is partly a result of the emergence of large and small coalitions of states, which worked together as a significant negotiating force, and partly due to the presence and participation of NGOs in the negotiation processes. Although the influence of NGOs in the ICC negotiations has been lauded,<sup>34</sup> a closer examination of their participation will contribute to a more accurate awareness of the usefulness of this as a model for NGO interaction in international law and of the broader impact of NGOs on

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20 (2001) (noting that the ICC is an extension of the human rights agenda embodied in article 1 of the U.N. Charter); Charney, *supra* note 24, at 454 (promoting international human rights and criminal law).

31. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 24, at 555 (“[The ICC] asserts that impunity for the perpetrators of ‘genocide,’ ‘crimes against humanity’ and ‘war crimes’ is no longer tolerated. . . . It affirms that justice is an integral part of peace . . . .”) (quoting M. Cherif Bassiouni, Chairman, Drafting Committee, Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court (July 17, 1998)); STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 302 (1997) (noting that a permanent international tribunal is essential to individual accountability for human rights violations); Pace, *supra* note 23, at 194 (enumerating the achievements of the Rome Statute); Lee, *supra* note 24, at 27 (“[The Rome Statute] has . . . enormously enriched the content of international law.”).

32. See, e.g., SCHABAS, *supra* note 30, at 20 (“The International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations.”).

33. Pace, *supra* note 23, at 205-08; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 733-34; see also BASSIOUNI, *STATUTE OF THE ICC*, *supra* note 22, at 26; SADAT, *supra* note 22, at 45.

34. See, e.g., Human Rights Watch, *Special Issues and Campaigns: The Rome Diplomatic Conference*, [http://www.hrw.org/worldreport99/special/icc.html#rome\\_diplomatic](http://www.hrw.org/worldreport99/special/icc.html#rome_diplomatic).

The Nongovernmental Coalition for the International Criminal Court (CICC) played an extraordinary role, coordinating the 200 plus nongovernmental organizations that attended the conference. . . . This positive role was noted and reinforced by numerous speakers—from Kofi Annan to foreign ministers. The press likened NGO influence to that of a major government and, in general, the NGOs were seen as an important contributing force in the negotiations. The extent of “partnering” with governments and the degree of consultation with the U.N. Secretariat provided a model for future multilateral negotiations. In the critical moments, the major international human rights organizations met almost as one, enabling the human rights community to analyze developments and maximize impact with key delegations.

*Id.*

international lawmaking processes. The ICC negotiations are illustrative of the complexities of global civil society actors' participation in international law in an era of globalization. In this article, I draw on interviews and document analysis to shed light on some of these complexities. A detailed examination of some of the substantive and structural strategies NGOs used to engage in the ICC negotiation processes provides insight into the effectiveness—or otherwise—of NGOs in successfully influencing these negotiations. What factors were important for NGO participation? Are existing U.N. structures adequate to accommodate the diversity and complexity shown by NGO participation? Do the structures and processes of international law facilitate or limit this participation? The concluding analysis of NGO interaction in the ICC negotiations provides some useful illustrations of the possibilities for future global civil society involvement in international lawmaking.

#### B. The Participation of NGOs

Due to the complexities of the ICC negotiations, in particular the length of the process and the diversity and number of people and issues involved, it is very difficult to identify with any degree of certainty the particular areas of the Rome Statute on which NGOs had an influence. From the perspective of those whom I interviewed, it is clear that there were issues on which representatives from both NGOs and states felt that the NGO influence was crucial to the outcome of particular statute provisions. This influence seems to have been both direct—for example, when states followed the advice of NGOs to advocate for particular wordings in statutory provisions—and more indirect, such as providing information and advice to states lobbying for particular positions through position papers or seeking informal contact with delegates.<sup>35</sup>

However, while the impressions and perceptions of those closely involved in the negotiations are instructive for assessing the dynamics of interactions at the negotiations, these interactions are for the most part unquantifiable. In any situation where the subtleties and complexities of human dynamics are crucial to the outcome, as they are in the case of the ICC negotiations, such evidence is neither available nor quantifiable, nor is it necessarily particularly enlightening. The personalities and politics of international law and international negotiations cannot be ignored. Attempting to identify exactly which approach of any NGO had an influence in a particular way on any particular issue with any state delegate, and how this then played out in the broader context of the multilateral negotiations, is largely a fruitless exercise. As such, this information is also unlikely to elucidate broader trends. Lastly, the number of state delegates committed to outcomes similar to those voiced by NGOs presents further difficulties in identifying NGO influence.

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35. For an analysis of NGO influence on particular provisions, see Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, in *GLOBAL CIVIL SOCIETY 2002*, at 137 (Marlies Glasius, Mary Kaldor & Helmut Anheier eds., 2002).

The importance of analysis of NGO interactions in the ICC negotiations and international law appears not to lie in identifying with precision the extent of their influence on any particular issue, but in observing the complexities and dynamics of the process and of the NGO involvement and influence. The observations below reveal particular structural, substantive, and strategic contributions of NGOs that assist in creating a picture of the extent and intricacies of the NGO participation and influence in the ICC negotiations. At a broader level, the observations highlight one of the significant complexities underlying these negotiations: the way in which NGOs' participation was defined by existing international law structures, processes, and assumptions.

### C. Structural Alliances

#### 1. Network Structures

A conspicuous feature of the involvement of NGOs was the way in which they organized themselves together into a network structure that provided collegiality, coordination, and a degree of unity among the majority of the NGOs represented at the ICC negotiations.<sup>36</sup> This structure, the Coalition for an International Criminal Court (CICC), is crucial to an analysis of NGOs' participation in the ICC negotiations. The CICC became an important focal point for NGO activity and successfully mobilized and coordinated different NGO groups throughout the negotiations.<sup>37</sup>

The establishment and evolution of the CICC throughout the ICC negotiations was the product of a deliberate and strategic approach by the NGOs involved. The small number of NGO representatives involved in the early stages of the ICC process in 1995 appreciated the potential value of a coordinated approach.<sup>38</sup> These NGOs recognized that a combined effort by a coalition of NGOs with diverse interests and capacities was more likely to be able to maintain relationships with a large group of states and to contribute their expertise to all parts of the complex negotiations.<sup>39</sup> This approach was also important to promote awareness of the ICC at national and regional levels. The number of NGOs involved in the CICC grew exponentially during the negotiations, numbering over 800 NGO members at the beginning of the Rome Conference in July 1998, to

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36. See Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 705 n.2 (estimating that more than ninety-five percent of NGOs that participated in the ICC negotiations were members of the CICC).

37. Pace, *supra* note 23, at 201; William Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, in *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 23, at 391, 392-94 [hereinafter Pace & Thieroff].

38. In the initial stages of the ICC process, involvement was limited to a small number of interested NGOs and experts, who independently monitored discussions in the U.N. General Assembly Sixth Committee. Pace and Schense note that many of these NGOs had followed the debate and promoted the idea of an ICC for some time. William Pace & Jennifer Schense, *The Role of NGOs*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 110-11 (Antonio Cassese et al. eds., 2002) [hereinafter Pace & Schense, *The Role of NGOs*].

39. *Id.*

between 1,000 and 2,000 in July 2002 when the Statute entered into force.<sup>40</sup> While the number of NGOs involved was not large in comparison with other international negotiations,<sup>41</sup> the NGOs at the ICC negotiations formed a highly visible presence, leading to comments that the presence of NGOs at the Rome Conference was “an unprecedented level of participation by civil society in a law-making conference.”<sup>42</sup>

As an umbrella organization, the CICC Secretariat was primarily responsible for coordinating a broad-based network of members (NGOs, international experts, and other civil society groups) and facilitating interactions with states and liaison with the U.N., including managing the U.N. accreditation process.<sup>43</sup> Prior to the Rome Conference, the involvement of NGOs in the ICC negotiations was largely informal because of the limited

40. *Id.* at 138 (tracing the growth in CICC member numbers prior to the Rome Conference). “Of the 236 NGOs accredited to participate in the Rome Conference, all but a few were members of the CICC.” Pace & Thieroff, *supra* note 37, at 392. It is difficult to gauge the exact number of CICC members, largely because many NGO members of the CICC are themselves coalitions of multiple NGOs that are not reflected on the CICC lists: for example, the Women’s Caucus for Gender Justice (WCGJ) was a caucus made up of individuals and NGOs. Interview with Jennifer Schense, Legal Adviser, Coalition for the ICC, in New York, NY (July 9, 2001) [hereinafter Schense Interview]. The Coalition continued to grow after the Rome Conference, even though the process became increasingly technical and somewhat less “exciting” because of the focus on the technicalities of the establishment of the Court rather than the definitions of crimes. Even after the adoption of the Rome Statute, the increasing number of NGOs involved in the CICC engaged in education and awareness-raising activities worldwide, and campaigned to secure ratification and national implementation of the Rome Statute. *Id.*; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 705.

41. Interview with William Pace, Convenor, Coalition for the ICC, in New York, NY (July 9, 2001) [hereinafter Pace Interview]. For a discussion of NGO presence at U.N. conferences, see Ann Marie Clark, Elisabeth J. Friedman & Kathryn Hochstetler, *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51 *WORLD POL.* 1, 8-9 (1998). At the 1992 Rio conference, for example, 1,400 NGOs were registered and 18,000 attended the parallel NGO conference; at the 1995 Fourth World Conference on Women in Beijing, approximately 3,000 NGOs were accredited, and many more attended the parallel NGO forum. *Id.*; see also Dianne Otto, *Holding Up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women*, 6 *AUSTRALIAN FEMINIST L.J.* 7, 7 (1996) (reporting that more than 2,900 NGOs were accredited to attend the Fourth World Conference on Women); World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, Johannesburg, S. Afr., *Consolidated List of Non-Governmental Organizations and Other Major Groups Accredited to the World Summit on Sustainable Development at Prepcoms II, III and IV* (2002), [http://www.johannesburgsummit.org/html/major\\_groups/forms\\_accredit/1508\\_consolidated\\_list\\_ngos.pdf](http://www.johannesburgsummit.org/html/major_groups/forms_accredit/1508_consolidated_list_ngos.pdf) (stating that 737 NGOs were accredited to attend the 2002 World Summit on Sustainable Development in Johannesburg, in addition to the 400 already accredited by ECOSOC).

42. The U.N. Secretary-General, *Preface to the Statute of the International Criminal Court*, *supra* note 22, at ix, ix (1998).

