Attempting to create a historical record of an international treaty conference is an extremely challenging undertaking — particularly a conference that lasted six weeks, was conducted in several concurrently held meetings, many of which were closed to non-governmental organizations, and dealt with daunting and technical subject matter. The Coalition secretariat is still sifting through the ruble of our own reports and files as we try to piece together what happened and what implications can be drawn. We imagine that many of our colleagues and governments are doing the same.

In this ICC Monitor, we summarize the findings of our twelve “teams” that monitored the negotiations in Rome. In order to attempt to cover the progress of a hundred-some articles with several hundred options, the Coalition organized itself into teams of NGO observers and legal experts covering specific issue areas, roughly along the lines of the draft statute. The teams were as follows: the Definitions Team, the State Consent Team, the Trigger Mechanism and Admissibility Team, the General Principles Team, the Composition Team, the Investigation Team, the Trial, Appeal and Review Team, the Penalties Team, the Cooperation & National Security Team, the Enforcement Team, the Financing Team, and the Final Clauses Team. These reports are the result of the many, many contributions of a small army of legal experts, activists, and volunteers.

This issue is meant to familiarize our readers with the main developments at the conference and present some tentative analyses by our teams. The material is very detailed and often makes reference to developments in other subject areas. But behind the details is a fascinating story of the brick-by-brick construction of a new permanent international legal institution.

A much more elaborated and detailed account is being produced in book form, tentatively titled The Construction of Justice, for publication at the end of the year. It will contain chapters on the major issues, the sectoral areas such as gender justice and peace, and regional reporting from groups who were active in Rome. Special messages from independent legal experts, government representatives, and United Nations officials will be featured as well. Hopefully this Monitor will spur your interest to obtain and read the book. [See page 8 for more information.]


Please note that these reports are based on the observations and analyses of independent NGO observers and should not be construed as official records of the meetings in Rome.
I am convinced that the successful adoption of the Rome statute is largely due to the work of the Coalition and the partnership that you managed to develop between NGO's and governments during the four years of our work. The fluid dialogue between delegations and representatives of civil society was indeed essential to identify goals and preoccupations and to design the best strategy to achieve them.

- Ms. Silvia Fernández, Legal Adviser, Permanent Mission of Argentina to the United Nations

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**Editorial Note**

The NGO Coalition for an International Criminal Court does not take positions but is committed to disseminating relevant ideas and proposals related to the International Criminal Court. The Coalition is always interested in receiving submissions for our newsletter the ICC Monitor. Submissions should be sent to the attention of Rik Panganiban at CICC, c/o WFM, 777 UN Plaza, 12th Floor, New York, New York 10017, USA, or via email to <wfm@igc.org>. Please note that opinions expressed in a particular article are not necessarily the views of the Coalition or any of its participating organizations.

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**The International Criminal Court MONITOR**

a project of the NGO Coalition for an International Criminal Court (CICC)

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Parliamentarians for Global Action  
Women's Caucus for Gender Justice in the ICC  
World Federalist Movement

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Definitions of Crimes

The crimes falling within the Court's jurisdiction are listed in article 5: genocide, crimes against humanity, war crimes and aggression. Since it is defined by a future provision, see articles 121 and 123 of the ICC statute. Genocide is defined in article 6, crimes against humanity in article 7 and war crimes in article 8. While the Conference did not succeed in defining the elements of crimes, article 9 did manage to include a provision for their later definition and inclusion. Article X, included below the definition of war crimes in the draft statute, had aimed to prevent limitations or prejudices to existing or developing international law beyond the ICC statute. This provision became article 10, and, together with the above changes, articles 5 through 10 were adopted by the Conference.

Main Issues Monitored by the Team

The issues which the Definitions Team monitored was which crimes would come under the jurisdiction of the Court. Within this context was the question of how they would be defined. The first part of the question related in terms of which crimes would be included in the statute and the second part was how they would be defined. Going into the Rome Conference, the crimes to be considered for inclusion were the three core crimes, aggression, and the "treaty crimes." The conventional side believed the core crimes were defined, yet entire days were spent on defining these crimes and several of these issues were among the most contentious of the Conference. For aggression and treaty crimes, both the issues of inclusion and definition remained to be debated upon arrival in Rome. For aggression, the Conference had the onerous task of defining it in a way that would make it politically acceptable to all. The treaty crimes were seen never or less from the beginning as bargaining chips since it was clear that consensus on these individual crimes would be extremely difficult to obtain.

