

Chapter Three

The Creation of the International Criminal Court

Introduction

It was observed in the preceding chapter that NGOs have risen to greater prominence in international relations. And at last I mentioned that I choose the case of the making of the International Criminal Court as an example to see the roles of NGOs in international relations practice. Therefore, the purpose of this chapter is to introduce the history of the making of the International Criminal Court.

The International Criminal Court (ICC) was created on 17 July 1998, when 120 States participating in the “UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court” adopted the Rome Statute.¹ The ICC entered into force on 1 July 2002. The establishment of the ICC is a historic victory for human rights and international justice. It shows the first permanent international judicial institution with jurisdiction over individuals who commit the most egregious violations of human rights and humanitarian law.

The ICC has often been described as the “missing link” in international human rights enforcement. Excluding ICC, there is no permanent enforcement mechanism

¹ See The Rome statute of the International Criminal Court:
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>;
<http://www.un.org/law/icc/statute/romefra.htm> (Retrieved 24 January 2005).

with jurisdiction over individuals who commit terrible crimes (such as genocide, war crimes and crimes against humanity), has ever existed at the international level.²

To sum up, this first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished is a milestone in our human history. The participants of the creation of the ICC really did a great job. We shall first discuss the history of the making of the ICC in detail.

The Background of the Making of the International Criminal Court

The concept of an international criminal court is not a new one. Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. Since the earliest times of human history, mankind has sought to lessen the horrors of wars through measures for the limitation and control of armaments and wars. However, those who started wars or committed acts of terrorism usually do not have to take the responsibility for their mistaken actions. Tragedies happen again and again. The voice of protecting human rights and humanitarian law is getting louder and louder. Therefore, establishing an international criminal court to punish those people or protect human rights becomes an urgent task.

² CICC website. "Importance of the International Criminal Court: Why it Matters."
<http://www.iccnw.org> (Retrieved 26 January 2005).

Moreover, the absence of such an international court discredits the rule of law.³

People thus have worked for this vision for a long time. Finally, the goal has been reached.

The Period of the League of Nations

Before the World War I, there was no regular international machinery, neither on the political–diplomatic level nor on the administrative level.⁴ The so-called Concert of Europe of the time was an informal system of consultation between the Great European Powers of the epoch; it lacked all the attributes of system and constitution, and its machinery was that of the traditional techniques of diplomacy.⁵ However, the foundation of the League of Nations by the Peace Treaties of 1919 changed this.

At the end of the First World War, it was taken for granted that a new court would be established. The Permanent Court of International Justice thus was in existence from 1922 until the dissolution of the League on 18 April 1946. Strictly speaking, the Permanent Court was not an organ of the League. The fact that a State

³ Commission on Global Governance, *Our Global Neighborhood*, p. 323.

⁴ The world came to 1914 with no general machinery for handling international disputes except the Permanent Court of Arbitration, which was organized in 1900, upon the coming into force of the Hague Convention of 1899. The Second Peace Conference at The Hague in 1907 revised the 1899 Convention, and provided for the continued maintenance of the Court. In a strict sense, however, this institution is not a court. See Manley O. Hudson, *The World Court 1921-1934*, 4th ed. (Boston: World Peace Foundation, 1934), pp. 2-6.

⁵ Shabtai Rosenne, *The World Court – What It Is and How It Works*, 4th ed. (Dordrecht; Boston: Martinus Nijhoff Publishers, 1989), pp. 11-3.

was a Member of the League did not automatically make it a party to the Statute of the Court; in other words, the States which were parties to the Statute were not identical with the international political community organized in the League.⁶ As a result, the Court became in a measure dependent on the continued existence of the League of Nations. The League of Nations and the Court disappeared at the same time.

Moreover, in 1937, an International Convention against Terrorism by the League of the Nations was a great contribution to the making of the ICC. Article I of the Convention reaffirms “the duty of every state to refrain from any act designed to encourage terrorist activities take shape.” Nevertheless, the Convention is framed in terms of individual responsibility. Linked to the Terrorism Convention, and dependent upon its entry into force, was a Convention for the Creation of an ICC for the trial of persons accused of having committed acts of terrorism. Regretfully, the Terrorism Convention was only ratified by India, and never came into force.⁷

However, there is no denying that the Permanent Court of International Justice was the most important institution during the period of the League of Nations. The experience of the Permanent Court shows that the high standards of personal integrity and professional competence, and worldly wisdom, of its members, the fact that the

⁶ Ibid., pp. 13-4.

⁷ Nina H. B. Jorgensen, *The Responsibility of States for International Crimes* (New York: Oxford University Press, 2000), p. 31.

judicial pronouncements were endowed with strong moral authority in addition to their formal finality.⁸ The reconstituted system of international adjudication after the end of the Second World War had started to settle. The Permanent Court of International Justice thus was replaced by the International Court of Justice in 1945.

The Period of the UN

When the League disappeared, and the UN took its place, it was never suggested that the Court had outlived its usefulness and could be disbanded. It was natural that International Court of Justice substituted for the Permanent of International Court. Article 92 of the United Nations (UN) Charter states that the International Court of Justice shall be the principal judicial organ of the UN, and that it shall function in accordance with the annexed Statute, based on the Statute of the Permanent Court, which forms an integral part of the Charter.⁹ In addition, Article 7, 92, and 93 of the UN Charter and Article 1 of the Statute put emphasis on the general provisions setting forth the position of the Court within the UN. Moreover, the Court's decisions, and the General Assembly arranges for the election of the judges and payment of the Court's expenses also are stipulated in the Charter.¹⁰ Therefore, the

⁸ Shabtai Rosenne, *The World Court – What It Is and How It Works*, p. 18.

⁹ *Ibid.*, p. 23. The principal organs of the UN include the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.