43. At least ninety percent of the work of the CICC Secretariat was concerned with organization and provision of services to CICC members, the U.N. and states, rather than “issue-orientated advocacy.” See Pace & Schense, *The Role of NGOs*, *supra* note 38, at 125; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 711. The broad and general mandate of the World Federalist Movement (WFM), which initially managed the CICC Secretariat, enabled the Secretariat to assume a facilitative role coordinating the NGOs and addressing procedural issues. *Id.*

access of NGOs to the General Assembly.<sup>44</sup> Part of the CICC's initial strategy to secure NGO involvement in the ICC negotiations was to work with sympathetic governments at the negotiations to arrange opportunities for consultation.<sup>45</sup> While U.N. General Assembly Resolution 50/46 provided that contributions by other "relevant organizations" (including NGOs) were to be taken into account in the work of the Preparatory Committee,<sup>46</sup> the right of NGOs to attend the Preparatory Committee sessions was initially challenged by some states, who argued that NGOs had no right of access to the General Assembly or subsidiary bodies, including the Preparatory Committees.<sup>47</sup> In a development that established a productive relationship between the CICC and the U.N. Secretariat, NGOs were given the right to observe open plenary and formal sessions, to distribute materials to government delegations with analysis and recommendations on aspects of the draft text, and to meet with delegates.<sup>48</sup>

The U.N. formally invited NGOs to participate in the Rome Conference through accreditation and permitted them to attend open plenary and formal meetings, receive copies of the official documents, make their materials available to delegates, and address the opening and closing sessions on a limited basis.<sup>49</sup> The CICC assisted the U.N. Secretariat in the

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44. Interview with Felicity Wong, N.Z. Delegation, Wellington (Mar. 12, 2001) [hereinafter Wong Interview]; see also Helen Durham, *Increasing the Effectiveness of the International Criminal Court: The Contribution of Non-State Actors 19-21* (June 30, 1999) (unpublished S.J.D. Thesis, University of Melbourne), available at <http://eprints.unimelb.edu.au/archive/00001392/01/Durham.pdf>.

45. See Pace & Schense, *The Role of NGOs*, *supra* note 38, at 114 n.18; see also Wong Interview, *supra* note 44.

46. G.A. Res. 50/46, ¶ 2, U.N. Doc. A/RES/50/46 (Dec. 11, 1995); Christopher Keith Hall, *The First Two Sessions on the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 AM. J. INT'L L. 177, 177-78 (1997) [hereinafter Hall 1997]. The Preparatory Committee was created in late 1995, and met over 1996-1998 to prepare a "widely acceptable consolidated text of a convention for an international criminal court" for consideration at a diplomatic conference. See Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 22-23 (1999) (quoting G.A. Res. 50/46, *supra*, ¶ 2).

47. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 21.

48. NGO access to the Preparatory Committee negotiations varied. Hall notes that the First Session consisted almost entirely of plenary meetings, which were open to NGO access. Hall 1997, *supra* note 46, at 178. NGOs had similarly open access to the plenary and working groups of the Second and Fifth Sessions. *Id.* In addition, Hall notes that the working groups of the Third and Fourth Sessions were declared open to NGO observation, Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124, 125 (1998) [hereinafter Hall 1998a], while much of the work of the Sixth Session was in closed working groups to which NGOs did not have access. Christopher Keith Hall, *The Sixth Session on the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 548, 549 (1998) [hereinafter Hall 1998b]. See also Lee, *supra* note 24, at 3-4 (reviewing Preparatory Committee activity from 1995-1998); Arsanjani, *supra* note 46, at 22-24 (providing a general overview of the Rome Statute negotiating process).

49. G.A. Res. 52/160, ¶ 9, U.N. Doc. A/RES/52/160 (Dec. 15, 1997). Paragraph 9 reads:

[The General Assembly] [f]urther requests the Secretary-General to invite non-governmental organizations, accredited by the Preparatory Committee with due



accreditation process for CICC members and in the establishment and maintenance of an organizational system to maximize NGO attendance in the limited seating arrangements at the conference in Rome.<sup>50</sup> A number of interviewees remarked that NGOs were realistic in what they sought in terms of their involvement in the process. For example, NGOs did not seek speaking rights or access to informal meetings, and this was important in keeping governments satisfied with levels of NGO presence in the proceedings. While their inability to monitor informal meetings was a source of frustration for some NGOs, the ability of NGOs to liaise with states before, during, and after informal meetings assisted this monitoring process and enabled NGOs to maintain an effective presence. The close relationship between the CICC and U.N. Secretariat, and the growing trust and confidence of officials, "preserved and expanded NGO access to PrepCom sessions."<sup>51</sup>

The facilitative role of the CICC Secretariat meant that the CICC itself did not take positions on substantive issues, allowing CICC members the freedom to follow their own mandates, encouraging but not insisting on consensus and ensuring that priorities of individual NGOs were able to be respected and facilitated within the structure.<sup>52</sup> Despite the varied positions from which CICC members lobbied, they shared the common goal of an "effective, just and independent ICC."<sup>53</sup> The overall network structure

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regard to the provisions of section VII of Economic and Social Council Resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee, on the understanding that participation means attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate, in accordance with the rules of procedure to be adopted by the Conference.

*Id.*

50. There was a separate accreditation process for NGOs that were not CICC members. The CICC was asked to prepare a list of NGOs that had been working with the CICC prior to Rome. The CICC worked to ensure maximum NGO attendance in this way. See The Secretary-General, *Note by the Secretary-General on Non-Governmental Organizations Accredited to Participate in the Conference*, U.N. Doc. A/CONF.183/INF/3 (June 5, 1998) (listing the NGOs accredited to participate in the Conference); see also Pace, *supra* note 23, at 209; Pace & Schense, *The Role of NGOs*, *supra* note 38, at 125; *Important Notice Regarding NGO Participation at the ICC Treaty Conference*, ICC MONITOR (NGO Coalition for an International Criminal Court, New York, N.Y.), Nov. 1997, at 3, available at <http://www.iccnw.org/publications/monitor/07/monitor07.199802.pdf> (explaining the accreditation process).

51. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 710.

52. *Id.* at 710-11. See also Pace & Schense, *The Role of NGOs*, *supra* note 38, at 111.

53. *About the NGO Coalition for an ICC*, ICC UPDATE (NGO Coalition for an International Criminal Court, New York, N.Y.), Jan. 10, 2001, at 2, available at <http://www.iccnw.org/publications/update/iccupdate16a.special.pdf> (explaining the accreditation process). See generally Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 707 (explaining that NGOs "within the context of a coalition," must further the goals of their individual organizations in a way that promotes "the overall development of the institution."); Arsanjani, *supra* note 46, at 23 (discussing the collaboration between "like-minded states"); Philippe Kirsch & John T. Holmes, *The Rome Conference on an Interna-*

of the CICC accommodated the variety of NGO positions yet provided strong, cohesive coordination and a collegial approach to work based on commonalities where possible, thus maximizing NGO participation despite differences among NGOs.<sup>54</sup> Pace concludes that it was the “synergistic cooperation” of the CICC members that enabled their “outstanding” contribution.<sup>55</sup>

## 2. Diversity

The structures established by the CICC for NGO coordination encouraged and facilitated the participation of a diversity of NGOs in the ICC negotiations.<sup>56</sup> There was diversity in terms of political interests. Some were broad-based NGOs with wide-ranging expertise and interests,<sup>57</sup> and some were concerned with more specific issues.<sup>58</sup> NGOs were present from around the world, assisted by regional coalitions of the CICC that were established in Africa, Asia, Europe, Latin America and the Caribbean, the Middle East, and North America.<sup>59</sup> This diversity of NGOs was also reflected in the disparities of their funding and resources.<sup>60</sup> One way in which the CICC was able to contribute to the diversity of NGO voices present in the ICC negotiations was by providing funding to enable a number

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*tional Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999) (discussing the shared and divergent aims of states and NGOs during the ICC negotiations).

54. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 43.

55. Pace, *supra* note 23, at 205.

56. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 711-13 (describing the role of the CICC Secretariat in identifying and encouraging synergies between NGOs).

57. These include NGOs concerned broadly with ideas of justice and human rights protection, such as Amnesty International (AI), Human Rights Watch (HRW), Lawyers Committee for Human Rights (LCHR) (now Human Rights First) and No Peace Without Justice (NPWJ). SADAT, *supra* note 22, at 6.

58. For example, REDRESS was largely focused on the issue of reparations to victims. Other groups had a religious focus, for example the Baha'i International Community. The WCGJ is both broad based, but also had a specific gender focus. See McCormack & Robertson, *supra* note 29, at 646-66 (describing the roles of specific NGOs in broadening the ICC's subject matter jurisdiction).

59. The national and regional networks of the CICC give some indication of the representation of NGOs from around the world. These networks give some indication of where NGO activity was most strong. For example, there are strong national CICC networks (represented by NGO contact groups) in Africa (Burundi, Cameroon, Ghana, Kenya, Senegal, South Africa, Togo); Europe (Austria, Belgium, Denmark, France, Germany, the Netherlands, Portugal, Russia, Spain, the United Kingdom); North America (Canada and the United States of America); and Latin America and the Caribbean (Argentina, Brazil, Chile, Colombia, Mexico, Peru, Venezuela). By contrast, national networks in the Middle East (Egypt) and Asia (Bangladesh, China and Hong Kong, Japan, Thailand) are less numerous and therefore presumably enjoy less support from the NGO community in those areas. See Coalition for the ICC, Country Information, <http://www.iccnw.org/countryinfo.html> (last visited Feb. 18, 2006).

60. Interview with Australian Delegate, in New York, NY (July 17, 2001) [hereinafter Australian Delegate Interview]. This delegate emphasized the differences between large groups, often from the United States, and smaller NGOs, often run partly by volunteers, in capacity to operate and resources. With regard to certain issues, it appears that the sheer numbers of NGOs present lobbying on a particular issue may have been influential, for example, religious groups lobbying on “gender” issues such as the forced pregnancy issue.

of NGOs in developing countries to attend the conference negotiations.<sup>61</sup>

The size of NGOs present also differed markedly, with a presence from both large international NGOs and smaller national NGOs.<sup>62</sup> Much has been written about the activities of large NGOs with established pedigrees in human rights research and lobbying in international law.<sup>63</sup> NGOs such as Amnesty International (AI), International Commission of Jurists (ICJ), Lawyers Committee for Human Rights (LCHR), and Human Rights Watch (HRW) drew on their extensive experience and resources to play important roles in the ICC negotiations for a variety of reasons and on a number of levels.<sup>64</sup> These ranged from the support and cooperation of the large NGOs in forming the Steering Committee of the CICC to the autonomous lobbying and information-provision activities of each of them. The experience of the ICC further demonstrates that these organizations are powerful actors in international lawmaking fora and have developed a variety of different ways to facilitate opportunities for NGO participation in international lawmaking structures and processes. As well as utilizing the strength and presence of these larger NGOs, the CICC network itself became a powerful actor, a crucial coordinating network structure with a highly visible presence within which diverse NGOs could work together.

The experiences of smaller, less prominent, and less well-resourced NGOs in the CICC are also illustrative of the usefulness of the network structures. The International Criminal Defence Attorneys' Association (ICDAA) and REDRESS are examples of smaller, western-based NGOs with areas of particular interest in the substance of the ICC negotiations.<sup>65</sup> Both these groups engaged in the negotiation processes from the early stages, recognizing that their expertise could be valuable additions to the

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61. Schense Interview, *supra* note 40; Interview with Indira Rosenthal, Australian Delegation, New York, NY (July 11, 2001) [hereinafter Rosenthal Interview].

62. For example, compare international NGO groups such as AI (which had delegates from AI groups worldwide represented) with smaller national NGOs such as Australian Lawyers for Human Rights (one delegate at the Rome Conference).

63. See, e.g., WILLIAM KOREY, *NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE"* (1998); HOWARD B. TOLLEY, JR., *THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES FOR HUMAN RIGHTS* (1994); Widney Brown, *Human Rights Watch: An Overview*, in *NGOs AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 72 (Claude E. Welch, Jr. ed., 2001); Ann Marie Clark, "A Calendar of Abuses": *Amnesty International's Campaign on Guatemala*, in *NGOs AND HUMAN RIGHTS supra*, at 55; Morton E. Winston, *Assessing the Effectiveness of International Human Rights NGOs: Amnesty International*, in *NGOs AND HUMAN RIGHTS supra*, at 25.