The article on genocide was perhaps the first article in the Conference to be referred to the Drafting Committee, while its ancillary crimes were debated by the Working Group on General Principles of Criminal Law. The contents of both crimes against humanity and war crimes were extensively debated until the last days, primarily in informal sessions chaired by "coordinators" assigned on the fourth day of the Conference. These sessions required much of the Team's monitoring efforts. The discussions on aggression also continued to the last minute, although without reaching an agreement on a definition. The treaty crimes, on the other hand, were not regularly discussed, thus the work of the Team in this regard centered around noting and reporting the various positions of the different interested countries.

Main Issues of Contention

Genocide: Because the Convention on the Crime and Punishment of Genocide had been negotiated 50 years ago and article 6 made reference to an international penal tribunal, genocide was not a point of contention in Rome.

Aggression: The crime of aggression, however, proved to be rather contentious. The split over the definition was between the representatives of the United Nations (UN) who endorsed the UN General Assembly Resolution 3314 of 1974, and those preferring the precedent set by the Nuremberg and Tokyo Tribunals. UN precedents in this area did not provide any further clarity. Resolution 3314 defined aggression as an act of a state while the Nuremberg Principles affirmed by the UNGA in 1946 emphasized the principle of individual responsibility.

However, the definition of aggression was not the sole point of controversy. Given Chapter VII of the UN Charter, which provides that the Secretary Council shall "determine the existence of any . . . act of aggression" and decide the measures to be taken, the inclusion of the crime of aggression was closely related to that of admissibility and the relationship of the Court to the UN. Since no conclusion was reached, the questions of what constitutes an act of aggression and who decides when it has been committed will continue to be debated in the future.

War Crimes: These crimes were divided into four separate sections in the draft statute. The first two sections (5A and 5B of the draft statute and article 82(a) and (b) of the ICC statute) dealt with international armed conflict. The second sections (5C and 5D of the draft statute and articles 8(c), (d), (e) and (f) of the ICC statute) dealt with internal armed conflict. Each section had its roots in the existing international humanitarian law provisions. Section A recapitulated grave breaches of the four Geneva Conventions of 1949. Section B was derived from the Hague law. Sections C and D respectively came from Common Article 3 of the four Geneva Conventions and their Second Additional Protocol of 1977.

While section A was found to be acceptable to most participants, within section B several of the acts enumerated were found to be potential by several countries. First among these points of controversy was (f), the transfer of a civilian population into an occupied territory (this was a point of contention between several Arab countries and Israel). The next difficult point was (o), weapons to be prohibited and "calculated to cause superfluous injury or unnecessary suffering." Within (o) although several questions arose, the most important one was the politically sensitive issue of whether or not nuclear weapons should be included.

Subsection (p) bis, rape and sexual violence, was controversial in part because of the inclusion of "enforced pregnancy," which was the focus of much of the Women's Caucus lobbying efforts. Finally (t), enforcing children into combat continued to be debated with regard to the age level (the draft statute listed fifteen years of age but some countries asked to argue for eighteen) despite the fact that article 38(2) of the Convention on the Rights of the Child and previous PrepCom meetings had negotiated the issue. Under (b) (bis) and (t) proved to be so difficult that during the fourth week of the Conference the Coordinator for war crimes held separate informal sessions solely on these subsections.

The inclusion of sections C and D was more problematic. A strong but vocal minority spoke out repeatedly for the deletion of these sections. Although this was never very likely, the discussions on their inclusion did take up a significant amount of the Conference's time. While the problematic acts listed under section B were initially discussed in the Committee of the Whole, discussions opened to all plenipotentiaries on paragraphs C and D began much later in the Conference.

Crimes against humanity: Although war crimes were listed first under article 5 of the Continued on page 13.

State Consent

The State Consent Team monitored articles 6-9 in the draft statute, which later became articles 12 and 13 in the statute adopted by the Conference. The main issue the Team was monitoring was the jurisdiction of the ICC, i.e., the exercise of its jurisdiction and the preconditions to the exercise of jurisdiction. The question of whether or not states needed to consent to the exercise of the Court's jurisdiction was an extremely contentious issue. Automatic jurisdiction would mean that the ICC would have jurisdiction over all crimes in the statute. A state would accept the Court's jurisdiction by becoming a party to the statute. A next question was which states should have accepted the Court's jurisdiction, either by becoming a party or otherwise, before it can exercise its jurisdiction (the so-called preconditions to the exercise of jurisdiction).