¹⁰ *Ibid.*, p. 23, p. 27.

ambiguous relation between the League of Nations and the Permanent Court of International Justice has now been replaced by clarity. The Court is a principal organ of the UN and its Statute, no longer a separate international treaty, is an integral part of the Charter.¹¹ This is indeed a crucial step for international adjudication system.

International Court of Justice

In short, the International Court of Justice was set up in Hague, the Netherlands, in 1945 under the Charter of the UN to be the principal judicial organ of the Organization, and its basic instrument, the Statute of the Court, forms an integral part of the Charter. All members of the UN should *ipso facto* be parties to the Statute of the Court. Moreover, non-members could become parties to the Statute on condition to be determined in each case by the General Assembly upon the recommendation of the Security Council. Therefore, in some respects the International Court of Justice may be regarded as the successor of the Permanent Court. The Court resolves in accordance with international law disputes of a legal nature submitted to it by States, while in addition certain international organs and agencies are entitled to call upon it for advisory opinions.¹²

According to Article 36, paragraph 3, of the Charter, “*In making*

¹¹ Ibid., p. 23.

¹² See Article 92-96 of the Charter. Also mentioned in Shabtai Rosenne, *The World Court – What It Is and How It Works*, pp. 23-9.

*recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court,”*¹³ we can find that the Charter considers there are legal disputes and political disputes, and normally, the Court only deal with legal disputes. Moreover, Article 92 to Article 96 in Chapter XIV of the Charter, the Statute of the International Court of Justice and Rules of Court completely regulate the operation of the Court.¹⁴ Neither any groups nor individuals have qualifications to be parties of the Court. Generally speaking, it is only states, organs and specialized agencies of the UN that have the right to submit to the Court; namely, the Court reacts to the initiatives of States and other organs and specialized agencies in a spirit of co-operation, but has no power to of initiating action itself.¹⁵

Other International Criminal Tribunals¹⁶

According to the Charter of the UN, the International Court of Justice is the only judicial organ and is the principal judicial organ of the UN. However, this does

¹³ <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicunchart.htm#Chapter6> (Retrieved 30 April 2005).

¹⁴ <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicunchart.htm#Chapter14> (Retrieved 30 April 2005).

¹⁵ Shabtai Rosenne, *The World Court – What It Is and How It Works*, pp. 35-6.

¹⁶ For a general introduction to the subject, see H. Ball, *Prosecuting War Crimes and Genocide: The Twentieth-Century Experience* (University Press of Kansas, 1999); quoted in Kriangsak Kittichaisaree, *International Criminal Law* (New York: Oxford University Press, 2001), p. 17.

not mean that the Court is the only official channel that may be established either by the UN as an organization or by its individual members. Article 33 and Article 95 of the Charter serve as evidence for the idea. Article 33, which enumerates the various methods for the pacific settlement of international disputes, includes arbitration, judicial settlement, or other peaceful means of the parties' own choice: the principle that the parties are free to choose their own methods of peaceful settlement is firmly enshrined. Parallel to this is Article 95 of the Charter which spells out that nothing in the Charter shall prevent the members from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.¹⁷ Thus, the UN has been instrumental in establishing several other tribunals.

The following *ad hoc* international criminal tribunals were set up in the course of the twentieth century: the International Military Tribunal at Nuremberg (Nuremberg Tribunal) and the International Military Tribunal for the Far East (Tokyo Tribunal) after WWII¹⁸, the International Criminal Tribunal for the former Yugoslavia¹⁹ (ICTY) in 1993, and that for Rwanda²⁰ (ICTR) in 1994. The

¹⁷ Shabtai Rosenne, *The World Court – What It Is and How It Works*, p.34.

¹⁸ For historic events leading to the creation of these two Tribunals, see: M. M. Whiteman, *Digest of International Law*, xi (US Dept. of State, 1968), pp. 874-97, 965-73; M. P. Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg* (Carolina Academic Press, 1997), chap. 1; quoted in Kriangsak Kittichaisaree, *International Criminal Law*, p. 17.

¹⁹ For detailed accounts relating to the creation of the ICTY see: Sharf, *Balkan Justice*, chaps. 2-5; M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996), chaps. I-III; A. Fatic, *Reconciliation via the War Crimes Tribunal?* (Ashgate, 2000); quoted in Kriangsak Kittichaisaree, *International Criminal Law*, p. 22.

establishment of these tribunals is because that the International Court of Justice is not a court exercising jurisdiction in criminal cases between States or between a State and an individual or individuals.²¹ Article 34, paragraph 1, of the Statute of the International Court of Justice provides that only States may be parties in cases before the Court, and this precludes, apart from any other consideration, individuals being arraigned by a State or any other body before the Court.²² It only acts in response to legal disputes and advisory opinions submitted by its parties. The Court does not have the power to deal with international criminal cases.

However, the Nuremberg Tribunal and the Tokyo Tribunal are often criticized because they dispensed the “victor’s justice” and violated the principle of legality.²³ The main characteristic of ICTY and ICTR is that they exercise jurisdiction over natural persons and that they are set up on ad hoc basis by specific political consensus of the Member States of the UN Security Council. Their jurisdiction is binding on all UN member States. Both of them have been created to investigate and prosecute specific atrocities and their jurisdiction is temporally and geographically limited.²⁴ To sum up, the descriptions above explain the fact that there is no regular and permanent

²⁰ For background and materials, see: J. Oppenheim and W. van der Wolf (eds.), *Global War Crimes Tribunal Collection*, i (Global Law Association, 1997); J. Tebbs, *Rwanda, War and Peace?! (Global Law Association, 1999)*; C. Scheltema and W. van der Wolf (eds.), *The International Tribunal for Rwanda: Facts, Cases, Documents* (Global Law Association, 1999); quoted in Kriangsak Kittichaisaree, *International Criminal Law*, p. 24.