64. The International Committee of the Red Cross (ICRC) was another civil society organization that played an important role in the ICC negotiations. See Durham, *supra* note 44, for an examination of this influence.

65. ICDAA is an NGO based in Montréal, Canada, with a particular objective to ensure a professional defense for an individual accused of war crimes and crimes against humanity. ICDAA, <http://www.aiad-icdaa.org/index.jsp> (last visited Feb. 18, 2006). ICDAA claims to be a truly international organization, with members from many different countries. For a list of members, see ICDAA, *ICDAA ANNUAL REPORT 1998-1999*, available at <http://www.hri.ca/partners/aiad-icdaa/reports/E-Anual99.htm>. REDRESS is an NGO based in London, UK, with a particular focus on seeking redress for victims of torture. REDRESS, <http://www.redress.org> (last visited Feb. 18, 2006).

substance of negotiation.<sup>66</sup> As well as working autonomously in their own areas of expertise,<sup>67</sup> they were able to engage with the broader CICC structures, such as working groups,<sup>68</sup> maintain web sites for dissemination of information and building dialogue,<sup>69</sup> and organize and attend meetings and conferences as part of broader negotiating and awareness-raising processes.<sup>70</sup> Both groups found that being a smaller, less well-known

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66. The ICDAAs involvement in the ICC evolved from recognition that in order to ensure the credibility of the international justice system, a balanced legal system was needed with professional defense services for the accused—concerns that were largely neglected in initial ICC negotiations. See Elise Groulx, *Call for an “International Criminal Defence Attorney’s Association,”* ICC MONITOR, May 1997, available at <http://www.iccnw.org/documents/monitor04.199705.pdf>. REDRESS became involved in the negotiations for a permanent ICC in August 1996, as it was concerned that the ILC Draft Statute did not adequately take into account the needs of torture victims: only one article addressed the need to afford protection to victims and witnesses and one article indirectly provided for the compensation of victims of crimes. STUART MASLEN, *PROMOTING THE RIGHT TO REPARATION FOR SURVIVORS OF TORTURE: WHAT ROLE FOR A PERMANENT INTERNATIONAL CRIMINAL COURT?* (1997) (REDRESS report); see also Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT*, *supra* note 23, at 77, 82–83 (1999). Van Boven notes that the ILC was reluctant to include broad provisions for victims in the Draft Statute because of several factors: the potentially high numbers of victims, perceived difficulties with mingling criminal procedures with civil claims for damages, and a perception that issues of reparation would be best dealt with by national jurisdictions.

67. The ICDAAs authored a number of position papers on a range of issues designed to highlight defense issues in the ICC negotiations. ICDAAs Documents Presented During the U.N. Preparatory Conference on ICC Rules of Procedure and Evidence, <http://www.hri.ca/partners/aiad-icdaa/icc/> (last visited Feb. 18, 2006). REDRESS authored a number of position papers, which gave further recommendations regarding wording of draft texts and stressed the need for an emphasis on victims’ rights, arguing specifically for a reparation regime in the ICC. See, e.g., REDRESS, *ENSURING THE RIGHTS OF VICTIMS IN THE ICC* (2001), available at <http://www.redress.org/publications/EnsuringRightsICC.pdf>; REDRESS, *THE ICC TRUST FUND FOR VICTIMS: RESOURCE MATERIALS ON OTHER TRUST FUNDS AND COMPENSATION MECHANISMS* (2002), available at [http://www.redress.org/publications/icc\\_trustFund.pdf](http://www.redress.org/publications/icc_trustFund.pdf); see also Interview with Fiona McKay, Adviser, REDRESS, London, U.K. (Aug. 1, 2001) [hereinafter McKay Interview]; Maslen, *supra* note 66; Van Boven, *supra* note 66, at 83.

68. REDRESS was responsible for leading the Victims’ Rights Working Group (VRWG) within the CICC. VRWG, <http://www.vrwg.org/> [last visited Feb. 18, 2006]. The VRWG was seen as an important forum for enabling small NGOs with specific expertise or interests to be involved in the discussion, and for enabling victims’ issues to be more strongly emphasised to delegations. The VRWG did not develop common positions; instead, NGOs used the forum to strategize and coordinate issues for meetings with states. Interview with Carla Ferstman, Adviser, REDRESS, London, U.K. (July 31, 2001) [hereinafter Ferstman Interview]; see also Silvia A. Fernández de Gurmendi, *Definition of Victims and General Principle*, in *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 23, at 427, 428 (observing that NGOs argued that “victims” should be defined in the broadest possible way from the beginning of negotiations).

69. See, e.g., ICDAAs, <http://www.aiad-icdaa.org/index.jsp> (last visited Feb. 18, 2006); REDRESS, <http://www.redress.org> (last visited Feb. 18, 2006).

70. For example, the ICDAAs organized several conferences to consider defense issues, with the sponsorship of the governments of The Netherlands and France. See ICDAAs ANNUAL REPORT 1999, *supra* note 65. Conferences were held in November 1999 and November 2000 in The Hague, and in June 2001 in Paris. Other activities included supporting counsel at the ICTR and ICTY, building relationships with professional associations and NGOs, and the broader dissemination of information regarding defense issues. See generally the ICDAAs website, <http://www.hri.ca/partners/aiad->

organization created difficulty at the start of the negotiations, but increased interactions and engagement led to greater visibility and credibility, as well as increasingly stronger relationships both with states and other NGOs.<sup>71</sup> In particular, the experience of smaller NGOs reveals that collaboration can exist among NGOs: both ICDA and REDRESS reported that relationships with other NGOs were largely supportive, despite what may be seen as clear differences in mandate between some organizations.<sup>72</sup> Both NGOs felt that their contributions were reflected in the eventual outcomes, indicating that they felt that their engagement was successful.<sup>73</sup>

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icdaa/agendae.shtml (last visited Feb. 18, 2006), for an overview of ICDA's activities. REDRESS was active in assisting to organize a seminar in April 1999 in Paris for NGOs, state delegates, and experts to consider victims' access to the ICC, aimed at developing further the limited provisions of the draft RPE relating to victims. The report of the seminar was in the form of draft rules, and was forwarded by the French delegation to the following Preparatory Commission for consideration. International Seminar on Victim's Access to the ICC, Paris, Fr., Apr. 27-29, 1999, *Report on the International Seminar on Victims' Access to the International Criminal Court*, U.N. Doc. PCNICC/1999/WGRPE/INF/2 (July 6, 1999); see also Lee, *supra* note 24, at xiv-xv; Fiona McKay, *Paris Seminar on Victims' Access to the ICC*, ICC MONITOR, Aug. 1999, at 5, available at <http://www.iccnw.org/publications/monitor/12/monitor12.199908.pdf>; Fernández de Gurmendi, *supra* note 68, at 429-30.

71. The ICDA saw the ICC negotiations as a productive arena for those interested in defense issues to become involved in and to work towards change in this area at a broader level. Telephone interview with Élise Groulx, President, ICDA (May 29, 2001) [hereinafter Groulx Interview]; see also ICDA ANNUAL REPORT 1999, *supra* note 65 (highlighting the benefits of networking and establishing the ICDA at high profile international negotiations).

72. For example, most of the larger, more prominent NGOs worked from a victim's perspective, which is often regarded as inconsistent with issues of defense. The ICDA was the main NGO concerned with fair trial procedure and defense organization and was associated with the CICC. See *id.* More broad-based NGOs were also concerned with defense issues as part of a more general agenda. See, for example, Human Rights First, *The International Criminal Court*, [http://www.humanrightsfirst.org/international\\_justice/icc/icc.htm](http://www.humanrightsfirst.org/international_justice/icc/icc.htm) for papers and press releases (last visited Feb. 18, 2006); AI, *AI Documents on ICC*, <http://web.amnesty.org/pages/icc-docs-eng> (last visited Feb. 18, 2006) (regarding the right to a fair trial in the ICC, including rights of the defense); Ferstman Interview, *supra* note 68; McKay Interview, *supra* note 67.

73. The ICDA ANNUAL REPORT 1999, *supra* note 65, sets out the ICDA's achievements in relation to the two main issues it considered critical to a fair trial: the right to cross-examine witnesses and the need to the need to safeguard the independence of defense lawyers and the rights of the defense. Groulx Interview, *supra* note 71. ICDA noted that they had the support of France, Canada, Germany, and the Netherlands on this issue and worked closely with them. Commentators such as Pace and Schense recognize that the ICDA was instrumental in creating greater awareness of defense issues, which ultimately led to a more balanced and fair set of rules for defendants. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 732. The Rome Statute is generally thought to embody strong provisions in support of victims' and witnesses' rights. Lee, *supra* note 24, at xiv, comments: "This new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice . . . . In all, the area of victim protection and participation has been greatly expanded and developed." For general commentary on the provisions for victims, see SCHABAS, *supra* note 30, at 146-55; Van Boven, *supra* note 66, at 77-89; and particularly comments by Fernández de Gurmendi et al., in the chapter *Victims and Witnesses*, in *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 24, at 427-91 (2001). One commentator and state delegate in the negotiations comments: "The Rome Statute, in an historic step forward, makes progress from the mere exercise

The experiences of these two smaller NGOs at the negotiations highlight that there are commonalities experienced by all NGOs working within international law structures (though these differ in degrees), and the value of a broader network structure in which NGOs can participate to the extent and in ways that are useful to them to do so. Such experiences also starkly highlight the diversity of NGOs, and illustrate how a broad and strategically cohesive network structure can accommodate and encourage such diversity in order to make an enriching contribution to international law-making exercises.

NGO and state representatives alike were aware of the importance of the presence of a diversity of NGOs, particularly in terms of geographical representation, in order to ensure broad-based global support for the ICC, and to promote the recognition that the issues in the ICC negotiations were of worldwide relevance, rather than solely concerning “western” issues and values.<sup>74</sup> The presence of a diversity of NGOs from around the world was also useful for broader NGO communication with delegates from non-English speaking countries.<sup>75</sup> NGOs were able to assist delegations to participate more fully in the negotiations.<sup>76</sup> This broad-based NGO interaction also enabled the CICC to gain insights into the views of a broad range of delegations, useful in order to “gain a more nuanced view” of the proceedings.<sup>77</sup> The CICC structures were therefore important for “leveling the playing field” and ensuring that all NGOs had opportunities to participate in and contribute to the broader NGO voice in some way.

It is important to emphasize the diversity among the NGOs present at the ICC negotiations to avoid the danger of homogenizing all NGOs under the umbrella of the CICC. While this diversity was valuable to NGO participation in many ways, the fact that there were different positions among NGOs meant that the interactions among NGOs, and between NGOs and states, were more complicated than the unified picture that is often portrayed of the CICC. The diversity of CICC members and the autonomy of their positions and agendas did inevitably cause some tensions among NGOs in the CICC due to differences in viewpoints on issues.<sup>78</sup> However,

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of retributive justice to a new dimension of making reparations and allowing victims to participate in all phases of the proceedings.” Fernández de Gurmendi, *supra* note 68, at 427; see also Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 INT’L LAW. 7 (2000). REDRESS representatives were generally pleased with the outcome, and felt that REDRESS had a significant role; however, they stressed that it was important to acknowledge the influence of other NGOs that were involved in victims’ issues, particularly through provision of information and assistance to states, such as the WCGJ, HRW, and AI. McKay Interview, *supra* note 67. In addition, state delegations such as France and members of the LMG were supportive of victims’ issues throughout the negotiations. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 729–31.

