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Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*

M. Cherif Bassiouni**

I. Preparing the Draft Statute

From 1995 to 1998, the United Nations General Assembly convened two committees to produce what was called a "consolidated text"¹ of the Draft Statute for the Establishment of an International Criminal Court (ICC).² The Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) met throughout 1995 to discuss major substan-

* Portions of this article derive from M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1* (M. Cherif Bassiouni ed., 1999).

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1. See *United Nations General Assembly Resolution on the Establishment of an International Criminal Court*, G.A. Res. 51/207, U.N. Doc. A/51/627 (1996) [hereinafter G.A. Res. 51/207], reprinted in *THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-98 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS 1*, 13 *Novelles Études Pénales* (M. Cherif Bassiouni ed., 1997) [hereinafter 13 NEP]. The resolution recalls the General Assembly's decision to establish a preparatory committee "to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission, and taking in account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text . . ." *Id.* at 1 (emphasis added).

2. *Rome Statute of the International Criminal Court*, U.N. GAOR, 53d Sess., U.N. Doc. A/CONF.183/9 (1998), reprinted in 39 I.L.M. 999 (1998) [hereinafter Rome Statute]. Both committees worked at the United Nations headquarters in New York. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995), reprinted in *THE STATUTE OF THE INTERNATIONAL COURT: A DOCUMENTARY HISTORY* (M. Cherif Bassiouni ed., 1999) [hereinafter *THE STATUTE OF THE INTERNATIONAL COURT*]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vols. I & II*, G.A., 51st Sess., Supp. No. 22, U.N. Doc. A/51/22 (1996), reprinted in *THE STATUTE OF THE INTERNATIONAL COURT, supra*. This compilation also contains the April 1998 draft statute prepared by the PrepCom, the final text of the Statute, and a historical background. For a commentary on the work of the PrepCom, see 13 NEP, *supra* note 1; *OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE, 13bis NOUVELLES ÉTUDES PÉNALES* (Leila Sadat Wexler, special ed., M. Cherif Bassiouni, general ed., 1998) [hereinafter 13bis NEP].

tive and administrative issues,³ but did not engage in negotiations or drafting. In 1996, the Ad Hoc Committee was replaced by the Preparatory Committee on the Establishment of an International Criminal Court⁴ (PrepCom), which met through 1998. During its first year, the PrepCom also did not draft provisions of the Draft Statute because several States were not ready to proceed to the drafting stage. Indeed, a number of major states, including the United States, the United Kingdom, and China, initially felt that the PrepCom, like the Ad Hoc Committee, should only discuss issues until the political climate matured enough to allow the process to move into the drafting stage.⁵

Had the PrepCom continued to merely discuss issues throughout 1997, it would not have been able to complete the Draft Statute by the April 3, 1998 deadline,⁶ and the Rome Diplomatic Conference (the Conference) due to start June 15, 1998, would have had to have been postponed. While some governments would have welcomed a postponement, most governments did not want the Conference to be delayed. Ambassador Adriaan Bos, an experienced Dutch diplomat who was the Chairman of the Ad Hoc Committee and the PrepCom, was sensitive to these concerns and cautiously moved forward. By 1997, the PrepCom had produced only an unstructured and substantially unusable compilation of all governmental proposals.⁷ To remedy the situation, an inter-sessional meeting of the Bureau⁸ and the coordinators of the different parts⁹ was held at Zutphen, The Netherlands, January 19-30, 1998. That meeting provided some structure and streamlining for the compilation of the proposed texts. Even so, what emerged remained essentially a cumbersome accumulation of alternative governmental proposals requiring additional technical work and more extensive negotiations, particularly with regard to fundamental issues such as the definition of crimes, the nature of the ICC's jurisdictional mechanisms, and complementarity, which remained in the early stages of negotiation.

The work at Zutphen and the diligence of the coordinators at the last PrepCom session (March-April 1998) allowed the completion of the Draft Statute and Draft Final Act on April 3, 1998. However, due to the time it took to have the working text translated from English into the other official

3. See *supra* note 1, at 1.

4. G.A. Res. 50/46, U.N. GAOR, U.N. Doc. A/RES/50/46 (1995).

5. See M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, in 13 NEP, *supra* note 2, at 5-36.

6. The PrepCom's mandate from the General Assembly ended on April 3, 1998. See *supra* note 4.

7. Many delegates jokingly referred to this compilation of proposals as the "telephone book."

8. The Bureau consisted of the Chairman, Vice-Chairperson, and the Rapporteur.

9. The Chairman appointed a number of delegates to be "coordinators" or informal chairs of working groups which met formally and informally to draft text for the different parts of the Statute, e.g., Procedure, Jurisdictional Mechanisms, Crimes, Criminal Responsibility, Cooperation and Enforcement, etc. In the end, the Statute adopted in Rome contained 12 Parts.

languages,¹⁰ the Member States in New York did not receive it until the end of April. This left only six weeks for the text to make its way from the Member States in New York to their respective foreign affairs ministries, and then to their justice and, in some cases, defense ministries.¹¹ Thus, by the time the text reached those officials who later joined their governments' delegations in Rome, they had little time to study and assess the Draft Statute or to obtain specific instructions for the Conference from their superiors.

The length of the Draft Statute further complicated the delegates' task: it was 173 pages and consisted of 116 articles with some 1300 brackets for optional provisions and word choices.¹² Working with such a text was difficult even for those who participated in the Ad Hoc Committee and the PrepCom, let alone for those delegates who were unfamiliar with it.

While the Ad Hoc Committee and the PrepCom met in New York from 1995-98, the ICC was largely ignored by the governments, media, and general public in most Member-States. For most states, the advent of the ICC seemed too remote to be a matter for domestic political debate. However, whenever debate existed, it was typically limited to foreign affairs specialists, human rights organizations, and a few academics. Neither official circles nor the general population in most states were adequately informed about the proposed Court. The lack of information created considerable uncertainty in the capitols, which in turn hampered negotiations in both New York and Rome. The absence of public debate on the ICC still persists in most countries, including those that voted in support of the Conference's Final Act or signed the Rome Treaty.¹³ This has made the subse-

10. The official languages are Arabic, Chinese, French, English, Russian, and Spanish.

11. In Rome, many justice ministries' representatives complained that their foreign affairs ministries had not communicated with them on the ICC until the last minute, so that they did not have sufficient time to prepare for the Conference. Also, many Member States only involved their foreign affairs ministries and did not include justice or defense ministries.

12. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act*, U.N. Doc. A/Conf.183/2/Add.1 (1998), reprinted in *THE STATUTE OF THE INTERNATIONAL COURT*, *supra* note 2, at 119-210.

13. One hundred twenty states voted in support of the Conference's Final Act. See *UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, U.N. Press Release L/ROM/22 (17 July 1998). As of October 20, 1999, 89 states had signed the Rome Treaty and four have ratified it: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bangladesh, Belgium, Benin, Bolivia, Burkina Faso, Burundi, Bulgaria, Cameroon, Canada, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Haiti, Honduras, Hungary, Iceland, Ireland, Italy (ratified), Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Monaco, Namibia, the Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Poland, Portugal, Romania, Samoa, San Marino (ratified), Saint Lucia, Senegal (ratified), Sierra Leone, Slovakia, Slovenia, the Solomon Islands, South Africa, Spain, Sweden, Switzerland, Tajikistan, Trinidad and Tobago (ratified), Uganda, the former Yugoslav Republic of Macedonia, the United Kingdom, Venezuela, Zambia, and Zimbabwe. See *Rome Statute of the Interna-*

quent ratification process that much more difficult.

II. Preparing for the Conference

Approximately two-thirds of the Conference delegates had not participated in the Ad Hoc Committee or the PrepCom, and as noted above, most of the delegates either did not have the time to study the text or had studied it superficially. Consequently, the delegates needed a learning curve period, which slowed the negotiations. Fearing that the Conference might resemble the first meetings of the Ad Hoc Committee, particularly in light of the Conference's relatively short five-week duration,¹⁴ the PrepCom's Bureau¹⁵ decided to hold an organizational meeting before the Conference began. However, convening a pre-Conference organizational meeting posed an unusual problem – no one had authority to convene a formal meeting. The PrepCom's Bureau and working groups coordinators had no official capacity after April 3, 1998, when the PrepCom ended.¹⁶ The nominated Conference chairpersons, in turn, had no legal capacity prior to their formal election on June 15, 1998. The pragmatic solution, wisely proposed by the United Kingdom, was to have an informal meeting of the nominated chairpersons and whomever they wished to include as prospective coordinators of the Conference's working groups.

That solution still left the problem of who would convene the meeting and how it would be funded. The International Institute of Higher Studies in Criminal Sciences (ISISC), a non-governmental organization (NGO) with a special cooperation agreement with the United Nations,¹⁷ offered to assume responsibility for organizing and funding the meeting in cooperation with another NGO, the International Scientific and Advisory Profes-

tional Criminal Court, Ratification Status (last modified Oct. 20, 1999) <<http://www.un.org/law/icc/statute/status.htm>>.