²¹ Shabtai Rosenne, *The World Court – What It Is and How It Works*, p. 37.

²² *Ibid.*

²³ Kriangsak Kittichaisaree, *International Criminal Law*, p. 19.

²⁴ *Ibid.*, pp. 22-6.

international criminal court.

Building the International Criminal Court

"For nearly half a century -- almost as long as the United Nations has been in existence -- the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War -- the camps, the cruelty, the exterminations, the Holocaust -- could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time -- this decade even -- has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response." --- Kofi Annan, United Nations Secretary-General²⁵

The UN already has *ad hoc* tribunals deal with abuses in certain places, but the International Criminal Court is the first permanent court set up to try individuals for genocide, war crimes and other major human rights violations.

The Preparatory Phase

The ICC was initially proposed in 1948. In resolution 260 of 9 December 1948, the General Assembly of UN, "Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate

²⁵ "Why Do We Need an International Criminal Court?"
<http://www.un.org/law/icc/general/overview.htm> (Retrieved 5 April 2005).

mankind from such an odious scourge, international co-operation is required”, adopted the Convention on the Prevention and Punishment of the Crime of Genocide.²⁶ At that time, the International Law Commission was requested by the General Assembly to study the possibility of setting up an international criminal court.²⁷ The International Law Commission believed that the establishment of such a court to try persons charged with genocide or other crimes of similar gravity was both desirable and possible. Two draft statutes for an international court were developed by the UN in 1951 and 1953, and much international dialogue has followed, work having been accomplished especially by the International Law Commission. However, the General Assembly decided to postpone consideration of the draft statute pending the adoption of a definition of aggression. Since that time, the question of the establishment of an international criminal court has been considered periodically.²⁸

Work was suspended during the ‘Cold War’ but resumed in 1989, following a suggestion at the 44th General Assembly of the UN.²⁹ In 1993, the International Law Commission was asked by the General Assembly to draft a statute for a court. The draft statute finalized in 1994, drawn up by the International Law Commission, was

²⁶ Overview on Rome Statute of the International Criminal Court: <http://www.un.org/law/icc/general/overview.htm> (Retrieved 18 April 2005).

²⁷ Union of International Associations, eds., *Yearbooks of International Organizations: Guide to Global and Civil Society Networks 2003/2004*, Vol. 1B (München: K. G. Saur, 2003), p. 1528.

²⁸ Ibid. Overview on Rome Statute of the International Criminal Court: <http://www.un.org/law/icc/general/overview.htm> (Retrieved 18 April 2005).

For detailed accounts relating to the efforts of the International Law Commission to the establishment of the ICC see: Nina H. B. Jorgensen, *The Responsibility of States for International Crimes*, pp. 215-7.

²⁹ Union of International Associations, eds., *Yearbooks of International Organizations: Guide to Global and Civil Society Networks 2003/2004*, p. 1528.

largely influenced by the ICTY Statute.³⁰ The draft statute was submitted to the 49th General Assembly in 1994, but no agreement was reached. The General Assembly established the ad hoc Committee on the Establishment of an International Criminal Court in order to review and consider major substantive issues arising from the International Law Commission draft statute. After that, the UN Preparatory Committee on the Establishment of an International Criminal Court (known as the PrepCom) was created to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.³¹ The PrepCom, which met from 1995 to 1998 and had developed a new innovative system of international criminal justice, merging elements from different legal systems, held its final session on 3 April of 1998 and completed the drafting of the text³²

The General Assembly of UN gave the PrepCom political recognition for progress made and encouraged it to carry on and speed up the draft statute. The PrepCom was particularly asked to achieve a draft treaty that a diplomatic conference would be able to negotiate into an agreed final text, ready for signature and

³⁰ Kriangsak Kittichaisaree, *International Criminal Law*, p. 27.

³¹ Overview on Rome Statute of the International Criminal Court: <http://www.un.org/law/icc/general/overview.htm> (Retrieved 18 April, 2005).

³² Philippe Kirsch, Q. C., "The Development of the Rome Statute," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International: The Hague, 2002), p. 451. Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance*, Vol. 5, Iss. 1 (Jan-Mar 1999), p. 1.

ratification.³³ The PrepCom met the challenge throughout its six sessions. Table 3.1 provides a brief, selective chronology.³⁴ However, the PrepCom had accomplished a great deal, including developing the structure of the Draft Statute which was never protested by the Rome Conference.³⁵

Selective chronology of events in drafting the Rome Statute, 1996-1998	
1996	
25 March – 12 April	First session of the UN Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) convenes.
10 July – 14 July	Informal intersessional meeting convenes in Siracusa, Italy, to discuss general principles of criminal law, rules of evidence and procedure, and states cooperation with the international criminal court.
12 August – 30 August	Second session of the PrepCom convenes.
17 December	UN General Assembly adopts a resolution setting forth the dates for third, fourth, fifth, sixth, and seventh PrepCom sessions and welcoming Italy's offer to host the treaty conference in 1998.
1997	
11 February – 21 February	Third session of the PrepCom convenes.
29 May – 4 June	Informal intersessional group of experts meets in Siracusa, Italy, to discuss rules of procedure and evidence.
11 August – 15 August	Fourth session of the PrepCom convenes.
14 September	The fourteen nations of the Southern African Development Community set out ten basic principles as benchmarks for an independent and effective international criminal court.
16 November – 22 November	Informal intersessional meeting convenes to discuss state cooperation.
1 December – 12 December	Fifth session of the PrepCom convenes.

³³ Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance*, pp. 4-5.

³⁴ For detailed accounts relating to the six sessions of the PrepCom see: Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance*, pp. 5-8.