74. Schense Interview, *supra* note 40.

75. BASSIOUNI, STATUTE OF THE ICC, *supra* note 22, at 25–26.

76. *Id.* at 26.

77. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 122.

78. For example, the WCGJ had different positions on provisions relating to the controversial “forced pregnancy” issue compared with those NGOs with religious motivations. Another issue where differences of opinion arose between NGOs included

these divisions did not cause the collapse of the Coalition—most NGOs reported little tension between themselves and other NGOs that took different positions on issues, commenting that the atmosphere was cooperative and collegial on the whole and that differences were largely respected.<sup>79</sup> These differences serve to highlight the diversity of the NGOs involved, and the importance of attempting to present a balanced and accurate picture of NGO interaction. It is also important to acknowledge power dynamics that exist within this diversity.

Other structural features within the CICC that facilitated commonalities and cooperation amongst members were the establishment of a number of caucuses and working groups. Caucuses were formed around issues of gender, peace, faith, protection of children, and victims' rights, and were designed to provide strategic fora in which groups of NGOs with particular interests could work on issues and coordinate lobbying and liaison between the CICC and states.<sup>80</sup> In addition, the CICC established twelve NGO teams at the Rome Conference to monitor the formal Working Groups of states.<sup>81</sup> The teams followed debates in Working Groups, liased with other NGO teams and states, developed team reports that were disseminated to other NGOs and interested delegations, and reported to CICC daily meetings.<sup>82</sup> This networking involved a monitoring and sharing process that allowed all CICC members to keep informed of the broader developments of the negotiations, ensuring that different parts of the draft statute were developing in complementary rather than contradictory

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provisions for evidence in rape cases. The WCGJ was one NGO that was a part of the CICC, but remained autonomous and campaigned on specific issues only. See generally WIGJ, <http://www.iccwomen.org/> (last visited Apr. 19, 2006) (WCGJ is now the WIGJ). While no NGOs were asked to leave the CICC, some eventually chose to do so because of differences in interests and positions regarding support for the Rome Statute and the ICC. Schense Interview, *supra* note 40; see also Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 705 n.2 (“A handful of extreme nationalist, right-to-life, and anti-feminist organizations, less than .5% of the Coalition, expressed opposition to or serious concerns about the Rome Statute after the conference, and have not been a part of the Coalition since.”); Pace Interview, *supra* note 41; Groulx Interview, *supra* note 71; Telephone interview with delegate, WCGJ (June 14, 2001).

79. Interview with Richard Dicker, HRW, New York, N.Y. (July 11, 2001) [hereinafter Dicker Interview]; Telephone interview with Ting Dolgopol, WCGJ, (July 27, 2001) [hereinafter Dolgopol Interview]; Ferstman interview, *supra* note 68; McKay Interview, *supra* note 67. See also Pace, *supra* note 23, at 208-09; Pace & Schense, *supra* note 38, at 705.

80. See Pace & Schense, *The Role of NGOs*, *supra* note 38, at 117; Pace & Thieroff, *supra* note 37, at 392; see also CICC, *About the Coalition*, <http://www.iccnw.org/?mod=coalition> (last visited Apr. 19, 2006); Ferstman Interview, *supra* note 68; McKay Interview, *supra* note 67; Arsanjani, *supra* note 46, at 23; McCormack & Robertson, *supra* note 29, at 647 n.55.

81. These teams focused on issues including definitions, state consent, the trigger mechanism and admissibility of cases, general principles, composition of the court, investigations, the trial, appeal and review, penalties, cooperation and national security, enforcement, financing and the Assembly of States Parties, and the Statute's final clauses. See Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 712.

82. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 126-27. The authors also note that the Bureau of the Committee of the Whole benefited from NGO materials, especially those that summarize state positions on issues.

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### 3. *Broader Networks*

As well as coordinating diverse NGO participation in the formal negotiation processes, another important aspect of the organization of the CICC was the establishment of networks of civil society groups outside formal negotiating processes, enabling the CICC to work in a coordinated way at regional levels throughout the world. A key aspect of the CICC efforts was aimed at promoting awareness of the ICC negotiations to a broader, worldwide audience to increase the awareness of the ICC and international issues at the national level, and to strengthen national and regional cooperation and enforcement of the ICC and international legal principles.<sup>84</sup> The work of the NGOs has been described as “critical” in generating the necessary, widespread support for the establishment of a strong and independent permanent ICC.<sup>85</sup>

### 4. *Relationships with States*

The working relationships that developed among participants were another feature of the ICC process that was crucial to the outcome. The relationships between NGO and state representatives were as diverse as the various NGOs and states that were present at the ICC negotiations. It is important to recognize the complex human and social dynamics that are involved in such a process. These human interactions are impossible to quantify, susceptible as they are to the vagaries of perception. However, there are some insights that may be drawn from the process. Positive interactions between states and NGOs seem to have been assisted by a number of factors.

### 5. *CICC Coordination*

In addition to coordinating the NGOs, the CICC played an organizing role and was a focal point for interaction between NGOs and states. An essential part of the work of the CICC in this regard involved assisting in

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83. Telephone interview with Kate Eastman, Australian Lawyers for Human Rights (ALHR) (June 20, 2001) [hereinafter Eastman Interview]. The network approach to monitoring negotiations continued in the Preparatory Commission negotiations, with NGO teams focusing on monitoring the progress of particular issues as considered by state Working Groups. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 712; Pace & Schense, *The Role of NGOs*, *supra* note 38, at 126-27.

84. See Pace Interview, *supra* note 41; Lee, *supra* note 24, at 14; Pace & Thieroff, *supra* note 37, at 392; Coalition for the International Criminal Court, <http://www.iccnw.org/Introduction.html> (last visited Feb. 18, 2006).

85. Ved Nanda, *The Establishment of a Permanent International Criminal Court: Challenges Ahead*, 20 HUM. RTS. Q. 413, 427-28 (1998). See Silvia Fernández, *Preface to ICC MONITOR*, Nov. 1998, at 2, available at <http://www.iccnw.org/documents/monitor10.199811.pdf> (“I am convinced that the successful adoption of the Rome Statute is largely due to the work of the Coalition and the partnership that you managed to develop between NGO’s and governments during the four years of our work. The fluid dialogue between delegations and representatives of civil society was indeed essential to identify goals and preoccupations and to design the best strategy to achieve them.”).



breaking down stereotypes about NGOs. The CICC sought to challenge such stereotypes in the international arena from the beginning, seeking to move beyond the image of NGOs' involvement as consisting solely of protest and "sound bite advocacy" and to present NGOs rather as knowledgeable, credible actors.<sup>86</sup> The CICC Secretariat facilitated contact between NGOs and states by arranging meetings on various ICC issues, ranging from large formal meetings to smaller informal discussions.<sup>87</sup> Durham notes that the sensitivity of the CICC to the format of these talks was crucial to their success,<sup>88</sup> recognizing that not all states were equally receptive to NGO participation, and not all states had experience with extensive NGO interaction and participation in these fora. Therefore, it was crucial to target the forum and discussions in different ways so that interaction took place within the comfort levels of states, in order to maximize the receptivity of states towards the presence and positions of NGOs.<sup>89</sup> Many of the participants considered that the CICC and NGO involvement evolved to meet the circumstances of the ICC negotiations as well.

The positive working relationship that developed between the "Like-Minded Group" of states (LMG) and the CICC was critical to the evolution and work of the CICC.<sup>90</sup> Largely working towards the similar objective of a strong ICC, these two groups were natural allies. The acceptance of the CICC by the LMG states created an environment in which positive interactions between states and NGOs could be further developed and the CICC could work in an advisory role to the LMG.<sup>91</sup> The CICC, in addition to working in a consultative role, also helped to push the LMG to strengthen its positions and work for greater cohesiveness and coordination between states.<sup>92</sup> Members from the CICC and LMG groups worked closely with each other at Preparatory Committee sessions, conferring with each other in informal meetings on strategic and substantive issues.<sup>93</sup> This relationship was important at key strategic moments in the negotiations,<sup>94</sup> and has been described as "constructive interaction."<sup>95</sup> The LMG and CICC continued to work together after the Rome Conference, both in the formal ICC processes and in avenues and fora outside this, such as organizing conferences, technical assistance, and operational programs for implementation.<sup>96</sup>

Another important facet of NGO and state interactions was the direct assistance that NGOs provided to state delegations through provision of

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86. Schense Interview, *supra* note 40.

87. See generally Durham, *supra* note 44, at ch. 3.

88. *Id.*

89. *Id.*

90. SADAT, *supra* note 22, at 6-7.

91. Schense Interview, *supra* note 40.

92. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 119.

93. *Id.* at 119 n.36 (giving the example of regular informal NGO/LMG lunch meetings).

94. Dicker Interview, *supra* note 79.

95. Interview with Richard Rowe, Australian Delegation and Chair of LMG, in Canberra, Austl. (May 19, 2001).

96. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 140-41.

representatives to serve on smaller state delegations. Provision of this direct assistance enabled smaller delegations to attend more of the negotiations enabling them to participate more actively in the processes. The important role of NGOs in information provision, both monitoring the progress of negotiations and also regarding substantive aspects of the Rome Statute, meant that all delegations had the opportunity of being well-informed. This leveled the playing field for states somewhat.

## 6. *Individuals*

One of the principal factors in establishing and maintaining effective NGO-state relationships was the personality of individuals involved. The ICC negotiations involved a wide range of committed and knowledgeable individuals representing both NGOs and states, who brought their own experience, energy, and enthusiasm to the negotiations.<sup>97</sup> Pace emphasizes the role of individuals:

The Rome Statute does not serve as a testament to the power and political will of a single state or even a handful of influential states. Rather the opposite is true: the contributors to the creation of the ICC are almost innumerable. From the renewed call for the Court, following World War II, to the present day campaign to ratify and implement the Rome Statute, literally thousands of individuals have brought their own personal and professional skills to this effort.<sup>98</sup>

The length of the ICC negotiations and the intensity of the process meant that individuals invariably developed close working relationships over the course of several years.<sup>99</sup> Interviewees highlighted that, in the early stages of the ICC process, there was less of a clear delineation of people into categories of NGO or state representatives, but rather a sense of committed individuals working together towards similar goals regardless of their affili-

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97. There appears to have been a wealth of expertise on the part of individuals involved, from NGOs with experience in issues and at international negotiations, to technical experts from ministries of justice and defense representing states worldwide. A number of participants particularly stressed the involvement of technical experts on state delegations rather than political appointees. This is thought to be a factor in the success of the momentum of the ICC process, particularly in the beginning, when many assumed that the process would either fail or be lengthy. Many states and NGOs seemed not to take the process seriously at first, so sent people that may have been more unused to the politics of international negotiations, or who were junior members of delegations who were new to the process or experienced members about to retire. Many NGO interviewees saw these people as therefore more willing and able to cooperate on the issues, less locked into sovereignty concerns and more open to NGO involvement. Schense Interview, *supra* note 40; Pace Interview, *supra* note 41; Wong Interview, *supra* note 44; Pace, *supra* note 23 (noting generally the important roles that a number of individuals (including NGO, state, and U.N. representatives) played in ICC negotiations).

98. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 106.

99. Telephone interview with Helen Brady, Australian Delegation (June 21, 2001) [hereinafter Brady Interview]; Rosenthal Interview, *supra* note 61. Representatives from the larger NGOs who were present from the beginning became particularly well known as did leaders and long-serving delegates of states. William Pace, convener of the CICC, was identified as being particularly crucial to the cohesiveness of the CICC, and to the relationship of the CICC to states, particularly the LMG. *Id.*

ations. While NGOs' involvement became more clearly defined by the formal accreditation process, and relationships between states and NGOs became more formalized, a number of interviewees described the relationships as friendly and as deepening over time. A number of those interviewed felt that the personal rapport established between NGO and state representatives was fundamental to positive NGO and state interactions, facilitating communication and negotiation.

### 7. *Uneasy Relationships Between States and NGOs*

While many NGOs may have had close relationships with states during the ICC negotiations, it would be unwise to draw immediate generalizations from this. Not all NGOs have close, cooperative interactions with all states. For example, while the larger, more experienced NGOs may use existing contacts to build relationships with state delegations, NGOs that were smaller or new to the international negotiating process may have found this much more difficult and therefore had less success in interactions with delegates.<sup>100</sup> To some extent the forum of the CICC may have assisted these NGOs to gain a footing in the process.<sup>101</sup> The extent of state and NGO contact is also a result of NGOs deliberately targeting states seen as either more powerful, and therefore, important to influence, or as more receptive to NGO interaction and more sympathetic to NGO views. NGOs often did not spend as much time interacting with states that were obviously hostile to their presence or positions, instead focusing their energies on working to strengthen and support the positions of more sympathetic states. By and large, NGO representatives felt that most states were approachable and had constructive relationships with NGOs.<sup>102</sup>

However, even those states that were generally receptive to NGOs presence occasionally felt that NGO presence was inappropriate. This is reflected in the structures of the negotiating process, which meant that NGO presence was restricted to plenary meetings or open working groups, with NGOs excluded from informal meetings. The idea of a forum in which states could negotiate without having the fear of NGO exposure was seen by some as part of the delicate political process and necessary in order to facilitate compromises to secure broader agreement.<sup>103</sup> States' willingness to engage with NGOs was also, to some extent, issue-dependent. For example, NGOs thought that while there were issues in which their involvement and expertise was welcomed, such as victims' reparation, there were some issues they were deliberately kept out of because these were regarded as being more political.<sup>104</sup> In addition, states became more

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100. Dolgolpol Interview, *supra* note 79.

101. Eastman Interview, *supra* note 83.

102. McKay Interview, *supra* note 67.

103. Interview with Helen Duffy, HRW, London, Eng. (Aug. 1, 2001) [hereinafter Duffy Interview].

104. *Id.* The issue of weapons and the issue of jurisdiction have been identified as issues where an NGO presence was largely absent, and where the consideration of these issues in the Rome Statute was less prominent. However, one participant noted that often these issues were so politically charged that a strong NGO presence may not have

reluctant to acknowledge NGO presence when NGOs were seen to act in inappropriate, irresponsible, or disruptive ways. For example, representatives from the Argentinean NGO group Asociación Madres de Plaza de Mayo were thrown out of a Plenary meeting at the Rome Conference for disruptive behavior.<sup>105</sup> A number of interviewees observed that the negotiations in the Preparatory Commission after the Rome Conference became increasingly hostile towards NGO involvement, with apparently deliberate use of informal meetings seemingly designed to limit the participation of NGOs. These boundaries regarding the extent and appropriateness of NGO involvement limit the possibilities of NGO interaction and often reinforce stereotypes of NGOs.

NGOs that I interviewed were on the whole realistic and cautious about the extent of NGO influence on the ICC negotiations, and anxious not to overestimate or overstate this. Most explicitly recognized the importance of these negotiations being primarily a state-based process for the ultimate success of the Court. It is worth noting that the extent of NGO influence on the ICC negotiations is often susceptible to exaggeration by states that are opposed to NGO involvement. These states exaggerate the NGO influence in international fora in order to foster the impression that there was some sort of “democratic deficit” happening as a result of NGO presence. Exaggerating the influence of NGOs in the negotiating process and underplaying the extent of state control may be used by states to bolster the argument that NGOs should be kept out these fora.<sup>106</sup>

## 8. *Towards Strategic Partnership*

Many of the interviewees referred to the idea of partnership in describing the relationship between NGOs and state delegations during the ICC negotiations. The informal partnership between the CICC and the LMG members in particular became a powerful force, and the NGOs and the LMG were able to align themselves to take issues forward.<sup>107</sup> Pace and Schense comment on the “new approach to international diplomacy” that the “partnership” shown in processes of the ICC negotiations may suggest.<sup>108</sup> In particular, they identify the coordination among and between the states, civil society, and international organizations present in the negotiations as evidence of the potential of this new approach for international diplomacy.<sup>109</sup> They comment:

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made a great deal of difference. It is worth considering why NGOs' presence may be limited in particular areas, whether it is the result of choices made by NGOs with limited resources, or whether it is a result of certain areas of international law being less open to NGO participation.

105. The representatives had unfurled a banner during the speech of the state representative from Argentina, protesting against the Argentinean government. See *Madres Thrown Out After Disrupting Argentina Speech*, TERRAVIVA, June 18, 1998, available at <http://www.ips.org/icc/tv1806.htm>.

106. Duffy Interview, *supra* note 103.

107. Pace Interview, *supra* note 41.

108. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 706.

109. *Id.*

[T]he depth and extent of cooperation between these actors on the ICC—at the PrepCom and around the world—and the magnitude of the goals which this partnership has set for itself and achieved, establishes the ICC process as a vanguard approach to international diplomacy and the development of international laws and institutions . . . . [J]udging from the interest in this new diplomacy among governments and civil society members alike, it is likely to serve increasingly as the model for future joint initiatives.<sup>110</sup>

However, it is important not to overstate the informal partnership that emerged during the ICC negotiations. The NGOs interviewed qualified this idea of partnership, calling it an “uneasy” or “strategic” partnership, indicating that NGOs and states did not work successfully on every issue on every occasion.<sup>111</sup> One interviewee stressed that partnerships can easily break down, citing the perceived increasing hostility of states towards NGOs in the Preparatory Commission as an example of this. Limitations on formal provisions for NGO involvement in the negotiations also indicate that this partnership was not equal. While NGOs were involved from the beginning of the ICC negotiations, much of the extent of their eventual involvement was due to the tenacity of the CICC and the personalities of individuals from both NGOs and states in arguing for legitimation of the informal participation. “Strategic” partnership is the best description of this phenomenon, with both states and NGOs making strategic use of each other when necessary.<sup>112</sup> CICC members recognize that such partnerships are not always easy, due to differences between states and NGOs in terms of organization, interests, objectives, methods of work, and political pressures.<sup>113</sup>

#### D. The Limitations of Traditional Boundaries

At a broader level, there are interesting observations to be made regarding NGOs and the “boundaries” of traditional international lawmaking structures and processes. The experience of the ICC illustrated the importance of NGO engagement both inside and outside of these structures. The way in which the CICC NGOs participated within the negotiation structures and processes showed sophisticated engagement, despite the limitations of these structures. The professionalism of the CICC was important for creating good relationships with the U.N. Secretariat and the coordination by the CICC of the U.N. facilitation process strengthened the extent of NGO participation under traditional U.N. accreditation guidelines.<sup>114</sup> While these structures were not without their frustrations for the NGOs, this engagement showed a strong awareness of the process and serious engagement within the structures.<sup>115</sup> The structures and funding

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110. *Id.*

111. Dicker Interview, *supra* note 79.

112. For example, NGOs were often used as a backup for states, to assist with political pressure on states that were seen to be obstructive or unsympathetic. In these cases, the NGO presence was often crucial for the continued momentum of the negotiations.

113. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 706-07.

114. Pace & Thieroff, *supra* note 37, at 392-93.

115. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 707.

arrangements that the CICC were able to utilize enabled a diversity of NGOs to access the negotiations, largely held in expensive Northern cities (New York, Geneva), raising, as with many international law and governance fora, issues of equity of access—not just for NGOs.<sup>116</sup> The diversity, numbers, and organization of NGOs within the CICC structure gave NGOs crucial strength in working within the state-based structures and using these to their advantage, enabling intensive monitoring of the state working group structures for example.

Another important aspect of the NGO involvement in the CICC negotiations was the way in which they were able to work outside the traditional, structured limitations of U.N. accreditation to international conferences. NGOs recognized that coordinated regional coalitions working in national contexts would be important for the overall success of the negotiations and of the functioning of the ICC. This engagement also demonstrated a sophisticated understanding of the politics of international law, and the importance of involving a broader audience and utilizing national pressure points. The work of the NGOs outside of the formal negotiating processes enabled a number of different strategies to be used to assist with lobbying efforts to affect the substance of the negotiations. Some of these strategies will now be explored.

## E. Substantive Contributions

### 1. *Creating Momentum*

One of the ways in which NGOs contributed to the ICC negotiations was simply by virtue of their presence in the negotiations. Characterized as “a stable and continuous force in support of the Rome Statute,”<sup>117</sup> the number of NGOs, their diversity, and their varied and strategic engagements with states from prepared position papers to lobbying and awareness-raising activities meant that they had an intense and highly visible presence throughout the negotiations.<sup>118</sup> The result of this intensity was the creation and maintenance of a collective momentum that served “to sustain and strengthen” the progress of the negotiations.<sup>119</sup> While states retained the decision making power, NGOs provided the context for the decisions to be made. The momentum established and maintained by NGOs served to provide an environment in which states that were in favor of the establishment of a strong ICC were supported and encouraged to strengthen their positions, whereas states that were more reluctant were pressured to revise their positions.<sup>120</sup>

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116. THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 477 (1995); Immi Tallgren, *We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court*, 12 *LEIDEN J. INT'L L.* 683, 685 (1999).

117. Lee, *supra* note 24, at 1xv.

118. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 712–15.

119. BASSIOUNI, *STATUTE OF THE ICC*, *supra* note 23, at 26 (commenting that NGOs' activities “served to sustain and strengthen the momentum of the process”).

120. Arsanjani, *supra* note 46, at 23.

## 2. Information Provision

Perhaps the key feature and most visible aspect of the work of the CICC Secretariat and CICC members throughout the ICC negotiations was the provision of information to the U.N. and states.<sup>121</sup> The CICC prided itself on being the “primary source of information” about the ICC throughout the negotiations.<sup>122</sup> This claim was based on the depth and breadth to which CICC members were able to engage in the substantive issues and monitor the progress of negotiations, and the degree to which this was coordinated among NGOs.<sup>123</sup> NGO representatives were an invaluable resource for delegates to utilize, as they were seen as a broad group with a rich array of expertise in different areas.<sup>124</sup>

The reputation that NGOs earned as reliable and knowledgeable sources of information, prepared to engage in a professional way about the subject matter of the ICC issues, greatly contributed to the receptiveness of states to their positions and assisted the good working relationships that evolved between many NGOs and state delegations.<sup>125</sup> The professionalism of NGO interactions and lobbying challenged negative stereotypes of NGOs and presented them as credible sources of information. This sort of NGO engagement was very much within the traditional frameworks ascribed to NGOs’ presence at international conferences. NGOs’ capacity and facility for extensive and intensive research on issues were reflected in the volume and high quality of NGO papers and advice to state delegations.<sup>126</sup> Legal expertise and position papers containing information, expert analysis, and assessment of legal provisions in the draft texts were prepared by a number of NGOs throughout the ICC negotiations and were widely disseminated to state delegations prior to, during, and after formal negotiations.<sup>127</sup> State delegations and U.N. officials came to expect and

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121. Pace Interview, *supra* note 41; *see also* Pace, *supra* note 23, at 203; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 713.