14. While it may appear that five weeks is a long time, officially there were only 24 working days of six hours a day. Within that period the delegates had to discuss and draft 116 articles, which entailed compromising on the definitions of crimes, on the scope of the ICC's jurisdiction and triggering mechanisms, on the role of the Security Council and the Prosecutor, and on other unresolved political issues. The participation of 161 delegations with an estimated 2000 delegates (out of the 5000 registered ones) compounded the difficulty of achieving consensus in such a limited period of time.

15. The Bureau members were Adriaan Bos, Chairman; M. Cherif Bassiouni, Sylvia Fernandez de Gurmendi, and Marek Madej, who resigned and was replaced by Peter Tomka, Vice-Chairpersons; and Juan Yoshida, Rapporteur, who resigned and was replaced by Masataka Okano. See THE STATUTE OF THE INTERNATIONAL COURT, *supra* note 2, at 115.

16. See G.A. Res. 51/207, *supra* note 1.

17. See M. Cherif Bassiouni, *International Institute of Higher Studies in Criminal Sciences*, in THE CONTRIBUTIONS OF SPECIALIZED INSTITUTES AND NON-GOVERNMENTAL ORGANIZATIONS TO THE UNITED NATIONS CRIMINAL JUSTICE PROGRAM: IN HONOR OF ADOLFO BERIA DI ARGENTINE 209 (M. Cherif Bassiouni ed., 1995) [hereinafter CONTRIBUTIONS OF SPECIALIZED INSTITUTES]. The ISISC had already hosted several informal meetings of the PrepCom's working groups in Siracusa. See THE STATUTE OF THE INTERNATIONAL COURT, *supra* note 2, at 24.

sional Council (ISPAC).¹⁸ The Italian Ministry of Foreign Affairs also supported the initiative and agreed to eventually refund the organizers for the meeting costs. The outgoing PrepCom agreed to this informal arrangement, and the meeting took place May 4-8, 1998, in Courmayeur, Italy. The Courmayeur meeting was attended by the three Conference chair nominees,¹⁹ the coordinators of the PrepCom working groups, the designated U.N. Executive Secretary of the Conference,²⁰ members of the U.N. Secretariat, and officials of the Italian Ministry of Foreign Affairs.

The Courmayeur participants discussed the organizational plan for the Conference's work, developed a strategy for the order in which the various parts of the Draft Statute would be discussed, and planned the work flow between the three official conference bodies – the Committee of the Whole, the Working Group, and the Drafting Committee.²¹ The Courmayeur participants also decided that the Conference's Plenary ini-

18. See Ernesto Ugo Savona, *International Scientific and Advisory Professional Council*, in *CONTRIBUTIONS OF SPECIALIZED INSTITUTES*, *supra* note 17, at 249.

19. The Conference chair nominees were Professor Giovanni Conso of Italy, Ambassador Adriaan Bos of the Netherlands, and Professor M. Cherif Bassiouni of Egypt. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Rules of Procedure*, U.N. Doc. A/Conf.183/2/Add.2 (1998), reprinted in *THE STATUTE OF THE INTERNATIONAL COURT*, *supra* note 2, at 211-19.

20. Mr. Roy Lee, Director, Codification Division, Office of Legal Affairs.

21. The duties of these bodies are set forth in the PrepCom's *Draft Organization of Work*, U.N. Doc. A/AC.249/1998/CRP.21 (1998), which provides as follows:

1. As mandated by the General Assembly in its resolution 52/160, of 15 December 1997, the task of the Conference is to finalize and adopt a convention on the establishment of an international criminal court. The Conference should move promptly to the consideration of substantive matters after a short session on organizational matters.
2. After the opening of the Conference by the Secretary-General of the United Nations, the Conference will meet to elect the President, adopt the agenda and the rules of procedure and elect other officers.
3. The General Committee will meet immediately following the election of its members. Its work will include, *inter alia*, assisting the President in the general conduct of business and making recommendations with respect to the election of members of the Drafting Committee.
4. The plenary, on the recommendations of the General Committee will then elect the members of the Drafting Committee and adopt the programme of work of the Conference.
5. The plenary will then proceed to hear statements from States in accordance with an established list of speakers prepared on a first-come-first-served basis. The Conference will also hear statements from a limited number of intergovernmental organizations and non-governmental organizations. The list of speakers will be opened for inscription on 15 April 1998.
6. With a view to the efficient and expeditious discharge of the work of the plenary, a time limit may be established for statements by States on the one hand (e.g., 10 minutes) and intergovernmental organizations and non-governmental organizations on the other. In principle, States should be given more time than intergovernmental organizations and non-governmental organizations. A total of eight meetings may be allotted for this purpose.
7. The Committee of the Whole should concentrate on the substantive work and should begin its work on 16 June. It may hold up to four meetings (with full interpretation) per day throughout the Conference, i.e., two bod-

tially would convene only during the first week of the Conference to allow delegation heads to make their speeches and then again for a final session to formally vote on the Conference's Final Act.²² They also decided that the Committee of the Whole, the Working Group, and the Drafting Committee would start their meetings on June 17, while the delegation heads were still presenting speeches at the Plenary. They also agreed that Parts 1 and 3 of the Draft Statute would be the first sections to be discussed by the Committee of the Whole and the Working Group since these parts were more likely to be accepted than other parts of the Draft Statute. Parts 1 and 3 would then be sent to the Drafting Committee for completion. This strategy aimed to create a positive momentum that would help accelerate the drafting process.

Shortly after the Courmayeur meeting, however, Ambassador Adriaan Bos, Chairman designate of the Committee of the Whole, underwent emergency surgery, and therefore could not assume his chair responsibilities in Rome. At Bos' suggestion, Ambassador Philippe Kirsch of Canada was elected as his replacement. A skilled and decisive diplomat, Kirsch proved most effective at the Conference. His success is particularly impressive given that he was representing his government before the International Court of Justice (ICJ) that May and was able to arrive in Rome only two days before the Conference started.

On June 14, Kirsch met with the other designated Conference chairs,²³ the PrepCom's working group coordinators, the U.N. Secretariat staff, representatives of the Italian Ministry of Foreign Affairs, and the Secretary General's Representative, Hans Corell, to review the Courmayeur plan. Kirsch accepted the plan and judiciously reappointed the PrepCom coordinators as Conference coordinators for the same topics. But he also foresaw that the time allotted for the discussions of the various parts of the Draft Statute needed to be more flexible. Kirsch urged everyone to push negotiations and curtail speech-making, and requested the coordinators to develop rolling texts to advance the process.

ies may meet concurrently, both morning and afternoon. The Committee of the Whole will report to the plenary upon the completion of its work.

8. A working group of the Committee of the Whole will begin its work on the afternoon of 17 June.
 9. The Drafting Committee may begin its work on 19 June; two meetings (with full interpretation) per day may be allotted to it throughout the Conference. The Drafting Committee will receive its work from the Committee of the Whole and report to it. Time constraints might make it necessary to allow the Drafting Committee to report on the last portion of its work directly to the plenary.
 10. The Credentials Committee will meet sometime during the second or third week of the Conference. One meeting has been allotted for that purpose.
 11. The last day of the Conference is reserved for the signature of the Final Act and of the Statute of the Court and for the closure of the Conference.
22. To maximize limited time, delegation heads were each given five to seven minutes for their opening remarks; IGOs (and some NGOs) were given three to five minutes.
23. Giovanni Conso of Italy and M. Cherif Bassiouni of Egypt. See *supra* note 19.

Unfortunately, when the Committee of the Whole met on June 17, it immediately became clear that they could not maintain the Courmayeur schedule due to the number of unprepared delegates. Thus, the Committee of the Whole and the Working Group became bogged down in the same discussions that the Ad Hoc Committee and the PrepCom had previously undertaken. For the veterans of the process it was a disappointing brush with *dèjà vu*.

III. The Rome Conference

After the first week of the Rome Conference, the number of delegates (many of whom had come only for the initial ceremonies) shrank from about 5000 to approximately 2000.²⁴ The remaining attendees fell into two categories: those with some knowledge of the Draft Statute's text, either from their previous participation in the Ad Hoc Committee or the PrepCom or from their own study; and those who had little or no knowledge of the text. The former, who constituted only about one-tenth of the delegates, were optimistic; the latter were not, and they initially expressed concerns and raised questions that had been previously debated (and in some cases even settled) by the PrepCom. With this difficult beginning, it seemed unlikely that the Conference would have a promising outcome. By the second week, some delegates started to speculate about the need for a second Diplomatic Conference, or Rome II.

This situation made the first two weeks of the Conference very pessimistic. To speed the pace of the discussions, Kirsch instituted several informal working groups, which ultimately broke down into smaller informal-informal working groups. At times, there were as many as a dozen of these groups convening simultaneously. In addition, delegations consulted one another, and met with regional and political groups.²⁵ As a result of these multiple meetings, most delegates worked ten to twelve hours a day, and those who assumed leading roles worked even longer hours. Given the hectic pace and grueling nature of the work, the delegates' mood became increasingly pessimistic during the ensuing weeks of the Conference. Worst of all, there were few effective negotiations on the Statute's difficult provisions (which are customarily left to the end of most negotiating processes).²⁶

The formation of smaller working groups and the extensive work schedule weighed most heavily on the smaller delegations, some of which

24. See Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, 5 *GLOBAL GOVERNANCE* 1, 16 (Jan.-Mar. 1999) (noting that the remaining delegates consisted of career U.N. diplomats, senior civil servants, public and private experts, and politicians).