³⁵ The thirteen Parts of the Statute were as follows: 1. Establishment of the Court; 2. Jurisdiction, Admissibility and Applicable Law; 3. General Principles of Criminal Law; 4. Composition and Administration of the Court; 5. Investigation and Prosecution; 6. The Trial; 7. Penalties; 8. Appeal and Review; 9. International Cooperation and Judicial Assistance; 10. Enforcement; 11. Assembly of States Parties; 12. Financing; 13. Final Clauses. More detailed information about the contents of each Part see: Kriangsak Kittichaisaree, *International Criminal Law*, pp. 29-38.

1998	
19 January – 30 January	Extended bureau of the PrepCom (including chairs and coordinators of the working groups) meets in Zutphen, the Netherlands. The Zutphen Report consolidates the various draft texts produced during two years of PrepCom meetings.
5 February – 6 February	Representatives of twenty-five African governments meet in Dakar, Senegal, to discuss the establishment of an international criminal court. They adopt the Dakar Declaration, which calls for an effective, independent court.
16 March – 3 April	Sixth session of the PrepCom convenes.
6 May – 9 May	Bureau of PrepCom and newly nominated bureau of the diplomatic conference meet in Courmayeur, Italy, to prepare for the Rome conference.
15 June – 17 July	UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convenes in Rome, Italy.

Table 3.1 Selective Chronology of Events in Drafting the Rome Statute, 1996-1998.

Source: Fanny Benedetti and John L. Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,” *Global Governance*, Vol. 5, Iss. 1 (Jan-Mar 1999), p. 6.

In its fifty-second session, the General Assembly decided to convene a diplomatic conference, the *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, to be held in Rome, Italy, from 15 June to 17 July, 1998, to finalize and adopt a convention on the establishment of an international criminal court.³⁶

During the Rome Conference,³⁷ the responsibility for being able to develop and adopt a draft statute in time for its mandatory conclusion in the diplomatic conference fell on primarily on the Committee of the Whole, in which debates were to give the

³⁶ See General Assembly Resolution 160/52 entitled Establishment of an International Criminal Court, UN General Assembly Official Records, Fifty-second Session, Supplement No. 32, A/52/32 (1997); quoted in Roy S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law,” Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 4.

³⁷ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, from 15 June to 17 July, 1998.

necessary policy direction to the many working groups and coordinators in charge of specific parts or articles of the draft statute.³⁸ Besides, the Drafting Committee³⁹ had to ensure proper and consistent drafting throughout the Statute in all languages, without altering the substance of the text emerging from the Committee of the Whole.

The Rome Statute

The Rome Statute is the basis for the creation of the International Criminal Court. The Statute of the ICC was formally adopted on 17 July 1998, as proposed by the Committee on the Whole of the recommendation of its Bureau, by an overwhelming majority of 120 States.⁴⁰ The Statute is referred to as *Treaty of Rome – Traité de Rome* and includes both crimes covered by international treaties and crimes recognized under international or national law. It particularly refers to *Convention on the prevention and punishment of the crime of genocide (Genocide Convention, 1948)* and *Geneva Convention on Torture (1949)*.⁴¹

The following is a brief outline of the parts and subject matter of the Rome

³⁸ Philippe Kirsch, Q. C., “The Development of the Rome Statute,” Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 451.

³⁹ The Drafting Committee was chaired by Professor Cherif Bassiouni of Egypt. The Drafting Committee was able to conduct a second reading of almost all the articles referred to it and produced no less than 200 documents; quoted in Philippe Kirsch, Q. C., “The Development of the Rome Statute,” Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 451.

⁴⁰ Philippe Kirsch, Q. C., “The Development of the Rome Statute,” Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 452-6.

⁴¹ Union of International Associations, eds., *Yearbooks of International Organizations: Guide to Global and Civil Society Networks 2003/2004*, p. 1528.

Statute.⁴²

PART 1: Establishment of the Court

Part 1 is comprised of articles 1 to 4. It concerns the establishment of the Court and its relationship with the UN. The Court is to be established by treaty and based in The Hague, the Netherlands. The relationship of the Court to the UN will be determined by an agreement under negotiation at the Preparatory Commission.

PART 2: Jurisdiction, Admissibility, and Applicable Law

Part 2 is comprised of articles 5 to 21. It concerns crimes within the Court's jurisdiction, the role of the Security Council, the admissibility of cases, and the law applicable to cases coming before the Court. The Court initially will have jurisdiction over war crimes, genocide, and crimes against humanity. Additionally, the Court will exercise jurisdiction over the crime of aggression once agreement can be reached on a definition of this crime. It also establishes the principle of complementarity, by virtue of which the Court will only exercise its jurisdiction when the States that would normally have national jurisdiction are either unable or unwilling to exercise it.

PART 3: General Principles of Criminal Law

Part 3 is comprised of articles 22 to 33. It concerns principles of criminal law drawn from different legal systems with the objective of providing all guarantees of due process. This section includes the principle of non-retroactivity, whereby the Court will not have jurisdiction over acts committed prior to the Statute's entry into force. It recognizes the principle of individual criminal responsibility, which makes it possible to prosecute individuals for serious violations of international law. This part also addresses the responsibility of leaders for actions of subordinates, the age of responsibility, the statute of limitations, and an individual's responsibility for both an act and an omission.

PART 4: Composition and Administration of the Court

Part 4 is comprised of articles 34 to 52. It details the structure of the Court and the qualification and independence of judges. The Court will be comprised of the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor and the Registry. Eighteen judges will be elected by the Assembly of States Parties for nine year terms. They must have strong personal and professional qualifications in the fields of international and criminal law. The composition of the Court will reflect an adequate balance of the different legal systems of the world, geographic regions and gender equality.

PART 5: Investigation and Prosecution

Part 5 is comprised of articles 53 to 61. It addresses the investigation of alleged crimes and the process by which the Prosecutor can initiate and carry out investigations. It also defines the rights of individuals suspected of a crime.