122. Pace & Thieroff, *supra* note 37, at 392.

123. *Id.*; *see also* Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 715 (emphasizing the role of NGOs and the CICC as documentarians of the ICC negotiations). For representative documentary materials, refer to the CICC web site, <http://www.iccnw.org/> (last visited Feb. 18, 2006).

124. Brady Interview, *supra* note 99; Kirsch & Holmes, *supra* note 53, at 4–5; William A. Schabas, *Follow up to Rome: Preparing for Entry into Force of the International Criminal Court Statute*, 20 HUM. RTS. L.J. 157, 165 (1999) (noting that a paper from the ICRC was used by the Working Group on the Elements of Crimes).

125. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 713 (noting that the most prominent role of NGOs at the Preparatory Commission was as expert advisors); Pace & Thieroff, *supra* note 37, at 392–93.

126. Rosenthal Interview, *supra* note 61.

127. *See* Pace, *supra* note 23, at 204; Pace & Schense, *supra* note 38, at 117; Arsanjani, *supra* note 46, at 23. Members of the CICC who regularly produced papers included AI, WCGJ, European Law Students’ Association (ELSA), Fédération Internationale des ligues des Droits de l’Homme (FIDH), HRW, ICJ, LCHR, REDRESS, the ICDA, and the International Association for Penal Law (IAPL). Papers are available from their respective websites, at <http://web.amnesty.org/pages/icc-docs-eng>, <http://www.iccwomen.org/>, <http://www.hrw.org/campaigns/icc/archive.htm>, <http://www.icj.org/index.php>, [http://www.humanrightsfirst.org/international\\_justice/icc/icc.htm](http://www.humanrightsfirst.org/international_justice/icc/icc.htm), <http://www.redress.org/>, <http://www.aiad-icdaa.org/index.jsp>.

rely on the production and distribution of NGOs' position papers on issues that were within their particular expertise.<sup>128</sup> Those state delegates interviewed confirmed that the NGO papers were sources of valuable information because of their overall excellent research and analysis of issues.<sup>129</sup>

The subject matter of the ICC negotiations no doubt assisted a large, diverse group of experienced NGOs to participate, drawing on expertise in issues including women's rights, sexual violence, victims' issues, defense lawyers, the legal community, and peace movement groups.<sup>130</sup> Because the ICC negotiations involved particularly diverse and technical issues at times, NGO representatives often had special expertise in areas that state delegates may have lacked. In this way, even smaller NGOs were able to contribute to the negotiations in their area of expertise.<sup>131</sup> NGOs also had advantages in their access to resources and in their ability to conduct in-depth research. Large NGOs in particular possessed resources that states, particularly smaller delegations, often did not have. The information provision activities of NGOs can also be seen as raising the level of knowledge among all participants, and therefore contributing to the richness and substance of debates.

Some delegates indicated that they used NGO papers extensively (albeit cautiously) to provide background and analysis of issues, finding them well-researched and wide-ranging on the whole. These papers were important to delegates in shaping the texts, analyzing the impact and effect of provisions in the texts, and for raising issues for discussion. Though indirect, NGOs can be regarded as having made some important substantive contributions to the ICC negotiations in their roles as knowledgeable sources of information.<sup>132</sup> Through their involvement in this way, delegates believed that NGOs had made a large difference to the level of debate and the substantive content of the ICC negotiations. However, due to the politics of the international negotiating process, this is a particularly difficult contribution to identify. States are reluctant to acknowledge their use of NGO research because of the effect that this would have on how that

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128. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 117.

129. *Id.*

130. The subject matter and the international political climate at the time also contributed to the willingness of states to negotiate these issues.

131. Dolgopol Interview, *supra* note 79. For example, REDRESS is a small NGO that was able to contribute to the ICC negotiations on issues involving reparation to victims, its area of specialty. See discussion at *supra* note 66.

132. See generally Hall 1997, *supra* note 46, at 183 (noting that NGOs had a significant impact on government proposals and aided in understanding the history and significance of statutory provisions); Hall 1998a, *supra* note 48, at 125 (noting that government delegates widely acknowledged the value of NGO commentary, which informed their drafting of session texts); Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of the International Criminal Court*, 92 AM. J. INT'L. L. 331, 331-39 (1998); Hall 1998b, *supra* note 48, at 549 (noting NGOs' role in producing excellent daily summaries of individual state positions); Rosenthal Interview, *supra* note 61; see also Hans-Peter Kaul, *Towards a Permanent International Criminal Court - Some Observations of a Negotiator*, 18 HUM. RTS. L.J. 169, 174 (1997) (noting that NGO involvement also increases transparency and public attention to the negotiating process).



state's position was regarded by other states.<sup>133</sup> NGOs are also aware that, in order to promote broad state support, the negotiations must be seen to be state-based, and were therefore cautious of overstating their level of involvement and influence on the negotiations. NGOs interviewed also recognized the crucial role played by a number of state delegations in the ICC proceedings. This adds a further difficulty to any attempt to quantify the distinct influences of different actors involved.

In addition to the more extensive position papers that NGOs prepared on particular issues, NGOs worked hard as the negotiations progressed to closely monitor debates and prepare materials in quick response to developments and new directions.<sup>134</sup> This practice ensured that NGO input remained relevant throughout the progress of negotiations,<sup>135</sup> and provided opportunities for effective NGO engagement with debates, and for fine-tuning draft provisions.<sup>136</sup> These papers were effective because of their usefulness for state delegations which, depending on their resources, sometimes struggled to follow the rapidly evolving negotiations. NGO papers were important for keeping the negotiations focused on the broader context as well as the minutiae of individual provisions, and for analyzing and assessing the impact and effect of all provisions on the broader aims of the Rome Statute.<sup>137</sup> NGO texts were generally well regarded by delegations, and this added to the respect NGOs were accorded and to the positive relationships between states and NGOs that characterized the ICC negotiations.

### 3. Reaching a Broader Audience

The worldwide CICC networks were crucial for raising awareness and providing information to a broader audience. CICC members engaged in numerous activities designed to provide information and raise awareness of the ICC, involving diverse participants from a range of state departments, civil society groups, media, and academic institutions in a plethora of countries and regions.<sup>138</sup> The establishment and maintenance by the

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133. Australian Delegate Interview, *supra* note 60.

134. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 713 (describing the important of NGOs as expert advisors and advocates); Pace & Schense, *The Role of NGOs*, *supra* note 38, at 108, 133. For example, Pace and Schense observe the use of LCHR's paper in response to U.S. concerns at the Rome Conference regarding the independent prosecutor. *Id.* See also *Lawyers' Committee Blasts US Paper*, TERRAVIVA, June 26, 1998, available at <http://www.ips.org/icc/tv2606.htm>.

135. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 108.

136. Ferstman Interview, *supra* note 68.

137. Dicker Interview, *supra* note 79.

138. Activities are listed in editions of the *ICC Monitor* at <http://www.iccnw.org/index.php?mod=monitor>. They included meeting and consulting with ministries, department officials, and parliamentarians; public lectures and meetings; meetings with representatives from the ICTY and ICTR; conferences, university and training programs, workshop organization and participation; providing databases of contacts and ICC information, liaison with media; publications including newsletters, academic symposiums and journal issues; establishment and maintenance of regional networks; petitions and public demonstrations, to name a few. See, e.g., Pace & Schense, *The Role of NGOs*, *supra* note 38, at 108-11.

CICC Secretariat of information networks and resources was critical for this broader awareness-raising exercise. Specifically, this included a detailed website<sup>139</sup> and e-mail lists to facilitate the exchange of information concerning the ICC negotiations and related activities, to encourage dialogue between NGOs in the CICC network, and to promote information dissemination to a broader international community.<sup>140</sup> Information distribution activities by the CICC Secretariat also included producing newspapers,<sup>141</sup> media releases,<sup>142</sup> reviews, and papers<sup>143</sup> regarding many aspects and activities (NGO and state) of the ICC negotiations.<sup>144</sup> The ability of NGOs to communicate and disseminate information about the ICC widely enhanced the reputation of NGOs as knowledge experts. In addition, NGOs engaged in more traditional street demonstrations and other events designed to promote awareness of the ICC to a broader audience outside the forum of the ICC negotiations. In Rome, these activities served as further pressure on states and added to the momentum for the creation of the Court.<sup>145</sup> Broader civil society groups also became involved

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139. See Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=documents> (last visited Feb. 18, 2006) [hereinafter CICC website]. This site "is the most comprehensive provider of on-line information about the process of establishing the ICC." French and Spanish translations are available. The website was established in 1996. See Pace & Schense, *The Role of NGOs*, *supra* note 38, at 129; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 715 n.18.

140. See CICC web site, *supra* note 139. The electronic listserv was established in 1995. See Pace & Schense, *The Role of NGOs*, *supra* note 38, at 129.

141. The *ICC Monitor* was produced throughout the Rome Conference and since, and electronic versions can be found at <http://www.iccnw.org/index.php?mod=monitor>. It provides articles by NGOs, state delegates, reports and calendar of events, updates on ratification, and lists of resources on the ICC. *Id.*; see also Pace & Thieroff, *supra* note 37, at 394 (providing an account of other NGO news coverage initiatives). For example, *Terraviva* was another newspaper published daily during the Rome Conference. A selection of articles from the daily editions are available at the *Terraviva* website, at <http://www.ips.org/icc/index.htm>. For a general discussion of the role of NGOs as "publicists" and "documentarians," see Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 715.

142. See Press Room, CICC website, <http://www.iccnw.org/pressroom.html> (last visited Feb. 18, 2006).

143. *Id.*

144. These resources were an important source of information for my research. See also Lee, *supra* note 24, at 14 (noting that NGOs provided momentum for the Rome Conference through daily publications, interviews, and explanatory press releases); Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 733 (noting that the Secretariat distributed a volume of materials regarding the relationship agreement, the headquarters agreement, the financial regulations, the privileges and immunities agreement, and the rules of procedure to delegates and NGOs); Pace & Thieroff, *supra* note 37, at 392 (discussing the Secretariat's role in recruiting diverse NGOs to the CICC, and increasing state-NGO interaction).