25. The Arab States formed one of the most active informal groups; they met frequently and adopted common positions that were not necessarily supportive of the ICC, although some states (such as Egypt and Jordan) were part of the "like-minded states." The "like-minded states" met most frequently and were the driving force for completing the Draft Statute and for establishing the ICC.

26. See *infra* notes 45-48, 61-64 and accompanying text.

consisted of only two or three delegates and who consequently could not attend all these concurrent meetings.²⁷ The non-English-speaking delegations suffered the most, since the informal working groups conducted their meetings exclusively in English due to the unavailability of simultaneous interpretation.²⁸ Nevertheless, the informal working groups accelerated the process, even though only a few of the 2000 delegates grasped the overall progress of the work.

To make matters worse, the headquarters building of the Food and Agriculture Organization of the United Nations (FAO), where the Conference was held, was not conducive to having multiple meetings.²⁹ Meetings of the various working groups were scattered throughout some 100 rooms and frequently had to be arranged on an ad hoc basis. Except for the three permanent meeting rooms of the Committee of the Whole, the Working Group, and the Drafting Committee (the last of which met in the remote Malaysia Room³⁰), the rooms in which the informal working groups met often changed, frequently without adequate notice, so that the delegates had to rush about to locate their meetings on a daily basis. The FAO building, a relic of the Mussolini-era architectural style, was, to say the least, confusing. Its three different horizontal wings were connected by vertical corridors, which did not correspond to the same floors, and delegates frequently lost their way from one meeting room to another.³¹

27. Delegations with 10 or more members could adequately cover all of the proceedings, but smaller delegations could not. The pressure on the Secretariat, however, was even more intense. For example, as more informal meetings were held over the course of the Conference, the understaffed Secretariat became desperate for assistance and began using its law student interns to staff the informal discussions.

28. Personnel constraints, logistics, and costs prohibited simultaneous interpretation into the six official languages. This placed delegates from non-English-speaking countries at a disadvantage and barred those delegations with limited English language ability from effective participation.

29. For example, participants were often confused as to the location and time of their meetings since the monitor placed in the main lobby of the building did not reflect updates or changes in meeting times and places. Also, a general shortage of computers available to conference delegates encumbered the distribution of proposals. Moreover, the Secretariat quickly became overwhelmed with the volume of documents that required translation and distribution among the delegates. Many other difficulties were compounded by the inadequate facilities for communicating to individuals outside of the conference. The hundreds of conference attendees waited in long lines for the six phones and two fax machines available for general use.

30. The Malaysia Room, named for the Government that had donated its furnishings, was in Building C on the second floor. It was far removed from the first floor rooms of the Committee of the Whole and the NGO quarters (the Sudan Room), which were in Building A. Thus, most delegates and NGOs did not even know where the Drafting Committee met, let alone what it accomplished. This gave the Drafting Committee an aura of mystery and remoteness, but it also meant that its efforts were not as appreciated as they should have been. Nevertheless, this anonymity allowed the Drafting Committee to work effectively and in complete confidentiality, particularly since the media was oblivious to its existence and thus to its work. Even the daily NGO bulletin, *Terra Viva*, referred to the Drafting Committee only once in five weeks.

31. Finding U.N. staff offices was another difficult endeavor. Further, air conditioning existed in only a few of the rooms, with the balance of the building and the corridors subject to one of Rome's hottest and more humid summers.

IV. The Flow of Texts to the Drafting Committee

While the breakdown into informal working groups quickened the drafting process, it also resulted in a piecemeal treatment of the Statute's articles. Each day, the Drafting Committee³² received only a few complete articles and an average of ten to fifteen paragraphs of disparate articles from the Committee of the Whole.³³ Furthermore, the Drafting Committee often received different parts of a given article over a two to three week period.³⁴ Formulating the Draft Statute thus resembled the assembly of a large jig-

32. Twenty-five elected delegations formed the Drafting Committee: Cameroon, China, the Dominican Republic, Egypt, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, the Philippines, Poland, the Republic of Korea, the Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, the Syrian Arab Republic, the United Kingdom, the United States, and Venezuela. The members of these delegations were not always the same throughout the five weeks. Since there was no official roster of delegates representing these delegations, the following names are those that the author recorded, though other delegates also occasionally participated. Thus, the following list is incomplete: Cameroon: Maurice Kamto, Victor Tchatchouwo; China: Xu Hong; the Dominican Republic: Christina Aguiar; Egypt: M. Cherif Bassiouni; France: François Alabrune, Pierre-André Lageze; Germany: Hans-Joerg Behrens; Ghana: Immanuel Akwei Addo; India: S. Rama Rao; the Republic of Korea: Sung-Kyu Lee; Lebanon: Hicham Hamdan; Jamaica: Wayne McCook, Cheryl Thompson-Barrow; Mexico: Socorro Roviroso, Jorge Palacios Treviño, Luis Fernández Doblado; Morocco: Amal Belcaid, Fakhr Eddine Essaaidi; the Philippines: Antonio Morales, Jose Tomas Syquia; Poland: Maria D. Frankowska, Kirill G. Gevorgyan; the Russian Federation: Alexei Dronov; Slovenia: Mirjam Skrk; South Africa: Sabelo Sivuyile Maqungo; Spain: Juan Antonio Yañez-Barnuevo, Julio Montesino Ramos; Sudan: Awad El-Hassan El-Noor, Abdalla Ahmed Mahdi; Switzerland: Lucius Cafilisch, Jürg Lindenmann; the Syrian Arab Republic: Mohammad Said Al-Bounni; the United Kingdom: Susan Dickson, Franklin Berman; the United States: Clifton Johnson, Michele Klein Solomon, Jamison S. Borek; and Venezuela: Victor Rodríguez Cedeño, Milagros C. Betancourt, Norman L. Monagas.

33. The working groups submitted draft provisions directly to the Committee of the Whole for its *pro forma* approval. After the Committee of the Whole considered each new provision, it labeled the additions "rolling text" and placed them aside pending receipt of the remainder of articles in which they belonged. Once the Committee had received a given article in full, the Secretariat would prepare a separate document and assign it a conference symbol number; the text would then be translated and distributed to the Drafting Committee for review. Once the Drafting Committee had the opportunity to discuss the portions of each article, it labeled the article "text adopted on first reading." The Drafting Committee would then await the remaining parts of the Draft Statute to determine whether the language for an individual article was consistent with the rest of the parts. Once that was accomplished, the Drafting Committee would label the article "text adopted on second reading." The Drafting Committee reported to the Committee of the Whole when it completed an entire part of the Draft Statute.

34. The Committee of the Whole began transmitting articles to the Drafting Committee on June 19, 1998, and continued to transmit articles until July 15, 1998. During this four week period, the Drafting Committee received 35 articles in two to nine different parts. The specifics are as follows: Article 3 (in 3 parts); Article 4 (in 3 parts); Article 24 (in 2 parts); Article 29 (in 3 parts); Article 31 (in 9 parts); Article 35 (in 4 parts); Article 37 (in 9 parts); Article 39 (in 4 parts); Article 40 (in 3 parts); Article 43 (in 9 parts); Article 45 (in 4 parts); Article 49 (in 6 parts); Article 52 (in 3 parts); Article 54 (in 9 parts); Article 58 (in 6 parts); Article 61 (in 9 parts); Article 67 (in 2 parts); Article 68 (in 7 parts); Article 69 (in 8 parts); Article 71 (in 2 parts); Article 72 (in 2 parts); Article 74 (in 3 parts); Article 75 (in 2 parts); Article 77 (in 3 parts); Article 80 (in 5 parts); Article 81 (in 3 parts); Article 82 (in 5 parts); Article 83 (in 4 parts); Article 86 (in 7 parts); Article 87 (in 3 parts); Article 90 (in 9 parts); Article 91 (in 5 parts); Article 94 (in 2 parts); Article 99 (in 3 parts); and Article 102 (in 2 parts).

saw puzzle: the Committee had to determine how all the pieces – the separate articles or paragraphs received in this manner – fit together. The disparity in languages, legal approaches, and drafting techniques among the various working groups further complicated the drafting process. The piecemeal transmission process also caused the Drafting Committee significant difficulties in maintaining a consistent form and style, in ensuring the uniform usage of terms, and in providing cross-references to other related articles.³⁵ As a result of these difficulties, most articles required several revisions before they were finalized.³⁶ Perhaps the Drafting Committee's most difficult and time-consuming task was to work in six languages simultaneously and to do its own corrections on most of the translated articles. Consequently, the twenty-five delegations serving on the Drafting Committee were heavily burdened.³⁷

On the third day of the Drafting Committee's work, it was discovered that most of the translating was done in New York and Geneva, requiring the U.N. staff to send the texts and receive the translations via e-mail. This process meant that different translators worked on different articles and more frequently on different paragraphs of a given article, and that resulted in a lack of consistency in the translation. As Chairman of the Drafting Committee, I called upon the Committee members' good will and support to tackle this problem and asked the delegations to rearrange their seating order according to linguistic affinity, instead of by alphabetical order by country name, which is U.N. protocol.³⁸ The linguistic groups worked together and reviewed translated text in their respective languages, and then compared translations in order to ensure that they reflected the same meaning.³⁹ For all practical purposes, the Drafting Committee took on

35. Cross-referencing was almost an impossible task as article numbers changed daily with the addition of new paragraphs.