There were a number of competing proposals at the end of the Conference. The options ranged from the opt-in/opt-out proposal and the case-by-case proposal both requiring further state consent beyond becoming a party to the statute, to the German Proposal of universal jurisdiction. According to this proposal no further consensus beyond ratification of the treaty was required. The proposal furthermore required no preconditions to the exercise of the Court's jurisdiction. The UK and Korea also put forward proposals in this regard. Under these proposals, the ICC could exercise its jurisdiction when a case is submitted to it only if certain combinations of states have accepted its jurisdiction.

All of the governments at the conference were heavily involved in this issue. The coordinator was the head of the Finnish delegation, Erkki Kourula. The issue was eventually taken over by Philippe Kirsch, Chair of the Committee of the Whole, in the Bureau Discussion papers on Part 2. The majority of the NGO community was interested in the state consent issue as well. The main NGOs involved, however, were those who were members of the team.

Process of the Negotiations

After the initial opening statements the state consent issue was discussed openly until June 30 when the coordinator, Erkki Kourula of Finland, organized an Informal discussion. Two of the State Consent Team assistants successfully monitored the meeting. The comments were not part of the formal negotiations on state consent. In the preconference meeting held in July 6 new developments emerged. The Chairman of the Committee of the Whole introduced on behalf of the Bureau a discussion paper (A/CONF.183/C.1/L.53, 6 July 1998) in which the very controversial issues in part 2 of the draft statute on definitions, jurisdiction, and trigger mechanisms had been narrowed down to a few options. The Committee decided that the exercise of jurisdiction were automatic Continued on page 14.
The CICC Steering Committee met in September and October in New York to strategize on the goals of the Coalition in this post-Rome period. There was general agreement at the close of the Rome conference that the Coalition should continue in its mandate to support a just, effective and independent ICC. In particular, it was confirmed that the Coalition will seek to coordinate activities on the two tracks of the Preparatory Commission meetings and the signature and ratification campaign.

To enter into this new phase of work, the Steering Committee is expanding to include more regional representation. This is one aspect of a larger process of “devolution” of the Coalition’s work and structure. It is anticipated that much more activity will need to take place at the local, national and regional levels in order to achieve the 60 ratifications necessary for the ICC treaty to enter into force.

At the same time, the upcoming meetings of the Preparatory Commission will need to be monitored and reported on by the Coalition secretariat in New York. Ensuring NGO participation in this important phase of the ICC preparatory work is a priority of the CICC. The Preparatory Commission is anticipated to begin meetings in March of 1999.

It was also decided to take advantage of the occasion of the centennial of the first Hague Peace Conference in 1899 to draw attention to the Court. The Hague Appeal for Peace global conference taking place in the city of the Hague in May of 1999 will serve as a launching event for a global ratification campaign. One of the four key strands of the Hague Appeal for Peace is the development of international humanitarian law. In upcoming issues of the ICC Monitor we will feature more information on the Hague Appeal for Peace and its linkages to the ICC.

Note on Investigation & Prosecution Report
The report on the issues of investigation and prosecution is still being prepared and will be published in the CICC Rome Report.

CICC Steering Committee Gives Direction to Coalition Post-Rome

The Hague Appeal for Peace can be reached at email hap99@igc.org or via the Worldwide Web at http://www.haguepeace.org.


Court Composition

The team monitored articles 35-53 from the draft statute, and articles 34-52 in the statute adopted by the Diplomatic Conference.

Main issues monitored
The team monitored the tenure, number, qualifications and election of Judges, the composition of the chambers, the removal and duties of the Prosecutor, the duties of the Registry, working languages, Rules of Procedure and Evidence and regulations of the Court.

Main Issues of Contention
Tenure and number of Judges: numerous delegates were concerned that Judges would not be needed on a full-time basis and, therefore, preferred a part-time, on-call system. A number of delegates expressed a concern about the cost of maintaining a full-time judiciary, especially if funding were solely provided by states parties. Other delegates were equally concerned that part-time judges might face conflicts of interest between their private business or professional interests and their public responsibilities as Judges.