145. An example was an NGO petition calling for ratification of the ICC Statute, signed by prominent people, such as heads of state, Nobel prize winners, academics, media personalities, and human rights activists that was published in major newspapers worldwide, including *The Economist*, *The International Herald Tribune*, *Il Corriere della Sera*, *El Mundo*, and *Le Monde*. Other examples included a torch lit march in Rome nearing the end of the Rome Conference organized by NPWJ, and a demonstration organized by Amnesty International, "Tutti Giu Per Terre" (meaning "All Fall Down"), outside the Conference buildings, which concluded with thousands of supporters lying

in the ICC issues to promote wider awareness at the global level of the importance of the establishment of the Court.<sup>146</sup>

Networks of CICC members assisted effective lobbying efforts by utilizing their national and regional members' contacts with ministers, parliamentarians, media, and civil society groups in a country to put pressure directly on national capitals when it was required.<sup>147</sup> These networks were critical in the energetic campaign of the CICC to encourage signature and ratification of the Rome Statute.<sup>148</sup> NGOs continued to be active at national and regional levels, lobbying and engaging in awareness raising activities to encourage states to sign, ratify, and implement the ICC Statute and provisions.<sup>149</sup> NGOs have also been important in assisting states with implementing legislation to incorporate the Rome Statute into their national legislation.<sup>150</sup> This activity of NGOs was important, as the scope for states to become involved in other states' domestic ratification and implementation processes is obviously limited. NGOs, however, were able to work inside countries to encourage ratification and implementation.<sup>151</sup>

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down on the footpath in silence, symbolising the victims of human rights violations. For details, see the No Peace Without Justice (NPWJ) website at <http://www.npwj.org/>. See also *Torch-light March*, TERRAVIVA, July 15, 1998, available at <http://www.ips.org/icc/tv150703.htm>; Transnational Radical Party, <http://www.radicalparty.org/icc/icc.html> (last visited Feb. 18, 2006); *NGO Activities in Rome*, ICC MONITOR, Nov. 1998, at 11, available at <http://www.iccnw.org/documents/monitor10.199811.pdf>.

146. For example, Nobel Peace Laureates called for the prompt establishment of the ICC in an appeal at a centennial meeting in Oslo on December 10, 2001. Statement, Nobel Peace Laureates' Centennial Appeal (Dec. 10, 2001), available at <http://www.iccnw.org/documents/NobelPeaceLaureates10Dec02.pdf>.

147. Pace & Thieroff, *supra* note 37, at 395.

148. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 46. This has been a major focus of the CICC Steering Committee and members since the Rome Conference.

149. For example, NGOs in Australia were active in the debate over ratification. The ALHR, AI Australia, Legacy, World Vision, HRW, Council for the National Interest, Australian members of the ICJ, the Australian Heritage Group, and the National Civic Council, as well as members of the Australian Red Cross and the New South Wales Bar Association made submissions and gave evidence to the Joint Standing Committee on treaties, the government body of inquiry into Australia's ratification of the Rome Statute. For details, see Parliament of Australia, Joint Standing Committee on Treaties, <http://www.aph.gov.au/house/committee/jsct/icc/index.htm> (last visited Feb. 18, 2006). Civil society groups, such as the ALHR, and individuals, university academics, for example, also wrote newspaper opinion articles and lobbied the government directly towards ratification. See, e.g., Andrew Byrnes & Hilary Charlesworth, *Action Urged on Statute*, CANBERRA TIMES, May 22, 2002, at A13; Susan Harris, *It's Time for Australia to Join the ICC*, CANBERRA TIMES, June 20, 2002, at A19; Donald R. Rothwell, *Necessity for International Court Grows*, CANBERRA TIMES, May 2, 2002, at A11.

150. Examples of this include the organization of parliamentary workshops and conferences and the provision of expert advice to state departments. Two CICC members, Parliamentarians for Global Action (PGA) and NPWJ, were particularly active in this regard, working through NGO networks to encourage ratification and providing technical assistance to states regarding implementing legislation. For further information, see their respective websites at <http://www.pgaction.org/> and <http://www.npwj.org/>. See also Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 706, 714 (discussing NGOs' roles as advocates for an ICC). The CICC web site provides a calendar and archive of events at <http://www.iccnw.org/?mod=currentevents> (last visited Apr. 19, 2006).

151. Wong Interview, *supra* note 44; see also Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 714. After entry into force of the Rome Statute, NGOs' focus has been

The strength of the CICC as a key source of information on the ICC negotiations is reflected in this Article's analysis. The observations in this Article about NGO participation in international lawmaking are based on research that relied extensively on the information resources of the CICC. Much of what I have described above is, therefore, at a general level and, to some extent, reflects the dominance of large NGOs, both within and outside of the CICC structure. This is a result of the practicalities of accessibility of information regarding different NGO activities. Because of my own spatio-temporal distance from the negotiations, much of my initial work contacting interviewees and subsequent research used information available on the internet. Therefore, the research is inevitably limited to reflecting the experiences of NGOs that have access to this tool of information dissemination, and in particular, large NGOs and the CICC.

Smaller NGOs without access to evolving technologies for information dissemination—particularly internet access—face much greater difficulties in enabling their voice to be heard at the international level. To some extent, both the structure of the CICC, which facilitated and encouraged the participation of smaller NGOs including those from developing countries, and the CICC's use of e-mail and the Internet has minimized the degree of partiality and the limitations of this research. Such information regularly provided details of the diverse activities undertaken by NGOs associated with the CICC worldwide, enabling me to gauge the participation of smaller NGOs in the ICC negotiations. This confirms the utility of structures such as the CICC for providing avenues for smaller NGOs to raise their voices and visibility at the international level. However, even such a coordinating structure with excellent information dissemination mechanisms cannot completely level the playing field between larger and smaller NGOs, and this remains an issue both for the success of these NGOs in international lawmaking, and for further research.

For example, NGOs that presented arguments against the ICC were not as visible as those in the CICC. What were the experiences of these groups in the ICC negotiations? There are a number of NGOs that expressed concerns about the ICC. Most of these groups are based in North America, and the majority of their concerns consisted of either religious objections to the gender provisions in the Rome Statute (especially the provisions relating to forced pregnancy in article 7),<sup>152</sup> or concerns that the ICC unacceptably intrudes into the national sovereignty of states.<sup>153</sup>

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working towards universal ratification of the Rome Statute. This has included working against the United States' attempts to weaken the ICC. See the CICC website at <http://www.iccnw.org/?mod=ciccmmedia> for details of such activities.

152. For examples of "right-to-life" groups, see the websites of Catholic Family and Human Rights Institute, <http://www.c-fam.org>, Human Life International, <http://www.hli.org>, REAL Women of Canada, <http://www.realwomenca.com>, and World Family Policy Centre, <http://kennedy.byu.edu/wldfampolcenter/>, respectively.

153. Sovereignty concerns are illustrated by the websites of The Heritage Foundation, <http://www.heritage.org>, The New American, <http://www.thenewamerican.com>, The Liberty Committee, <http://www.thelibertycommittee.org>, and The John Birch Society, <http://www.jbs.org>.

Much of their work has been at the domestic level, and this is especially the case in the United States. In the ICC negotiations, these NGOs tended to focus their attention on sympathetic states and used similar tactics to the CICC NGOs in terms of lobbying and provision of position papers to states. Many interviewees commented that there was a strong presence of these organizations at the Rome Conference. Groups with religious motivations were particularly noticeable in these negotiations and caused difficulties with other NGOs such as the Women's Caucus for Gender Justice.<sup>154</sup> Known generally as the "right to lifers," many interviewees saw these groups as destructive, highly emotive groups with intimidatory and harassing behavior. After the Rome Conference, these groups focused on activities at a domestic level to influence the position of their governments on the ratification of the ICC.

There are a number of factors contributing to the less visible position of these NGOs in the ICC negotiations, including the cohesiveness, size, and strength of the CICC, and the relative lack of support for these groups' positions from a majority of states. The style of lobbying of these NGOs was objected to by a number of state representatives, illustrating how important the credibility of NGOs in terms of information provision and lobbying techniques is to productive state and NGO interactions. The less visible position of anti-ICC NGOs outside the supportive structures of the CICC also indicates the importance of such a structure for NGO interactions and of this as a base for interactions with states.

#### 4. Lobbying

In addition to their visibility as information providers, NGOs' presence was also felt through their activities as advocates.<sup>155</sup> The CICC's ability to coordinate large numbers of NGOs to intensely lobby states was a strength of the coalition approach.<sup>156</sup> In this way, smaller NGOs were just as important as larger NGOs in adding to the sheer weight of NGO numbers at negotiations, in putting pressure on states through lobbying, and in raising awareness of the issues among states.<sup>157</sup> The ability of NGOs to

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154. See, e.g., Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 705 n.2.

155. Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 713 (noting that the role of NGOs as advocates was "equally central" to that of information provision and education.). Pace & Thieroff, *supra* note 37, at 392 (noting the intense advocacy efforts of the coalition members leading up to the Rome Conference).

156. *Id.*

157. Australian Delegate Interview, *supra* note 60; Dolgolpol Interview, *supra* note 79; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 712 ("For smaller NGOs, [the team] approach also demonstrates that they have as much to contribute as larger NGOs and this is an equalizing factor in NGO relations with one another."). NGOs with large numbers of representatives present were often able to lobby very intensely. The WCGJ, for example, was able to bring women representatives from around the world to ensure that there was a large WCGJ presence at the ICC negotiations, and particularly at Rome. This strategy was important for ensuring that a diversity of women's views were presented, and therefore for maximizing the receptiveness of different state delegations to gender issues. The sheer numbers of women present representing WCGJ also enhanced their ability to lobby delegates. The WCGJ regard this as an important factor in their success in raising awareness of gender issues.

intensely lobby state delegates appears to have been one of the most effective strategies, and has been credited as a key factor for maintaining the momentum of the negotiations.<sup>158</sup> NGOs were able to speak with delegates immediately before or after the meetings finished, in order to offer support, information, and advice on the negotiations, or to attempt to change or strengthen the position of delegates on particular issues. For lobbying to be effective, the personal rapport established between state delegates and NGO representatives was a crucial factor, as was building on and maintaining the reputations of NGOs as credible sources of knowledge. When mutual respect and rapport were developed, there was less need for aggressive lobbying tactics on the part of NGOs.<sup>159</sup> Many NGO representatives showed awareness of the need to maintain positive relationships and reputations, while using a variety of lobbying techniques to encourage or pressure states depending on the circumstances. Many of the NGOs, particularly the ones more experienced in international negotiations, were perceived as knowing how to read the “feel” of negotiations and understanding when to soften intense lobbying.<sup>160</sup>

However, their lobbying role, which might be characterized as a traditional role for NGOs at the international level, remains the most controversial and highlights the assumptions regarding appropriate NGO behavior and the limits of their participation in international lawmaking. NGOs must tread a fine line in their interactions with states, and in their roles as lobbyists versus information experts. For example, on the one hand a group with a particular focus and area of expertise may be seen as an expert on particular issues, but if the group lobbies too intensely it is likely to attract criticism for being too narrow in its focus.<sup>161</sup> State delegates made clear that the intensity of NGO lobbying could sometimes be counterproductive. Delegates commented that from their perspective NGOs sometimes did not show understanding of the state perspective and processes, or recognition of the constraints of delegations. Several delegates noted what they felt to be aggressive and confrontational behavior by a few NGOs.<sup>162</sup> Some NGOs were also identified as using heavily emotive arguments and not presenting an objective, informed point of view. Such

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158. Lee, *supra* note 24, at 14 (“[NGOs] provided vital momentum and their contribution was critical to the success of the Conference.”).

159. Dolgopol Interview, *supra* note 79.

160. Australian Delegate Interview, *supra* note 60.

161. The perceived inability of NGOs to focus on the broader issues and context was seen by some states as unhelpful to the wider issues and negotiation processes. The WCGJ, for example, was criticized by some states, and was seen as a specific, single-issue group with a narrow focus that lacked recognition of the broader context of negotiations. This perception resulted in some states avoiding contact with NGOs in the WCGJ, as they grew tired of discussing what they considered to be the same issue. This opinion may have been exacerbated by the strong presence of NGOs opposed to WCGJ positions that also lobbied states targeted by WCGJ. These groups presented arguments to counter WCGJ positions, and used what other NGOs and states saw as extreme and emotive arguments and intimidatory tactics.