36. Rule 49 of the Conference, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Rules of Procedure*, *supra* note 19, provided that the Drafting Committee would not deal with substantive issues. However, the rule was relaxed during the third and fourth weeks when the working groups, eager to move on at a faster pace, became more reliant on the Drafting Committee to undertake more substantive drafting. However, this meant that the Drafting Committee needed more time to consult with the working groups' coordinators to clarify the intent of the draft articles on which they were working. To assist the Drafting Committee, the Committee of the Whole referred various articles with notes representing its understanding of the transmitted articles. The notes also alerted the Drafting Committee to particular textual issues, such as term selection or identified terms that should not be changed.

37. Even though drafting is a rigorous process that requires much concentration, the Drafting Committee frequently worked 10 to 14 hours a day. The U.N. Secretariat worked almost around the clock for the last three days of the Conference.

38. This approach brought together delegates whose national positions were diverse and helped focus their attention on the text, while diminishing the psychological implications of adhering only to nationalistic positions.

39. We usually started by clarifying the meaning of a certain concept or term in English and then determining its equivalent or counterpart in the major legal systems represented within the Committee. At times, we were unable to reconcile different legal concepts because they were worded in carefully chosen diplomatic terms. Nevertheless, whenever we encountered a troublesome provision, we alerted the relevant working-group coordinator and tried to clarify the ambiguities. On several occasions we success-

both translation and review responsibilities. This in itself was unprecedented in multilateral treaty processes, but it was indispensable. U.N. reviewers then examined the translations, followed by the Drafting Committee's final review.⁴⁰ Nevertheless, despite the assiduous efforts of the U.N. reviewers and the Drafting Committee, the text still contained some technical errors. As a result, the Secretariat had to resort to a no-objection procedure⁴¹ in order to make some material (but non-substantial) corrections.⁴²

The members of the Drafting Committee worked extraordinarily well in an unsurpassed spirit of friendly cooperation. Notwithstanding the many difficulties and pressures described above, the Committee completed all 111 articles of the draft text on July 15. Except for Part 2 (Articles 5-21)⁴³ and certain Final Clauses,⁴⁴ the Committee of the Whole swiftly approved the draft text.

On the afternoon of July 16, the Drafting Committee received Part 2 of the Draft Statute (Articles 5-21) from the Bureau with the instructions that the text could be read but not altered. The Drafting Committee unanimously refused to accept this restraint. Most members felt that the Bureau's instructions violated the spirit if not the letter of the Conference's Rules.⁴⁵ If the Drafting Committee had been able to review Part 2, it could have resolved certain problem that surfaced later. For example, Article 12(3) refers to acceptance of the ICC's jurisdiction using the terms "with respect to the *crime* in question."⁴⁶ That terminology could imply that a non-State Party could select the crimes for which it would accept the

fully reconciled conflicts, but where the working group had selected the terms deliberately (i.e., as a result of lengthy negotiations), we could not alter the provision.

40. Because of the volume of the texts and time constraints, the translations contained some errors. The United Nations released a set of corrections on November 10, 1998, and on July 12, 1999.

41. The no-objection procedure, which requires unanimity, is based on Article 79 of the 1969 Vienna Convention on the Law of Treaties. Several multi-lateral conventions have resorted to no-objection procedures, which are essentially designed to correct non-substantive errors such as typographic punctuation and cross-referencing errors. The U.N. Secretariat communicates suggested corrections to the Member States; if the States make no objections, then the corrections are deemed accepted.

42. The Secretariat released a set of corrections based on the no-objection procedure in October 1998. See U.N. Doc. C.N./577.1998 Treaties-8 (1998).

43. Part 2, which contains Articles 5-21, addresses the ICC's jurisdictional authority and the applicable law to be applied in defining the elements of crimes. See also *infra* notes 45-48 and accompanying text.

44. The Chairman of the Committee of the Whole presented several of the Final Clauses to that Committee on behalf of the Bureau on the last day of the Conference. See *infra* notes 61-62 and accompanying text; see also Philippe Kirsch & John T. Holmes, *The Rome Diplomatic Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999). Surprisingly, an article by Mahnoush H. Arsanjani, the Secretary of the Committee of the Whole, makes no reference to the Drafting Committee. See Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999).

45. See *supra* note 19. Several delegations questioned the procedural validity of submitting a text on a take it or leave it basis when only some delegations had participated in its preparation.

46. Article 12(3) provides:

Court's exercise of jurisdiction and, conversely, prevent jurisdiction for a crime it wished to exclude. The intended meaning of Article 12(3) is that the Court could exercise its jurisdiction with respect to any crime referred to in Article 5 arising out of a "situation" which is referred to it. The term "situation" is used for a referral to the Court by a State Party or by the Security Council pursuant to Article 13.⁴⁷

Other drafting problems have also subsequently surfaced. For example, both Articles 27(2) and 98(1) concern immunity. This could potentially foster inconsistent interpretation of the Statute's immunity provisions. To avoid future interpretation problems, the content of these two Articles should have been joined.

The Statute's omission of the material elements of crimes, or *actus reus*, creates another problem area. During the Conference, an article defining *actus reus* was dropped from the Statute because some delegations could not agree on its content. However, until the last moment, the Drafting Committee expected to receive such a provision. Lacking a provision on the elements of crimes, the Court will have to determine what constitutes an act or omission by analogy to national legal systems. However, Article 22(2) specifically excludes interpretation by analogy. Furthermore, Article 22(2)'s prohibition of interpretation by analogy also conflicts with Article 31(3), which allows the Court to develop other grounds for exclusion from criminal responsibility.

Finally, there is no valid methodological explanation for the separation and placement of the provision concerning the presumption of innocence (Article 66) in Part 6 and the provisions concerning *ne bis idem* (Article 20) and applicable law (Article 21) in Part 2. All of these provisions properly belong in Part 3 of the Statute, which deals with general principles of criminal responsibility.⁴⁸

If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to *the crime* in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Rome Statute, *supra* note 2, art. 12(3) (emphasis added).

47. Article 13 (emphasis added):

The Court may exercise its jurisdiction with respect to *a crime* referred to in article 5 in accordance with the provisions of this statute if:

- (a) *A situation* in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) *A situation* in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Id. art. 5 (emphasis added).

48. While Articles 20 and 21 were included in Part 2 as a result of political considerations, the location of Article 66 in Part 6 reflects an insufficient appreciation of traditional legal methods of criminal law.

V. The Negotiating Process

The delegates at the Conference did not begin negotiating with a blank slate; instead, they built upon the efforts of the Ad Hoc Committee and the PrepCom.⁴⁹ During the meetings of these Committees, as well as the three inter-sessional meetings at the ISISC in Siracusa, Italy, and the Zutphen meeting,⁵⁰ the delegates of certain active governments and some NGO representatives forged strong professional bonds. Unlike other multilateral negotiation processes, where governmental delegates and NGO representatives are frequently in opposition, the cooperation between the two groups at the Conference was optimal. Also, the fact that the same participants met for thirteen weeks in New York, three weeks in Siracusa, and two weeks in Zutphen fostered cooperation and a collegial atmosphere which advanced the process in spite of differences of opinion.

During the Conference negotiations, a coalition known as the "like-minded states" became a significant driving force behind the Statute. This diverse group emerged from the meetings of the Ad Hoc Committee and the PrepCom and ultimately grew to over sixty states.⁵¹ It was well organized and its meetings and briefings for smaller countries were carefully prepared.

The 238 NGOs at the Conference also played a significant role in discussing the issues and proposing options to government delegations. The NGOs had contributed so greatly to the Ad Hoc Committee and the PrepCom meetings that they were given unprecedented access to meetings at Rome. Several notable organizations actively lobbied for the tribunal and provided legal and technical expertise.⁵² More particularly, the International Committee of the Red Cross made valuable contributions to the process, especially with respect to the definitions of crimes.

In light of the problems described in the previous section,⁵³ the first two weeks of the Conference reinforced the skepticism of those who did not want a successful outcome or who doubted the task could be completed within twenty-four working days. The delegates who remained after

49. See *supra* notes 1-7 and accompanying text.

50. See *supra* notes 8-12 and accompanying text.

51. The "like-minded states" at the Conference included: Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricom states), Uruguay, and Venezuela. See THE STATUTE OF THE INTERNATIONAL COURT, *supra* note 2, at 25. This group of states has continued to grow since 1998.