⁴² The ICC Statute agreed upon in Rome on July 17, 1998 is comprised of 13 sections and 128 articles. CICC website. "The Rome Statute Simplified." <http://www.iccnw.org/introduction/iccbackground.html> (Retrieved 27 March 2005). The full text of the Rome Statute is available on the CICC webpage at www.iccnw.org.

PART 6: The Trial

Part 6 is comprised of articles 62 to 76. It deals with trial proceedings, the question of a trial in the absence of the accused or following an admission of guilt, and the rights and protection of the accused. The Statute states that “everyone shall be presumed innocent until proved guilty in accordance with law.” This part also provides for the establishment of a Victims and Witnesses unit and the ability of the Court to determine the extent of damages and to order a guilty person to make reparation.

PART 7: Penalties

Part 7 is comprised of articles 77 to 80. It covers applicable penalties for persons convicted of a crime, which include: life imprisonment, imprisonment for a designated number of years, and fines, among other sentences. The death penalty is not a sentence of the Court. This part of the statute also establishes a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of victims.

PART 8: Appeal and Review

Part 8 is comprised of articles 81 to 85. It addresses appeals against judgment or sentence, appeal proceedings, the revision of a conviction or sentence, and the compensation to a suspect, accused, or convicted person. A convicted person, or the Prosecutor, may bring an appeal before the Court on the basis that the fairness of the proceedings was affected. The Statute states that anyone wrongfully arrested, detained, or convicted is entitled to compensation from the Court.

PART 9: International Cooperation and Judicial Assistance

Part 9 is comprised of articles 86 to 102. It addresses international cooperation and judicial assistance between States and the Court. It involves the surrender of persons to the Court, the Court’s ability to make provisional arrests, and State responsibility to cover costs associated with requests from the Court.

PART 10: Enforcement

Part 10 is comprised of articles 103 to 111. It includes the recognition of judgments, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, and parole and commutation of sentences.

PART 11: Assembly of States Parties

Part 11 is comprised of article 112. It establishes an Assembly of States Parties, formed by one representative of each State Party, to oversee the various organs of the Court, its budget, and reports and activities of the Bureau of the Assembly. Representatives will have one vote and decisions will be reached either by consensus or some form of a majority vote. The Assembly of States Parties will also have the power to adopt or amend the draft texts of the Rules of Procedure and Evidence and Elements of Crimes.

PART 12: Financing of the Court

Part 12 is comprised of articles 113 to 118. It states that funding for the Court shall be provided by three sources: (a) assessed contributions from States Parties; (b) funds provided by the UN; and (c) voluntary contributions from governments, international organizations, individuals, corporations and other entities.

PART 13: Final Clauses

Part 13 is comprised of articles 119 to 128. It addresses the settlement of disputes, reservations and amendments of the Statute, and ratification. It states that no reservations may be made upon ratification of the treaty. However, seven years after the treaty has entered into force, any State Party may propose amendments to the Statute at a Review Conference. The final clauses called for the Statute to be open for signature from July 17, 1998 to December 31, 2000 by all States that attended the Rome Conference. The Statute allows for a State Party to withdraw from the Statute by notifying the Secretary-General of the UN, in writing.

The contributions of the Rome Statute to international law are as follows: First, the Statute makes it possible for the Court to fill gaps in situations where national courts are either unable or unwilling to exercise jurisdiction. Second, a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to the Statute. Third, the definition of crimes contained in the Statute reflects existing practices and affirms current developments in international law. Fourth, the Statute's international criminal justice system represents the successful product of harmonization of the distinctive principles, rules and procedures derived from the world's major judicial systems. Fifth, the Statute has achieved a delicate balance between the search for international justice and international peace.⁴³ The Rome Statute not only is an instrument for the

⁴³ Roy S. Lee, "Introduction: The Rome Conference and Its Contributions to International Law," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 27-39.

establishment of the Court, but also has largely enriched the content of international law.

According to Article 125 of the Rome Statute, the Statute shall be open for signature by all States in Rome, at the head-quarters of the Food and Agriculture Organization of the UN, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at UN Head-quarters, until 31 December 2000. In Article 126, the Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the UN.⁴⁴ In short, the International Criminal Court should be formally established after 60 ratifications by States parties of the Rome Statute.

The Establishment of the International Criminal Court (ICC)

The Statute sets out the Court's jurisdiction, structure and functions, and it provides for its entry into force 60 days after 60 States have ratified or acceded to it; namely, the States that join after the first 60 have brought the Statute into force.⁴⁵ The 60th instrument of ratification was deposited with the Secretary General on 11 April

⁴⁴ Tuiloma Neroni Slade and Roger S. Clark, "Preamble and Final Clauses," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 443-5. Also see: p. 570.

⁴⁵ *Ibid.*, p. 445.

2002, when 10 countries simultaneously deposited their instruments of ratification. Accordingly, the Statute entered into force on 1 July 2002.⁴⁶ Anyone who commits any of the crimes under the Statute after this date will be liable for prosecution by the International Criminal Court (ICC).

Even though the Statute entered into force on 1 July 2002, it will take some time before the Court begins its operations. A number of statutory measures and practical steps still have to be taken before the Court becomes operational. Whereas the two *ad hoc* Tribunals for Yugoslavia and Rwanda could set up within the framework of the UN, the ICC will have to be set up as a completely new international organization and have to enhance its credibility and effectiveness.⁴⁷ Therefore, the relationship between the ICC and the UN is an important issue during the preparatory stages and at the Rome Conference.

Although the ICC is an independent judicial institution, it was born out of the UN system.⁴⁸ In accordance with Article 2 of the Rome Statute, the relationship with the UN system is governed by an agreement that has been approved by the Assembly of States Parties during its first Session held in New York from 3 to 10 September

⁴⁶ Johan D. Van Der Vyver, "Civil Society and the International Criminal Court," *Journal of Human Rights*, Vol. 2, No. 3 (September 2003), p. 425.