The UK (which chaired the Informal) and the U.S. supported the position that Judges with criminal trial experience should predominate in the pre-trial and trial chambers and the UK also wanted to ensure that some judges have both criminal and international law experience. Switzerland, Belgium and France preferred greater flexibility concerning the balance between criminal and international law experience. They sought to ensure that expertise in international law would not be underrepresented. Delegates from developing countries were concerned that, if any slots were reserved for Judges with criminal and international law experience, highly-qualified candidates from their countries would be unable to qualify for those slots as Judges in their country were not likely to have both types of expertise. The Women’s Caucus expressed its concern that the requirement would disqualify a substantial number of women, who are just entering the ranks of the judiciary in many countries and are also unlikely to have both types of expertise. The predominate concern was to prevent a system in which the majority of candidates would be white males from the North.

The chair created some tension when he issued a discussion paper reflecting the UK preference for an advisory committee to evaluate candidates. Strong opposition was voiced by many delegates. In particular, most contentious proved to be the question of how to select members of the screening committee, for example, to ensure geographic and legal system diversity (as well as gender diversity). In addition to having the appropriate professional qualifications, the delegation expressed concern on other criteria to ensure a broad representation. The judiciary should reflect an “equitable geographical representation” (original text “geographic distribution”) and the “principal legal systems of the world.” The requirement for “representation of the main forms of civilian and national conflict” was widely opposed everywhere it appeared in the text. At one point in this discussion an Arab delegate indicated that “gender balance” was unacceptable as it could mean “equality.” When the Syrian representative was asked if he could live with that solution, he replied he would “not commit suicide.” Many Arab (and other) delegates had been convinced by anti-choice lobbyists that “gender” would require states parties to adopt laws permitting same sex marriages and so they were vehemently opposed to the “gender balance” on two counts; it would require the equal treatment of women and recognition of rights of homosexuals.

Another gender-related dispute arose over the draft provision expressing the need for Judges with “expertise on issues related to sexual and gender violence.” The requirement that they represent women and gender violence, as well as issues concerning the rights of children and other similar matters. The Women’s Caucus had sought for provisions to ensure women’s presence on the bench and a requirement to have judges with expertise on gender and sexual violence. Most Arab delegates and several African delegates (e.g., Kenya) expressed the view that Judges trained in criminal law are capable of handling trials of sexual violence and violence against children because they are impartial professionals. They refused to give any credibility to research demonstrating the need for such expertise and clung to the notion thatrape and auto theft cases can be handled equally well by any experienced Judge. However, the delegate from Burundi explained in detail that, in Rwanda, only when experts interviewed children were they able to obtain informative answers.

The collection of Judges and composition of the chambers the UK discussion paper also sought to ensure a predominance of criminal judges in the pre-trial and trial chambers by establishing two tracks for electing Judges - the majority for criminal law Judges in one pool and about half as many international law Judges in another pool. Due to the strong resistance to this discussion paper, the Chair ended the discussion and walked out of the room, leaving the delegates to negotiate amongst themselves and then meet with him for bilateral consultations.

Removal and duties of the Prosecutor: the U.S. delegation, along with other delegations, wanted to give the Prosecutor the right to appoint and to remove the Deputy Prosecutor. Other delegations preferred the Deputy Prosecutor to be elected and removed by the Assembly of States Parties. Several Arab delegations sought to replace the requirement that the Prosecutor and Deputy Prosecutors be of “different nationalities” with the requirement that they represent “different legal systems.” They feared that the inclusion of “different nationalities” would permit many Western countries to be represented on the Court. Their position, however, was strongly opposed by other delegations because defining the term “legal systems” posed too many problems. (Note, however, that later
Trigger Mechanisms and Admissibility

The articles monitored by this team were articles 10-20 of the draft statute discussed throughout the Conference. These are now articles 21-21 in the statute adopted by the Diplomatic Conference.

In general terms, the issues covered by these articles related to the question of who can refer a situation to the Court and set its procedures in motion (known as the "trigger mechanism" - Articles 10-12), when a case is admissible and who can challenge its admissibility or the jurisdiction of the Court (known as "apply the "nullum crimen" and "admissibility" - Articles 13-19), and the laws to be applied in a given case ("applicable law" - Article 20). Almost all of these issues had been part of the extensive debate that took place in the Working Group, in particular the role of the Security Council, the role of the Prosecutor, and the preliminary rulings regarding admissibility and therefore all governments were concerned - if it always closely involved in the informal debates, especially since they had to express their positions in response to the two Bureau papers (A/CONF.183/C.1/L.53, 6 July 1998 and A/CONF.183/C.1/L.59, 10 July 1998). Those states which played key roles were the same as those in the Human Rights Conference, on all ends of the spectrum, such as the leading Like-minded countries, the P-5 (especially the US, the UK and France), India, and Syria.