52. These organizations included the American Bar Association, Amnesty International, the Association International de Droit Pénal, the Carter Center, the European Law Students Association, Human Rights Watch, the International Commission of Jurists, the International Human Rights Law Institute, the International Institute for the Higher Studies in Criminal Sciences, the Lawyers Committee of Human Rights, No Peace Without Justice, Parliamentarians for Global Action, the Women's Caucus, the World Federalist Association, and the Washington Working Group on an International Criminal Court.

53. See *supra* notes 32-48 and accompanying text.

the opening ceremonies to hammer out the Draft Statute had varying degrees of instructions from their respective governments.⁵⁴ While delegations from developed countries typically had detailed, specific instructions, other delegations had received instructions which varied widely in their detail and specificity and particularly in the level of discretion granted to the delegation heads. Most developing countries, based on my observation, had received fairly vague instructions. The nature of the instructions sent to the delegates depended on both the size and expertise of home-based staff. Developed countries generally fielded the larger, better-informed delegations. Delegation heads from these countries usually wielded broad discretionary authority, which allowed them to conduct more efficient negotiations. Conversely, the delegations of developing countries were typically smaller and had limited instructions. As a result, these delegations could not undertake broad negotiations, particularly if the ultimate result would likely meet with home-front opposition by more senior officials.

These factors, combined with the fact that many delegations did not have sufficient time to study the Draft Statute or were otherwise unready for wide-ranging negotiations, slowed the negotiating process. By July 5, the delegates' concern over the pace of the negotiating had increased to the point that the successful outcome of the Conference was genuinely threatened. The skeptics noted the obvious lack of progress on the major issues contained in Part 2 and in some of the Final Clauses;⁵⁵ they also voiced concern regarding the piecemeal approach to the drafting of the Statute,⁵⁶ which left most delegates unclear about the Statute as a whole.⁵⁷ To forestall a breakdown in negotiations, Kirsch, assisted by the Bureau of the Committee of the Whole, members of the Canadian delegation, and some members of the "like-minded states" delegations, produced a Chairman's Paper dealing with what he then saw as the major unresolved issues. Kirsch hoped that the Paper would re-focus the delegates' attention by providing them with a draft compromise. However, while many delegations were willing to discuss the Paper, few actively engaged in negotiations with each other, despite Kirsch's urgings.⁵⁸

54. Furthermore, "certain delegations were in special or unique circumstances . . . Italy was to be the host of the Rome conference; the Netherlands was the undisputed candidate to be the host country for the International Criminal Court." See Benedetti & Washburn, *supra* note 24, at 17.

55. See *supra* notes 45-48 and accompanying text.

56. See *supra* notes 34-35 and accompanying text.

57. The author was able to see the unfolding picture and keep the Drafting Committee updated by entering changes in an electronic version of the Draft Statute. Since the Drafting Committee was dealing with several hundreds of pages of different documents, this tracking system was accompanied by a parallel chart of the document symbols for each provision or paragraph. Without this approach, the Drafting Committee would have drowned in paper.

58. On July 8, "Kirsch opened the Committee of the Whole for a point-by-point discussion of the . . . paper . . . [H]e requested at the opening of the session that states answer a set of precise questions," rather than make general comments. The format "limited the scope of and length of the answers and forced delegations to be specific,"

Delegations engaged in a multilateral process usually try to resolve their differences by extensive negotiations. At the Conference, however, some delegations adopted inflexible positions either because they did not have enough instructions or for other specific reasons. In particular, the United States exhibited greater rigidity than many had expected. Most delegations, especially those from the "like-minded states," had bent over backwards to accommodate the United States. For example, the articles dealing with procedure and with the definition of crimes were substantially as the United States wanted. When the delegations began to grapple with such issues as the ICC's jurisdiction and the independent role of the Prosecutor, the U.S. delegation, which had previously secured broad concessions on many points, adopted an unyielding position. Many delegations were dismayed by this display of diplomatic inflexibility, which was widely interpreted as another sign of U.S. intransigence and as a weakness in the U.S. negotiating approach. The U.S. response failed to alleviate these concerns, thus confirming the delegates' negative judgments.⁵⁹ However, it must be noted that the United States had some valid concerns that were not sufficiently and clearly articulated, and that these were not addressed in an imaginative fashion.

By July 12, the gaps between the more active delegations narrowed, due to the efforts of Kirsch and those working with him. Although the United States had rejected the proposed compromise package, the other delegations were growing weary of what they perceived as the U.S. delegation's lack of negotiating flexibility and subtlety.⁶⁰ Increasingly, the other delegations felt that it would be better to stop giving in to the United States; they believed the United States would never be satisfied with the concessions it got and ultimately would never sign the Treaty for completely unrelated domestic political reasons. The other delegations therefore decided to go ahead with Kirsch's proposed compromise package rather than to have it unravel due to last minute U.S. demands.

VI. The Final Stage

Part 2 of the Draft Statute addressed, *inter alia*, the definition of crimes, the Court's jurisdiction and triggering mechanisms, complementarity, the roles of the Prosecutor and the Security Council, and the prospective appli-

which in turn allowed Kirsch to take a "virtual vote." See Benedetti & Washburn, *supra* note 24, at 31.

59. However, the U.S. position was not always clear, probably because of the uncertainty with which the U.S. Administration approached the entire endeavor. This situation made productive negotiations more difficult than expected. For an insightful description of the Administration's ambivalent stance, see Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 6 FOREIGN AFF. 20 (1998).

60. Several other delegations had problems with the proposed compromise package, and in that respect the United States was not alone. For example, India also rejected the compromise package, albeit for different reasons than the United States (e.g., India wanted to prohibit the use of nuclear weapons, while the United States fought hard against most states to keep nuclear weapons permissible). However, the importance of securing U.S. support guaranteed that its positions would command great attention.

cation of the Statute's substantive provisions. In other words, it contained all of the political issues that had not been fully addressed at the PrepCom. While the Conference delegates were heavily involved in all of the technical legal issues, as well as other political issues of a lesser significance, the weighty issues in Part 2 were left for last minute political compromises.⁶¹ By the third week, however, the Chairman of the Committee of the Whole saw the necessity of producing a text identifying those points from the Part 2 issues where agreement had been reached and those where compromise appeared possible. He and members of the Bureau consulted extensively for the remaining two weeks of the Conference. On the last day of the Conference, as stated above, the Bureau presented the Committee of the Whole with a proposed text for Part 2 on a take it or leave it basis.⁶² The Bureau adopted that approach to forestall further discussions by the Committee of the Whole; at that late stage, additional debate would have meant the collapse of the Conference. The take it or leave it approach was a calculated risk, as some delegations could have raised procedural hurdles in the few remaining hours of the Conference.

The Bureau's proposed text was completed in all six languages at 0200 hours on July 18, while the Conference was officially supposed to end at 1800 hours on July 17, or by midnight at the latest. To allow the delegations to study the text of Part 2, the Committee of the Whole convened after 1800 hours on that last Friday to adopt the Bureau's proposal. Due to the extraordinary efficiency of the Secretariat and the Conference staff, the text had already been integrated with the main body of the Statute, which had been previously adopted by the Committee of the Whole on July 15.⁶³ With the clock approaching midnight, the U.S. and Indian delegations each sought to introduce last minute amendments to the Part 2 proposal.⁶⁴ With respect to each of the two proposed amendments, however, Norway introduced a no action motion, which is the same as a motion to table. In response to these motions, the Chairman of the Committee of the Whole acted boldly and decisively, in accord with the rules, by giving precedence to the no action motions so that the Conference could proceed.

The vote of the no action motion for India's proposal was 114 in favor, sixteen against and twenty abstentions. The vote on the no action motion for the U.S. proposal was 113 in favor, seventeen against and twenty-five

61. As some veteran negotiators later said, if the Conference had another week, these issues would still have been debated on the last week and not before.

62. See *supra* note 45.

63. For reasons stated above, Part 2 (Articles 5 to 21) was not referred to the Drafting Committee like other parts of the Draft Statute.

64. India, for example, wanted to limit the role of the Security Council (a change most delegations opposed), and include nuclear weapons among prohibited weapons (a change most developing countries supported). The United States primarily wanted jurisdiction to be subject to the consent of the state of nationality of the prospective defendant but that was opposed by most states. India and the United States also wanted to limit the scope of Article 12 affecting non-State Parties. See *supra* note 46 and accompanying text.

abstentions. After this second vote,⁶⁵ the delegates burst into a spontaneous standing ovation, which turned into rhythmic applause that lasted close to ten minutes. Some delegates embraced one another, and others had tears in their eyes. It was one of the most extraordinary emotional scenes ever to take place at a diplomatic conference. The prevailing feeling was that the long journey that had started after World War I had finally reached its destination. This historic moment was of great significance for everyone who had struggled to establish the ICC. But it was also a moment of release from the tensions and pressures of the previous five weeks of intensive work.⁶⁶

The Committee of the Whole adjourned at about 2100 hours; shortly thereafter the Plenary convened for its final session. This was to be a quick formal session, but to everyone's surprise, the United States asked for another vote.⁶⁷ This time 120 delegations voted for the adoption of the Statute and the Final Act of the Conference,⁶⁸ and for the opening of the Convention for signature on the next day; only seven voted against⁶⁹ and

65. See *Draft Statute for the International Criminal Court*, U.N. Doc. A/Conf.183/C.1/L.76; A/Conf.183/C.1/L.76/Add.1-Add.14 (1998).