⁴⁷ Medard R. Rwelamira, "Composition and Administration of the Court," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 153-4.

⁴⁸ Daryl A. Mundis, "The Assembly of States Parties and the Institutional Framework of the International Criminal Court," *The American Journal of International Law*, Vol. 97, No. 1 (Jan 2003), p. 133.

2002. On 4 October 2004, this *Negotiated Relationship Agreement between the International Criminal Court and the UN* has been signed by the UN Secretary-General, Kofi Annan and the President of the ICC, Judge Philippe Kirsch.⁴⁹

The agreement provides a legal basis for a permanent relationship between the two organizations as well as information-sharing and judicial assistance.⁵⁰ Moreover, the relationship between the ICC and the Security Council of the UN and their respective roles are particularly showed in Article 13 (b) and Article 16 of the Statute.⁵¹

Under the Rome Statute, there are four organs in the ICC: the Presidency; an Appeals Division; a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry. Besides, the Court will consist of eighteen judges who will be elected as full-time members of the Court based on the criteria of representation of principal legal systems, geographical representation, gender balance and legal expertise on specific issues.⁵² Finally, on 11 March 2003, according to article 38 of the Rome Statute, the 18 judges of the Court elected the Presidency

⁴⁹ Historical introduction, <http://www.icc-cpi.int/about/ataglance/history.html> (Retrieved 3 April, 2005)

⁵⁰ The agreement includes an exchange of representatives between the UN and the court, the ICC's participation in the UN General Assembly as an observer, and UN cooperation if the court requests testimony of UN officials. This means that UN human rights, refugee and genocide experts may assist the ICC and, most importantly, UN humanitarian and peacekeeping missions can provide vital information on atrocities in conflict areas, said William Pace, head of the NGO Coalition for the International Criminal Court, an advocacy group that includes more than 1,000 civil society organizations; quoted in Edith M. Lederer, *UN, World Court Agree to Cooperate*, <http://www.globalpolicy.org/intljustice/icc/2004/1004uniccagree.htm> (Retrieved 27 March, 2005)

⁵¹ Lionel Yee, "The International Criminal Court and the Security Council: Article 13 (b) and Article 16," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 143-52.

⁵² Medard R. Rwelamira, "Composition and Administration of the Court," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, pp. 154-167. Also see: Part 4 of the Rome Statute, Article 34 to Article 52.

composed of Judge Philippe Kirsch (Canada) as President, Judge Akua Kuenyehia (Ghana) as First Vice-President, and Judge Elizabeth Odio Benito (Costa Rica) as Second Vice-President of the Court. The Assembly of States Parties to the Rome Statute of the ICC, meeting in its second resumed first session, unanimously elected Mr. Luis Moreno-Ocampo (Argentina) as the first Chief Prosecutor of the Court on 21 April 2003. Besides, on 24 June 2003, Mr. Bruno Cathala (France) was elected Registrar of the ICC by an absolute majority of the judges meeting in plenary session.⁵³ Since then, the ICC can formally take its responsibility for international crimes jurisdiction.

Participation of States

Participating in the Rome Conference were delegations from 160 countries, 17 intergovernmental organizations, 14 specialized agencies and funds of the UN, and 124 non-governmental organizations. In addition, 474 journalists were accredited to cover the event.⁵⁴ The Statute deliberately represents a balance of different interests. Most delegations were led by politicians or senior civil servants. They were especially determined to protect or advance their own interests.⁵⁵ The challenge was how to

⁵³ Historical introduction, <http://www.icc-cpi.int/about/ataglance/history.html> (Retrieved 3 April, 2005)

⁵⁴ The Conference was open to all UN Member States, members of the specialized agencies and members of the International Atomic Energy Agency. Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, L/ROM/22, 17 July 1998. <http://www.un.org/icc/index.htm> (Retrieved 3 April, 2005). The views and comments of governments on the Rome Statute and on the Conference are reproduced in this publication.

⁵⁵ Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two

accommodate the views of 160 different countries and create a Court credible in the eyes of the world. The answer is a global solution, a historic compromise. Therefore, the adoption of the Rome Statute was not an easy task.

Here is a figure which shows the distribution of States' attitudes toward the Rome Statute. In Figure 3.1, we can have a rough idea helps to understand what States have done with the Statute. The Statute was adopted on 17 July 1998 by a non-recorded vote of 120 in favor, 7 against, 21 abstentions.⁵⁶ Although the vote was non-recorded at the US's suggestion, the following countries spoke to reveal their voting positions. The US, China, Israel, and India stated that they had voted against the Statute. Mexico, Singapore, Sri Lanka, Trinidad and Tobago, and Turkey explained why they had abstained.⁵⁷

Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance*, p. 5.

⁵⁶ Seven States that voted against the adoption are as follows: China, Iraq, Israel, Libya, Qatar, the United States and Yemen. Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, L/ROM/22, 17 July 1998.

<http://www.un.org/icc/index.htm> (Retrieved 3 April, 2005)

The views and comments of governments on the Rome Statute and on the Conference are reproduced in this publication.

⁵⁷ Kriangsak Kittichaisaree, *International Criminal Law*, pp. 36-7. Also see: the Rome Conference's Press Release, L/ROM/22 dated 17 July 1998.