162. Australian Delegate Interview, *supra* note 60; Interview with Tim McCormack, Australian Delegation, Canberra, Aust. (June 14, 2001) [hereinafter McCormack Interview]; Rosenthal Interview, *supra* note 61.

behavior was felt to be intrusive, obstructive, and counterproductive to the negotiations and to the relationship between NGOs and states on the whole.<sup>163</sup>

Such defensive reactions are fairly typical responses of states when challenged by NGOs. Pace and Schense note that states are often less comfortable with NGOs acting in this role, because it can be a confrontational one.<sup>164</sup> They argue that NGOs generally did, in fact, take into account the political pressure states faced, and “[t]his more sophisticated recognition on the part of NGOs of the difficulties which government delegations faced in their work also contributed to a more constructive working relationship between delegates and NGOs.”<sup>165</sup> Lee also comments that while NGOs held strong views on matters of special concern to them, most NGOs were also prepared to moderate these opinions in the interest of the overall objective of a strong ICC.<sup>166</sup> It is worth noting that it seems to have been a minority of NGOs that engaged in what states regarded as irresponsible behavior. However, clearly this behavior by even a few NGOs has the potential to reflect badly on all NGOs involved, as it is a highly contentious issue from a state perspective, including on the part of state delegations otherwise sympathetic to NGO involvement.

While aggressive behavior on the part of some NGOs may have upset some state delegations, many delegates and NGO representatives acknowledged that these tactics were simply part of the lobbying techniques on the part of NGOs that are often important to the strength of the final outcome.<sup>167</sup> Such techniques are usually designed to represent a radical view, knowing that this may not succeed, but in the hope that the states will be able to find a higher middle ground as a result of being pushed to consider other extremes. Much of the work of NGOs is therefore about preventing the lowest common denominator from prevailing, and about ratcheting up state positions.<sup>168</sup> Much of the NGO work in the ICC negotiations was about preventing states from compromising too soon or too much. The background pressure of NGOs helped states hold positions, knowing they would be subject to NGO scrutiny and pressure otherwise.<sup>169</sup> While there is an acknowledgement of the importance of this role of NGOs, hostility encountered by some NGOs shows states’ preference for NGOs in roles of “neutral” knowledge experts as opposed to advocates, though the reality is that the two roles are often interlinked. Ongoing challenges remain for NGOs to be welcomed as legitimate and credible actors in international law, balancing and preserving their diversity and roles so that they may

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163. Australian Delegate Interview, *supra* note 60.

164. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 128; Pace & Schense, *Coalition for the ICC*, *supra* note 23, at 713.

165. Pace & Schense, *The Role of NGOs*, *supra* note 38, at 129.

166. Lee, *supra* note 24, at lxxv.

167. Australian Delegate Interview, *supra* note 60; McCormack Interview, *supra* note 162; Rosenthal Interview, *supra* note 61.

168. BRAITHWAITE & DRAHOS, *supra* note 1, at 610.

169. Interview with Victoria Hallum, N.Z. Permanent Mission to the U.N., New York, N.Y. (July 16, 2001).

continue to act in strategic partnership with states as well as pushing the boundaries through their advocacy roles.

## Conclusion

The richness of the interviewees' stories and the complexity of the ICC negotiations revealed that there were a number of factors that were important for the participation of NGOs. For example, the positive interactions of the CICC with the LMG states and the U.N., and the extent of support from state and NGO actors for the ICC assisted the involvement of NGOs in the negotiations. Of these factors, I conclude that there are two aspects of NGO interaction in the ICC negotiations that were particular important.

Firstly, networks of NGOs were crucial to the continued presence of NGOs throughout the ICC negotiations. The CICC provides a good example of a network structure that facilitated the presence of a diversity of NGOs, by providing a forum from which NGOs could access and participate in the negotiations as part of a fluid, plural, broad group of support for the establishment of the ICC. A crucial facet of this network structure was the facilitation of strategic alliances and connections between actors, while allowing room for NGOs to pursue their own autonomous agendas. The network structure of the CICC can be imagined as a web of actors, nonhierarchical and with a plurality of sites rather than centralized and hierarchical. The importance of this network structure in the ICC negotiations confirms the utility of such networks to assist interactions between actors in a variety of groups.<sup>170</sup>

Secondly, many of the NGOs involved in the ICC negotiations had longstanding reputations for being reliable and credible sources of expert knowledge on particular aspects of the Rome Statute, and these reputations were an important element of NGOs' influence in the ICC negotiations. The variety of NGOs within the CICC network meant that the CICC was able to utilize the broad knowledge and experience of its members in interactions with states. The network structure facilitated the dissemination of this knowledge, encouraging multiple sites of knowledge and disrupting usual hierarchies of state power in terms of sites of knowledge. The extent of NGOs knowledge and the use of information technology to connect networks of diverse actors and disseminate information through dialogue were important for the CICC's ability to shape the understanding of the ICC in the broader international community and contributed to the impetus behind the negotiations. In their research and lobbying activities,

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170. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 1 (discussing networks among business, NGO, and state actors); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Ann-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 *STAN. J. INT'L L.* 283 (2004) (discussing the international and transgovernmental networks in the "new sovereignty" in international law); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT'L L.* 1 (2002) (discussing the increase in transgovernmental and international networks in global regulation).



NGOs by and large demonstrated sophisticated engagement, showing awareness of the political exigencies of credible information and recognizing the need to be pragmatic, strategic, and to work productively with states and with each other. As a result, NGO networks with influence over the creation, dissemination, and interpretation of information may be powerful contributors to the development of international law.

My observations suggest that, in many ways, the involvement of NGOs in the ICC negotiations exemplifies the traditional roles of NGOs as actors with expert knowledge and skill in information dissemination. The U.N. ECOSOC provisions emphasize the roles of NGOs as information providers, and the ways in which NGOs were able to officially engage at the negotiations reinforce these boundaries and confirm this as a basis for the legitimacy of their presence. The experience of the ICC negotiations shows NGOs working within the structures of the U.N. and international law, making good use of these spaces despite the limitations that the structures and processes impose. In this way, NGOs were able to contribute to the substantive elements of the negotiations, introducing issues for discussion, shaping debates, and developing relationships with states to contribute to final texts.

However, as well as shaping the substance of international law, NGOs are in a position to shape the spaces where debates occur in international law. NGOs in the ICC negotiations showed skills in working not only within the established boundaries of international law, but in creatively shaping spaces for discussion outside of these structures and processes. The ability of the CICC members to share knowledge and gain the support of the international community through facilitating discussion about the ICC negotiations at a variety of levels worldwide were powerful. The extensive use of information technologies by networks such as the CICC meant that these groups were able to create connections among geographically diverse actors, and form spaces outside of and independent of established international law fora. Information networks such as the CICC present challenges to the dominant structures and processes of international law by using different strategies to influence state actors and open access points in international lawmaking to NGOs. My observations indicate that, in doing so, the CICC created alternative spaces in which discussion of the ICC negotiations could be furthered.

The CICC influence stretched the boundaries of the ICC negotiations, ensuring that there was the flexibility to include a diverse range of NGOs acting in a variety of roles. While still limited by traditional structures and processes in many of the ways the ICC negotiations were run, CICC members were able to work within spaces created by their interactions with states and through their global networks. In doing so, NGOs were able to work within and manage the unpredictable and volatile nature of the ICC negotiations. Networks of NGOs such as the CICC are ideally suited to such an environment, which encourages new relationships based on the relative strengths of actors, new forms of interaction and communication in these relationships, and allows for new spaces to develop as a result within

and outside existing boundaries. This fluidity and versatility of international lawmaking is useful because it allows room for spontaneity, and encourages NGOs to be seen as one of the diverse elements of an evolving, continuous international lawmaking process.<sup>171</sup>

These observations serve as a reminder of the complexities involved in international lawmaking negotiations. The overall picture of NGO involvement in these international fora is a positive one, with indications that these groups were able to significantly influence the substance and structure of the ICC negotiations. The ICC negotiations show the ability of a variety of NGOs acting within network structures, autonomously and cooperatively, to further particular agendas and issues at the international level. These negotiations also show the value of utilizing NGOs' experience and knowledge to enrich the substance of the negotiations, and to enhance the knowledge of states in developing new international law. Furthermore, utilizing the energies and network connections of NGOs also assisted in establishing broad-based knowledge and support for the ICC among global civil society groups worldwide.

However, these observations also remind us that the NGO influence on international negotiations is not always this straightforward or beneficial, nor is it always welcomed and facilitated by states. Despite the overall positive image of NGO influence in the ICC negotiations, NGOs faced criticisms that are commonly made of NGO involvement in international law: some NGOs were viewed as unrepresentative, narrowly-focused issue groups, and accused of using aggressive tactics to pressure states, and, as a result, being unhelpful to the proceedings. NGOs also faced the same access and legitimacy problems commonly experienced by NGOs at the international law. In addition, differences in opportunities for participation between large and small NGOs were evident, which serves to highlight the importance of an awareness of the power dynamics created by these actors. The success of the CICC network of NGOs lay largely in the ability of these diverse NGOs to work around state-centric structures, using politically astute strategies to maximize their visibility and influence in a positive way which recognized their limits as well as their combined strength in providing information to states through network structures. It is these sorts of characteristics and trends that are becoming increasingly apparent in NGO interactions in international law.

It is clear that the debate over the presence of NGOs in international lawmaking needs to be refocused. This article adds to an evolving literature that confirms and analyzes NGO presence at international lawmaking fora. While ongoing research could usefully describe and compare NGOs' experiences and roles in international lawmaking exercises to track the evolution of these aspects of NGO engagement, the questions we need to be asking in the analysis of this phenomenon appear to be changing. Because

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171. John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?*, 31 *LAW & POL'Y INT'L BUS.* 221, 239 (2000) (arguing that the information age has greatly increased the prominence and influence of NGOs).

the presence and influence of NGOs in international lawmaking is clear, it no longer makes sense to restrict the debate to whether NGOs *should* have a presence in international law. This contestation simply focuses on defending the vision of international law that results from the traditional state-centric view of international law, a blinkered vision that creates blind spots in our picture of international law.

Instead, more effort needs to go into examining not only the roles NGOs can play, but also the structures that dictate how NGOs can engage, as the two are inextricably linked. By challenging the existing cartography of international law and the assumptions that construct traditional pictures that privilege the state, a new map may be drawn. This map has the potential to illuminate the diversity of life in the international law landscape that globalization discourses suggest is occurring to highlight the particular roles that NGOs might contribute to the international lawmaking process. This will require acknowledgement that the changing geographies of power are leading to the creation of new spaces for interaction between emerging actors, particularly in terms of formal and informal sites of international lawmaking. In doing so, the debate moves beyond argument over which actors are legitimate participants in international lawmaking and refocuses on, as Schweitz encourages, how to ensure the continued development of an international law that serves humanity in all its diversity.<sup>172</sup> Of course, this takes the debate into much broader terrain, entering debates on the existence of an international community broader than states, and the role of international law in the life of this community.

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172. See generally Schweitz, *supra* note 5.