66. Some observers interpreted the elation of the delegates as anti-American, but that is exaggerated. The delegates were genuinely happy to have completed this historic task which, coupled with the release of tensions after a long and arduous process, produced a sense of euphoria. To be sure, there was also a sense of "enough is enough" with what was perceived as U.S. evasiveness or intransigence. But on the whole the atmosphere was celebratory, not anti-American. After all, the United States had won many significant concessions during the negotiations. The concessions the United States failed to achieve would have severely hampered the ICC's ultimate purpose; moreover, these requests were perceived as motivated by domestic U.S. politics and thus garnered little sympathy from the other delegations. The United States, however, had valid concerns such as the problem with Article 12(3), *see supra* note 46. It also had a valid concern with another non-State Party issue contained in Article 121, which gave acceding Parties the right to not accept the Court's jurisdiction for additional crimes adopted by the Assembly of State Parties. See Article 121(5) ("Any amendment to article 5 of this Statute shall enter into force for those State Parties which have accepted the amendment one year after the deposit of their instruments or ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory."). Lastly, the United States had valid concerns with the absence of a road-map and legal standards for complementarity and for the Prosecutor's *proprio motu* actions. See Article 15(1) (explaining that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court). These concerns could have been addressed in Rome with more time, and with clearer U.S. positions on these issues.

67. This was an unrecorded vote, presumably designed to encourage some States to vote against the Statute.

68. See Rome Statute, *supra* note 2. As a result of the limited time available between the adoption of the Statute and the Treaty's opening for signature ceremony, the Statute's text required a few corrections. Substantive corrections were made to Article 8, paragraph 4; Article 121, paragraph 5; and Article 124. For non-substantive errors, the Department of Legal Affairs instituted a "no objection" procedure. See *supra* note 41.

69. Regrettably, the United States, China and India did not join in the vote for the establishment of the ICC, and because of the importance of these states, it is hoped that they will see fit to join at a later date. The preparatory commission established by the General Assembly (based on the Conference's resolution contained in Annex I, F of the Final Act) may be the vehicle through which these major governments and others could

twenty-one abstained. This overwhelmingly positive vote was followed by some delegations' explanation of their vote as well as general statements by some delegations. The post-vote statements extended past 0200 hours the following day. However, the clock was figuratively stopped at one minute before midnight so that the Plenary could be said to have completed its work within the General Assembly's mandate, which provided that the Conference should end on July 17.

VII. Legal Methods and Techniques

Multilateral treaty negotiation processes differ from the manner in which states undertake to elaborate and adopt legislation. The former is essentially a political process, while the latter is essentially a technical one, though of course subject to political considerations. Multilateral treaty negotiations are conducted mostly by diplomats, not by legal technicians with expertise in the subject at hand. The rules and practices of multilateral treaty negotiations are shaped by years of diplomatic practice, and conditioned by international, regional, and domestic political concerns. Above all, the techniques employed in international and national processes are quite different.⁷⁰

The delegates who negotiated the Draft Statute came from various legal systems and traditions. Many were diplomats who lacked expertise in international criminal law, comparative criminal law, or comparative criminal procedure. Most delegates had no criminal practice experience of any kind. In addition, the composition of the working groups changed on a daily basis, except for a core number of constant delegates, who came from larger delegations that could afford to assign delegates to specific groups for the duration of the work, or from smaller delegations that had a specific interest in a given area.

Generally, experienced veterans of the Ad Hoc Committee and the PrepCom acted as coordinators for the working groups. Throughout the drafting process, the delegates primarily aimed to achieve agreement, even at the cost of a consistent and coherent legal method. Any comparatist can attest to the difficulty of reconciling different legal systems, and any jurist can attest to the difficulty of uniform legal drafting. The combination of these two objective difficulties created a significant challenge. On the whole and in light of the aforementioned challenges in Rome, the text pro-

explore possibilities of finding solutions to their concerns. For other states voting against the Statute, see Benedetti & Washburn, *supra* note 24, at 27 (noting that "the U.S. delegation found itself, according to the records of most observers, dissenting in the company of the delegations of Israel, China, Iraq, Yemen, Libya, and Qatar.").

70. Complex national legislation is frequently prepared by legislative experts who also benefit from the advice and expertise of consultants outside of the legislative process. Bar Associations and professional groups also frequently provide their input. These processes often take a long time, thus giving an opportunity for reflection and deliberation. In contrast, the history of ICC reveals how few experts work on even a complex statute, how little time is available at a diplomatic conference, and how haphazard that process can be.

duced is exceptionally good.⁷¹ Some parts of the Statute, however, posed particularly complex problems.⁷² The following observations illustrate some of the problem areas and their resolutions.

Part 2 of the Draft Statute contains, *inter alia*, the definition of crimes.⁷³ Defining the crime of genocide (Article 6) presented no problem since the delegates adopted almost verbatim the definition from the 1948 Genocide Convention.⁷⁴ As a result, the Statute's definition of genocide shares the same gaps in the protected categories of victims as does the Convention.⁷⁵ In contrast, the Statute's definition of crimes against humanity (Article 7) substantially expands the original definition contained in the Nürnberg Charter's Article 6(c),⁷⁶ and also from Article 5 of the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁷⁷ and Article 3 of the International Criminal Tribunal for Rwanda (ICTR).⁷⁸ Article 7's language is substantially clear, although some of the prohibited acts are mere labels⁷⁹ whose elements will need to be established in the

71. The Secretariat also contributed significantly to the negotiating process, although its role is not widely known beyond those few insiders who helped assemble the text. The members of the Secretariat worked efficiently and indefatigably. During the last week of the Conference, many of them slept only a few hours a day, with some working almost around the clock in the final three days. Their extraordinary contribution should not be overlooked by posterity. They are: Hans Corell, Under-Secretary-General and Legal Counsel; Roy Lee, Director of the Codification Division of the Office of Legal Affairs and the Conference's Executive Secretary; Manuel Rama-Montaldo, Secretary, Drafting Committee; Mahnoush Arsanjani, Secretary, Committee of the Whole; Mpazi Sinjela, Secretary, Credentials Committee; and Christiane Bourloyannis-Vraïlas, Virginia Morris, Vladimir Rudnitsky and Renan Villacis, Assistant Secretaries of the Conference.

72. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/Conf.183/2/Add.1, July 17, 1998, reprinted in *THE STATUTE OF THE INTERNATIONAL COURT*, *supra* note 2, at 119-210.

73. See *supra* note 43 for other Part 2 topics.

74. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 8, 1948, 78 U.N.T.S. 277, reprinted in 45 AM. J. INT'L L. 7 (1951) (Supp.).

75. Article 2 of Genocide Convention refers only to "national, ethnic or religious" groups. It does not include social or political ones. The delegates chose to not expand the Genocide Convention's definition since doing so might have required states to revise their laws implementing that Convention. Despite the strong urging of this writer, the delegates unfortunately lost a historic opportunity to fill these unjustified gaps.

76. See Agreement for the Prosecution and Punishment of London Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 299, E.A.S. 742. See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (2d rev. ed. 1999) [hereinafter BASSIOUNI, *CRIMES AGAINST HUMANITY*].

77. See International Criminal Tribunal for the Former Yugoslavia (ICTY), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993). See also M. CHERIF BASSIOUNI (in collaboration with PETER MANIRAS), *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996).

78. See International Criminal Tribunal for Rwanda (ICTR), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). See also VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1997).

79. The drafters were under pressure from different sources to include certain prohibited acts in the Statute, but they did not draft specific elements which would have required lengthy and complicated sub-paragraphs. There was no time to engage in such detailed technical legal drafting.

future, thus raising questions about their conformity to the requirements of the principles of legality contained in Article 22. Furthermore, the jurisdictional element of policy is characterized as acts that are “widespread or systematic.”⁸⁰ This is not the clearest definition of policy.⁸¹ The drafters may have been uncertain, but more likely the lack of clarity was intentional — it provided a diplomatic way around NGO pressure to transform crimes against humanity into a crime encompassing massive human rights violations whether or not it was pursuant to state or organizational (which encompasses non-state actors) policy.⁸²

Article 8, which deals with war crimes, was the most difficult article to draft. In large part, the drafting problems for this article can be traced to the United States, the United Kingdom, and France — all of whom were concerned that their military personnel could be charged with war crimes as a result of their activities in peace-keeping operations. The drafters opted to subdivide Article 8 into segments reflecting different sources of law applicable to different contexts. However, as Article 8 reflects, the conventional and customary law of armed conflicts is neither evenly balanced nor sufficiently clear, particularly in regard to both international and non-international conflicts and to prohibited weapons.

Paragraph 2 of Article 8 deals with “grave breaches” of the 1949 Geneva Conventions, which solely apply to international conflicts. Since Paragraph 2 was taken verbatim from these Conventions, it poses no problems of specificity. But other paragraphs in Article 8 encompass violations of the laws and customs of war arising in both international and non-international conflicts.⁸³ Moreover, unlike conventional law violations, the customary law violations set out in Article 8 are open to interpretation, particularly with respect to prohibited weapons and weapons of mass destruction.