Distribution of States' Attitudes toward the Rome Statute

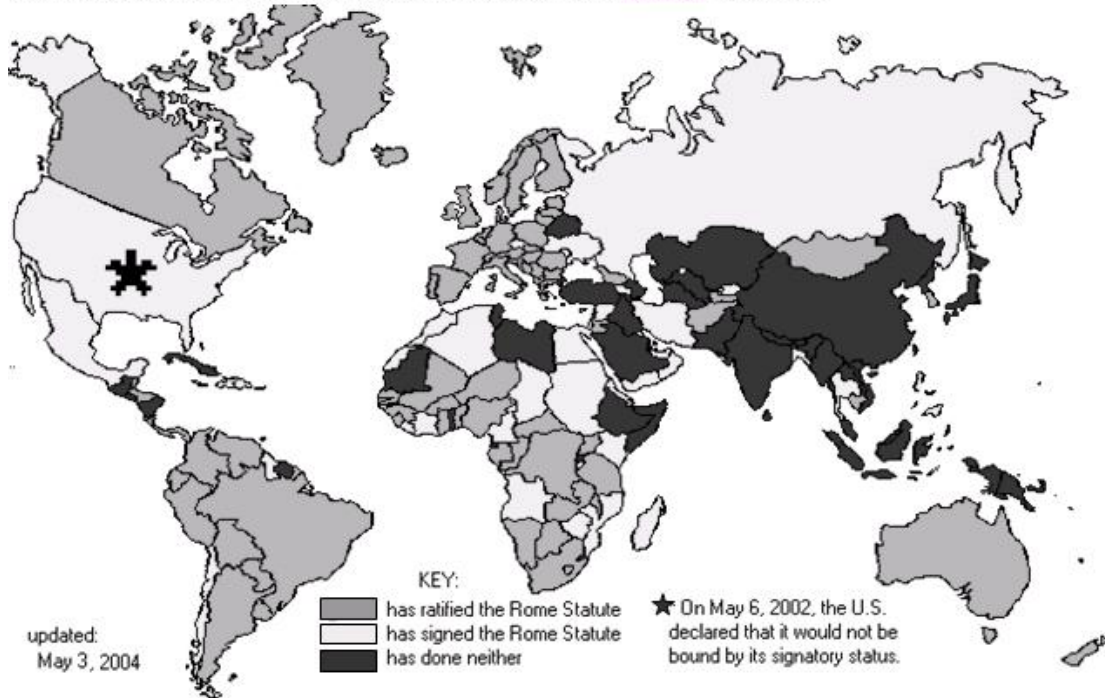


Figure 3.1 Distribution of States' Attitudes toward the Rome Statute

Source: The Council for American Students in International Negotiations
<http://www.americanstudents.us/icc.shtml> (Retrieved 5 May 2005)

Generally speaking, supporters would counter that the ICC's definitions are very similar to those of the Nuremberg trials.⁵⁸ They also argue that the states which object to the ICC are those which regularly carry out genocide, war crimes and crimes against humanity in order to protect or promote their own interests.⁵⁹ On the contrary,

⁵⁸ The establishment of the ICTY was the result of a political decision to activate the legal power and authority of the Security Council to enforce another set of international laws by creating a judicial institution with a political mandate; quoted in Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia* (New York: Oxford University Press, 2004), p. 5. However, in supporters' view, the ICC is a permanent and independent institution such as the UN and, more specifically, the UN Security Council (Rome Statute 1998, Preamble and Articles 2, 12, 13, and 16); quoted in Pam Spees, "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power," *Signs: Journal of Women in Culture and Society*, Vol. 28, No. 4 (Summer 2003), pp. 1233-5.

⁵⁹ Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance*, pp. 15-6.

some countries object to the court, saying that there is very little legal supervision of the court's apparatus, and that the court's verdicts may become subject to political motives. They argue that the court's mandate was already excessively wide (and would be even more so if the crime of aggression was defined in its Statute), meaning the Court could (perhaps unwillingly) become a tool for barratry and pointless legal hassle. The Court's jurisdiction is complementary to national system,⁶⁰ as it will only be able to take a case when the national system is unwilling or unable to genuinely investigate and/or prosecute (Rome Statute 1998, Preamble and Articles 1 and 17).⁶¹ Although supporters say that the checks and balances in the ICC made this an unlikely possibility, opponents argue that giving even a temporary member of the Security Council the power to veto any objections of prosecutorial bias gave the ICC no accountability whatsoever.⁶² These are pros and cons of participation of States.

As of 12 May 2005, 99 countries are States Parties to the Rome Statute. Out of them 27 are African States, 12 are Asian States, 15 are from Eastern Europe, 20 are from Latin America and the Caribbean, and 25 are from Western Europe and other States (the list of States Parties to the Rome Statute, see: Appendix II). However, John Rosenthal suggests that the Statute emerged from Rome shows the ICC is more

⁶⁰ John Rosenthal, "A Lawless Global Court – How the ICC undermines the U.N. system," *Policy Review* (February-March 2004), p. 37.

⁶¹ Pam Spees, "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power," *Signs: Journal of Women in Culture and Society*, p. 1235.

⁶² The Rome Conference's Press Release, L/ROM/22 dated 17 July 1998.

humbly and realistically, just a project of the European Union (EU). The EU has succeeded in rallying support among quite a few small and poor countries to ratify the Statute. Besides, he provides some reasons for the United States to have rejected the Statute.⁶³ To follow up States' attitudes toward the Statute further would involve us in other factors than NGOs' participation in the making of the ICC, and would take us beyond the scope of this thesis.⁶⁴

Participation of NGOs

The active participation of NGOs indeed played a crucial role to the creation of the ICC. There were hundreds of NGOs accredited to participate in the Rome Conference (the list of NGOs represented at the Conference by an observer, see: Appendix I, Annex IV). Not all of them were members of the NGO Coalition for the ICC. However, from the beginning of the Rome Conference, this informal grouping had grown into a movement involving more than 800 organizations. This growth in numbers was accompanied by an intensification and particularization of advocacy efforts in the run-up to Rome.⁶⁵

⁶³ John Rosenthal, "A Lawless Global Court – How the ICC undermines the U.N. system," *Policy Review* (February-March 2004), pp. 30-5.