Between the objective uncertainty of customary law and the desires of certain delegations for built-in ambiguities, Article 8 is an unwieldy and, in part, an unclear provision. Article 8 also contains different inconsistent terms referring to the mental element, but the reconciliation of these terms with the provisions contained in Part 3 on the mental element was not

80. The required element of policy (i.e., state action) distinguishes crimes against humanity from other mass human rights violations and establishes its status as a category of international crimes. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 76, at 246-49. The element of policy also applies to non-State actors, which is not clear in Article 7(1) and 7(2). *Id.*

81. *Id.*

82. *Id.*

83. For example, Article 8(b) reflects the provisions of Common Article 3 of the 1949 Geneva Conventions and some provisions of Protocol (II) Additional to Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Conflicts, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/144/Annex II (1977), *reprinted in* 16 I.L.M. 1391, both of which apply to international conflicts. Some provisions of Protocol (I) Additional to Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Conflicts, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/144/Annex I (1977), *reprinted in* 16 I.L.M. 1391, also apply to international conflicts.

made. Moreover, there is no clear connection between the exceptions, exclusions, and defenses contained in Article 8 and the defenses contained in Part 3. The repeated use of the term "unlawful" as a qualifier for certain military acts in Article 8 will foster yet more confusion. The question will surely arise as to what is meant by that term since most legal systems define unlawfulness in a specific prohibitory norm. It is unclear where that norm exists with respect to conduct that can be characterized as unlawful, and how the legal source of the unlawfulness and its applicability in a given case is to be determined. Furthermore, characterizing certain conduct as unlawful also involves the mental element of knowledge. The absence of knowledge negates criminal responsibility, and certain mistakes of law or fact affecting knowledge constitute legal defenses. But, since there is no clear indication of what legal source to rely upon for determining unlawfulness, Part 3 alone cannot solve all of these problems. Certain delegations probably intended this ambiguity, but other delegations were not alerted to it. Moreover, the members of the working group on Part 3 and those of Article 8 worked separately, and these texts were never reconciled. The Committee never reviewed Article 8, which fell within Part 2; as stated above, Part 2 went directly to a vote by the Committee of the Whole on July 17 without the possibility of discussion of amendments.

The overlap in the elements defining genocide, crimes against humanity, and war crimes in Articles 6, 7, and 8 will also foster serious problems in interpreting the Statute.⁸⁴ Several factors underlie this oversight, including the drafters' immediate concern to produce an acceptable compromise text (which necessitated dispensing with legal technicalities), and the inexperience of the informal working group dealing with these Articles.

Part 3 (General Principles of Criminal Responsibility) raised the deeper problem of reconciling different legal conceptions.⁸⁵ Part 3 is the most technically difficult part of the Statute and is the most likely to be criticized by comparative criminal law experts.⁸⁶ In particular, the lack of any limitations on affirmative defenses such as insanity, intoxication, mistake of law, and mistake of fact (insofar as they are available in the context

84. See M. Cherif Bassiouni, *Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 199 (1998). Interpretation problems arising from the overlap have already surfaced in connection with the ICTR's *Akayesu* case, *The Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T. In the French legal system and other Civilist/Romanist legal systems, this problem is referred to as *concours idéal d'infractions* (the ideal concurrence of crimes). When several crimes have overlapping legal elements, the judge has difficulty establishing which crime was committed. Presumably, the Preparatory Commission established under Resolution F of the Final Act pursuant to Article 9 will resolve some of these issues.

85. This writer faced this problem when developing a "general part" of international criminal law. See M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987) [hereinafter *DRAFT INTERNATIONAL CRIMINAL CODE*]. For additional information on Part 3, see William A. Schabas, *General Principles of Criminal Law in the International Criminal Court Statute (Part III)*, 6 *EUR. J. CRIME, CRIM. L. & CRIM. JUST.* 84-112 (1998).

86. See various authors in 67 *REVUE INTERNATIONALE DE DROIT PÉNAL* (1996), *commenting on DRAFT INTERNATIONAL CRIMINAL CODE*, *supra* note 84.

of genocide and crimes against humanity) will seem incongruous to many. Under the current form of these affirmative defenses, a head of state could claim that he or she issued an order to commit genocide while intoxicated and should therefore be exonerated of criminal responsibility. The drafters surely did not intend to allow those who order, command, or execute such crimes as genocide and crimes against humanity to assert these affirmative defenses, but they should have clearly stated their intent instead of leaving it open to judicial interpretation.

Another shortcoming of the Statute involves determining the mental element required for each of the crimes within the ICC's jurisdiction. The drafters failed in some instances to clearly delineate the requisite intent (i.e., specific or general) for crimes, or to distinguish those who order the commission of crimes from those who execute them.⁸⁷ These problems are especially evident in Article 8, where there is some confusion regarding when a given war crime requires specific or general intent. The Statute also does not specify which legal standards should be used to establish intent. Because common law, civil law, and other legal systems approach the mental element of crimes very differently, the drafters of Part 3 faced a significant challenge. While the drafters resolved some of the differences, in the interest of diplomatic compromise they left many others for ICC jurisprudence to settle. Part 3 thus contains many ambiguities relating to elements of crimes, especially because it does not include a provision on *actus reus*, which was dropped because the working group could not reach a consensus on the meaning and application of omissions as a basis for the material element.

To improve the situation concerning Part 3 and the definition of crimes contained in Articles 6, 7, and 8, Article 9 of the Statute requires the PrepCom to draft a set of non-binding elements of crimes to serve as future guidelines.⁸⁸ However, it is difficult to foresee how the judges of the Court will interpret these non-binding elements in light of the binding legal nature of the Statute's norms and other sources of interpretation.⁸⁹ This post hoc drafting of elements of crimes, while valid in international law, is anomalous in criminal law. Nevertheless, the drafters included Article 9 to try to balance the competing demands of diplomacy and specificity in criminal legislation.

Parts 4, 5, and 6 (dealing with procedure) present a veritable conglomeration of different legal processes, although the adversary-accusatorial process prevails in substance as well as in numerous specific provisions. The decision to develop detailed adversary-accusatorial norms and rules (with a few norms deriving from the so-called inquisitorial systems) was

87. See BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 76.

88. See Res. F of the Final Act at paragraph 5(b) ("The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of . . . Elements of Crimes.").

89. Article 21 of the Statute permits recourse to alternative legal sources of international law. That very norm, however, may pose problems in light of Article 22, which clearly states the applicability of the principle *nullum crimen sine lege*.

motivated by a desire to protect the rights of the accused, though some delegates, including myself, felt that excessive formalism would ultimately be counter-productive to the accused and would certainly delay the processes of investigation, prosecution, and adjudication.⁹⁰ Trials that are excessively long due to procedural reasons would, in my opinion, not only delay justice, but also negatively impact public support for the Court, particularly as costs arising from extended procedures skyrocket. Both the U.S. and the U.K. delegations insisted on the inclusion of those norms, over the objections of some other delegations.⁹¹ It is not certain whether the drafters envisioned the formalistic impact of these detailed procedures on the effectiveness of the ICC's processes.⁹² They did intend, however, to curtail the ability of the Court to enact rules of procedure, as is the case with the ICTY⁹³ and ICTR.⁹⁴

Part 7 (Penalties) may also raised questions with jurists who interpreted the principle of *nulla poene sine lege* more rigidly.⁹⁵ This part was extensively negotiated and represents a compromise between many seemingly irreconcilable positions. For example, the NGO community pushed strongly for some recognition of victims' rights and compensation, just as it had during the formation of the ICTY. In the latter instance, the Security Council paid only lip-service to the question of victim compensation and included a paragraph about it in Resolution 827.⁹⁶ Because international law is far from settled on the question of victims' rights, the drafters opted to not clearly delineate the substantive and procedural aspects of those rights in Articles 75 and 79.⁹⁷ The resulting provisions would not satisfy most legal codifications.

90. However, as illustrated by the work of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), this approach may not necessarily benefit the accused in connection with gathering evidence. See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994); *Annexes to the Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994). Representatives of the ICTY repeatedly pointed out the practical problems they faced when they appeared before the PrepCom, but their concerns about effectiveness and operational questions were not sufficiently heeded.

91. For example, the French delegation repeatedly sought to introduce an alternate approach but ultimately acquiesced to the U.S. and U.K. position.

92. While many delegates questioned the necessity of such detail, that was one of the concessions granted to the U.S. delegation. In the future, however, such an approach will likely encumber the Court with procedural hurdles. Consequently, the effectiveness of ICC may suffer and its proceedings are likely to be lengthy and procedurally contentious.

93. See S.C. Res. 808, *supra* note 77.

94. See S.C. Res. 955, *supra* note 78, art. 14.

95. See *supra* note 89.

96. See S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES 827 (1993).

97. See, e.g., *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/40/53 (1985); *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Final Report submitted by Mr. Theo Van Boven, Special Rapporteur, U.N. ESCOR, 45th Sess., U.N. Doc. E/CN.4/Sub.2/

Part 9 (Cooperation) also reflects a delicate compromise and consequently treats the legal nature of the obligations it requires ambiguously.⁹⁸ A link to complementarity would have helped overcome the possibility that some governments would assert the supremacy of national legal norms concerning surrender and other forms of penal cooperation over the norms of the Statute.⁹⁹ But precisely these tensions between what could have been deemed a supra-national rather than an international process produced the more ambiguous compromise approach.

Commentators on the Rome Statute will surely find much to criticize in the method and technique (or lack thereof) of the drafters. Nevertheless, the Rome Statute text is not likely to be amended easily, if for no other reason than any amendments would require another lengthy process of ratification. As the Court develops its own jurisprudence, it should address many of the Statute's flaws. The Assembly of State Parties can also remedy some of these problems. That expectation is in itself a legal technique in addressing difficult questions, and it would surely be valid, provided that it can be reconnected with Article 22 (*Nullum crimen sine lege*).¹⁰⁰

A more immediate problem, however, is how states wanting to ratify

1993/8 (1993); *Revised Set of Basic Principles and Guidelines on the Rights to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, prepared by Mr. Theo Van Boven pursuant to Sub-Commission decision 1995/117, U.N. Doc. E/CN.4/Sub.2/1996/17 (1996); *Question of the Human Rights of All Persons Subject to Any Form of Detention or Imprisonment*, U.N. Doc. E/CN.4/1997/104; *Report of the Independent Expert on the Right to Restitution, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, submitted by Mr. M. Cherif Bassiouni pursuant to Commission on Human Rights Resolution 1998/43, U.N. Doc. E/CN.4/1999/65 (1999).

98. See, e.g., 2 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 2d ed. 1999).

99. See M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, in 13 NEP, *supra* note 2, at 12-13; M. Cherif Bassiouni, *Observations on the Structure of the (Zutphen) Consolidated Text*, in 13bis NEP, *supra* note 2, at 8-9, 11-16.

100. It should be noted that Article 21, "Applicable Law," states:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief.

Rome Statute, *supra* note 2, art. 21. This Article may well appear to be in contradiction with a rigid interpretation of Article 22, which adopts the principle of *nullum crimen sine lege*.

the Treaty will develop national implementing legislation.¹⁰¹ Since states will develop such legislation based on their respective national legal systems, the resulting legislation will differ widely. Consequently, the ICC and those who will have to work with this Statute will have to grapple with a wide-range of different legal issues arising from not only the problems of the Statute, the Elements of Crimes, and Rules of Procedure and Evidence, but also the different types of national implementing legislation.

Some of these difficulties might have been avoided by having more delegates with expertise in international and comparative criminal law and procedure in national delegations, as well as by allowing more time for the drafting process.¹⁰² Nevertheless, some problems were inevitable since the drafting process itself suffered from the flaws of multilateral negotiating practices.¹⁰³ The drafting process was too vulnerable to the obstinacy of single delegations or even single delegates who refused to allow approval by consensus. There has to be a better way to draft such complex multilateral treaties.

Conclusion

On July 18, the Convention was opened for signature at Il Campidoglio in Rome. In order to permit the Secretariat and the translators to finalize the text, the ceremony started at 1600 hours. Within two hours, twenty-six governments had signed the Treaty, which remained available for signature in Rome at the Italian Ministry of Foreign Affairs until October 30, 1998. Thereafter, the Treaty was transferred to its depository with the Secretary-General of the United Nations at New York Headquarters. By the end of October 1999, eighty-nine states had signed and four states had ratified the Treaty.¹⁰⁴ In the interim, the General Assembly established the Preparatory Commission to prepare the way for the Court to function as soon as the Treaty entered into force.¹⁰⁵ The Preparatory Commission's first ses-

101. See 13*qatar* NOUVELLES ÉTUDES PÉNALES (1999).

102. The five-week period (with 24 working days) was negotiated between the U.N. Office of Legal Affairs and the Italian Government. Cost factors largely determined the period of time and the number of U.N. personnel at the Conference.

103. See *supra* notes 32-48 and accompanying text for a description of problems in the drafting process of the ICC Statute.

104. See *supra* note 13.

105. See *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/9 (1998), at Annex I (F). The Preparatory Commission's duties included the preparation of

proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

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

sion took place in New York in February 1999, the second session occurred in July 1999, and its third session will be held in November 1999.

This writer's speech at the Rome Ceremony on July 18, which follows, expresses the moral, ethical and policy significance of this historical journey.¹⁰⁶

The world will never be the same after the establishment of the International Criminal Court. Yesterday's adoption of the Final Act of the United Nations Diplomatic Conference and today's opening of the Convention for signature marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice. The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world.

The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted. It asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated. In that respect it fulfils what Prophet Mohammad said, that "wrongs must be righted." It affirms that justice is an integral part of peace and thus reflects what Pope Paul VI once said, "If you want

The Commission is also charged to prepare a draft provision for the crime of aggression.

106. M. Cherif Bassiouni, Speech at Rome Ceremony (July 18, 1998). In that speech I refer to the few to which so many owe their thanks. Among those who were delegates and who merit special recognition for their commitment, hard work and dedication to the success of this endeavor are: François Alabrune, France; Zeid Ra'ad Zeid Al-Hussein, Jordan; Hans-Joerg Behrens, Germany; Franklin Berman, United Kingdom; Trevor Chimimba, Malawi; Jamison S. Borek, United States; Adriaan Bos, The Netherlands; Lucius Cafilisch, Switzerland; Delia Chatoor, Trinidad and Tobago; Roger Clark, Samoa; Harvey Dalton, United States; Phani Daskalopoulou-Livada, Greece; Susan J. Dickson, United Kingdom; Paula Escarameia, Portugal; Sylvia Alejandra Fernandez de Gurmendi, Argentina; Rolf Einar Fife, Norway; Charles Garraway, United Kingdom; Fabricio Guariglia, Argentina; Gerhard Hafner, Austria; John Holmes, Canada; Mark B. Jennings, Australia; Hans-Peter Kaul, Germany; Philippe Kirsch, Canada; Erkki Kourula, Finland; Sung-Kyu Lee, Korea; Beatrice Le Fraper du Hellen, France; Lamia Mekheimer, Egypt; Phakiso Mochochoko, Lesotho; Christopher Muttukumaru, United Kingdom; Yasumasa Nagamine, Japan; Hisashi Owada, Japan; Marc Perrin de Brichambaut, France, Donald Piragoff, Canada; Mauro Politi, Italy; Rama Rao, India; Medard R. Rwelamira, South Africa; Waleed Sadi, Jordan; Per Saland, Sweden; David Scheffer, United States; Joanna Scott, France; Cathrine Lisa Steans, Australia; Peter Tomka, Slovakia, Peter Vallance, United Kingdom; Hermann Von Hebel, The Netherlands; Mary Ellen Warlow, United States; Elizabeth Wilmhurst, United Kingdom; Felicity Wong, New Zealand; and Lionel Yee, Singapore.

The responsibility for the Conference rested on the Italian Ministry of Foreign Affairs, and more particularly on Ambassador Umberto Vattani, Secretary-General of the Ministry; Professor Umberto Leanza, Director of Legal Affairs and his Deputy Counselor, Umberto Colesanti; and at the Italian Mission to the United Nations, Ambassador Francesco Paolo Fulci and Professor Mauro Politi. Last, but not least, is Professor Giovanni Conso, Former Minister of Justice and Honorary President of the Constitutional Court, who was the President of the Conference.

Many academics have worked for the establishment of the ICC and their scholarly work made it possible for the idea to gain international recognition and national support.

As with all such developments, it takes dedicated, knowledgeable and capable persons to transform ideals into reality.

peace, work for justice." These values are clearly reflected in the ICC's Preamble.

The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, or restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimization, and bring to justice some of the perpetrators of these crimes. In so doing, the ICC will strengthen world order and contribute to world peace and security. As such, the ICC, like other international and national legal institutions, will add its contribution to the humanization of our civilization.

The ICC also symbolizes human solidarity, for as John Donne so eloquently stated, "No man is an island, entire of itself; each man is a piece of the continent, a part of the main . . . Any man's death diminishes me because I am involved in mankind."

Lastly, the ICC will remind us not to forget these terrible crimes so that we can heed the admonishment so aptly recorded by George Santayana, that those who forget the lessons of the past are condemned to repeat their mistakes.

Ultimately, if the ICC saves but one life, as it is said in the *Talmud*, it will be as if it saved the whole of humanity.

From Versailles to Rwanda, and now to the Treaty of Rome, many have arduously labored for the establishment of a system of international criminal justice. Today our generation proudly, yet humbly, passes that torch on to future generations. Thus, the long relay of history goes on, with each generation incrementally adding on to the accomplishments of its predecessors.

But today, I can say to those who brought about this historic result, the government delegates in Rome, those who preceded them in New York since 1995, the United Nations staff, members of the Legal Office, the non-governmental organizations and here in Rome the staff of the Italian Ministry of Foreign Affairs, what Winston Churchill once said about heroes of another time, "never have so many, owed so much, to so few."