⁶⁴ For detailed accounts relating to States' attitudes toward the Rome Statute see: United States and Yemen. Press Release, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, L/ROM/22, 17 July 1998. <http://www.un.org/icc/index.htm>

⁶⁵ William R. Pace and Mark Thieroff, "Participation of Non-Governmental Organizations," Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 392.

Here one catches a glimpse of the background of NGOs participation before the establishment of the ICC. In general, the NGO community has come to play a vital role within the domain of human rights promotion and protection. Its functions in this regard include the following:⁶⁶

1. Creating an awareness, through the dissemination of information and education, of human rights values;
2. Developing norms and a general conceptual framework for human rights activities;
3. Coordinating human rights activities within the national or international arena;
4. Promoting a particular human rights agenda through extensive lobbying with state representatives in norm-creating institutions or conferences;
5. Gathering and disseminating information on human rights violations through fact-finding missions to, or national representative bodies within, the human rights trouble spots of the world;
6. Submitting complaints of human rights violations to government institutions or to the enforcement agencies within the UN system of human rights protection;
7. Affording publicity to instances of human rights violations as a means of persuading those responsible for such violations to desist from their repressive policies and conduct;
8. Bringing pressure to bear on governments or government officials guilty of repression or human rights violations.

Before the Rome Conference, international human rights organizations active in performing these activities have indeed contributed much to the development of human rights norms, the cultivation of a human rights awareness, and condemnation of human rights abuses. They have mostly done so individually.⁶⁷ However, the Rome conference altered this situation.

In 1995, NGOs rallied around the UN' renewed efforts to create a permanent

⁶⁶ John D. Van Der Vyver, "Civil Society and International Criminal Court," *Journal of Human Rights*, Vol. 2, No. 3 (September 2003), p. 426.

⁶⁷ Ibid.

international criminal tribunal and formed an official coalition – the Coalition for an International Criminal Court (CICC). The coalition consisted of human rights monitoring and advocacy groups, faith-based groups, victim/survivor advocacy groups, and other. In 1997, a substantial presence of women advocates and activities joined this effort and formed the Women’s Caucus for Gender Justice in the International Criminal Court.⁶⁸ These are two of the most important NGOs have great contribution to the Rome Statute.⁶⁹ The main purpose of the CICC was to advocate the establishment of an effective and just international criminal court.⁷⁰ The Women’s Caucus is a network of individuals and groups committed to strengthening advocacy on women’s human rights and helping to develop greater capacity among women in the use of International Criminal Court, the Optional Protocol to CEDAW⁷¹ and other mechanisms that provide women avenues of and access to different systems of justice.⁷²

⁶⁸ Pam Spees, “Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power,” *Signs: Journal of Women in Culture and Society*, Vol. 28, No. 4 (Summer 2003), p. 1236.

⁶⁹ John D. Van Der Vyver, “Civil Society and International Criminal Court,” *Journal of Human Rights*, Vol. 2, No. 3 (September 2003), p. 425.

⁷⁰ William R. Pace and Mark Thieroff, “Participation of Non-Governmental Organizations,” Roy S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 391.

⁷¹ Text of the Optional Protocol to CEDAW (the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women), pp. <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>.

⁷² Women’s Caucus for Gender Justice, see: <http://www.iccwomen.org/archive/aboutcaucus.htm> (Retrieved 30 May, 2005). More detailed accounts of the efforts of Women’s Caucus to the ICC, see: Pam Spees, “Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power,” *Signs: Journal of Women in Culture and Society*, pp. 1233-54. John D. Van Der Vyver, “Civil Society and International Criminal Court,” *Journal of Human Rights*, pp. 431-4.

In short, the efforts of the Women's Caucus are to mainstream gender in the creation of the ICC, including mapping a gender perspective in the Rome Statute, asking women and gender expertise on the court, giving the gender definition, and so on.⁷³ It is important to note that the Women's Caucus was formed in the ICC negotiations at a critical moment in the history of the international women's human rights movement.⁷⁴ However, as compared with CICC, the objectives of Women's Caucus are more professional and adept instead of simply appealing to create a permanent international criminal court. Therefore, the fuller study of the successes of Women's Caucus lies outside the main scope of this thesis. Having made this distinction, we may further observe the CICC in the making of the ICC, as we shall see in the next chapter. It is worthwhile examining the roles of the master NGO, CICC, more closely.

Conclusion

It has been fifty years since the UN first recognized the need to establish an international criminal court, to prosecute crimes and punish violations of human rights. The Rome Statute achieves this goal by providing a first permanent international criminal court to enforce the law.⁷⁵ The Statute is by no means perfect. It is a product

⁷³ Pam Spees, "Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power," *Signs: Journal of Women in Culture and Society*, pp. 1236-46.

⁷⁴ *Ibid.*, p. 1237.

⁷⁵ Roy S. Lee, "Introduction: The Rome Conference and Its Contributions to International Law," Roy

of multilateral negotiations amongst 160 States with different values, interests and concerns. No one State or group of States may claim completely victory, or a monopoly of the Statute, for each made concessions and compromises in order to make the instrument generally acceptable. It is the best instrument possible in the present circumstances. The fact that the Diplomatic Conference was successful and that it was able to complete its work within five weeks as largely the result of the determination of many governments to accomplish the work of the Conference and the active participation of non-governmental organizations.⁷⁶ Finally, the ICC was established in The Hague, The Netherlands, and it complements national courts so that they retain jurisdiction to try genocide, crimes against humanity and war crimes.⁷⁷

S. Lee ed., *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, p. 27.

⁷⁶ *Ibid.*, pp. 36-7.

⁷⁷ *Agreement Between the International Criminal Court and the UN*, http://www.icc-cpi.int/pressrelease_details&id=47&l=en.html (Retrieved 3 April 2005).