The three polar extremes were reflected in strong position statements made by Germany, which staunchly presented views closest to those of the Human Rights Conference, stated it did too, such as South Africa, Argentina and Belgium), the U.S., which was one of the most vehement opponents of an independent Court (unless the Security Council could have veto power over India, which also ended up opposing the Court but said that this was because - like many Arab states - it absolutely rejected any role for the Security Council; On the P-5 side, almost all were involved because of the nature of the issues at hand, which permeated the entire statute. For the NGOs, which carry the most influence around the world or in specific regions held a similar level of influence at the Conference.

Results of the Negotiations

Article 14(1)(k) Referral of a situation by a State Party: Article 14(1)(c) clarifies paragraph (a) of Article 13[6] by defining the way in which a state party...

Continued on page 12.

General Principles of Criminal Law

The team monitored articles 21-34 of the draft statute which later became articles 21-33 in the statute adopted by the Diplomatic Conference.

Main Issues of Content

Nullum Crimen: How firmly should the prohibition of analogy be expressed? Should the article also state that it does not affect the characterization of any conduct as criminal under domestic law?

Non-retroactivity: How will the interrelationship with temporal jurisdiction under Part 2 be resolved? How should entry into force be defined, how could earlier but ongoing conduct be reached? Should changes of procedural law be resolved under the rule to apply the law of the place in which the crime was committed?

Individual criminal responsibility: Legal Persons; Should legal persons have criminal responsibility under the statute? If not, who - international organizations and groups? Corporations? What law would be applicable to determine the nexus between the natural and the legal person? One or two crimes?

Incitement: Should a person be criminally responsible not only for the incitement to genocide but also for the incitement to other crimes? If these crimes were committed in fact? Must the incitement for such crimes have been direct or does it matter?

Conspiracy: How should conspiracy be defined?

Attempt: Do all attempts to commit a crime incur criminal responsibility?

Irrelevance of official position: The real issues of contention were not addressed within this Working Group. On June 16, it was the understanding of the Team Leader that the Committee of the Whole decided to send this article and part of the article on mens rea straight to the Drafting Committee, and that Mexico had only requested that the last paragraph of mens rea remain with the Working Group. Yet, on June 18, the second paragraph of this article reappeared in the Working Group ostensibly due to a request by Mexico. Strangely, Mexico mentioned as its only reason that the paragraph had seemed repetitious.

Kenya claimed that immunities take priority but that they could be lifted. The Chair read Kenya as having an insurmountable problem. Australia pointed out that the second paragraph covers also the immunities of members of international organizations and was therefore not redundant. The Chair mentioned the diplomatics, and the paragraph was very quickly adopted as it had been before. In the Committee of the Whole on June 19, Spain restored, asking that the exercise of jurisdiction should be "in relation to acts of that person" instead of "in relation to that person." The Chair of the Committee of the Whole answered that the Drafting Committee would consider the point. Ultimately the real task of the Drafting Committee was how to reconcile this Article with the outcome of the Working Group on International Cooperation and Judicial Assistance.

Age of responsibility: Should juvenile offenders be criminally responsible before the Court? At what age?

Statute of limitations: How would the absence of a statute of limitations, or any choice of years higher than the one used under a national jurisdiction, work with the concept of complementarity? LG, would a State be automatically considered "unable or unwilling" if it is constrained due to its own statute of limitations? Should a statute of limitations apply to war crimes? Should limitations apply exceptionally?

Responsibility of [commanders] [superiors] for acts of [forces under their command [subordinates]: How could the provision best take into account different types of superior/subordinate relationships? What should be the standard of knowledge to determine criminal responsibility? Should a superior be responsible for acts committed under his or her predecessor?

Actus reus (act and/or omission): Should omission be only punishable if expressly spelled out, e.g., in the definition of a crime? Should it be only punishable under specific rules? Should the question be left to the Court?

Mens rea (mental elements): Should the Statute include a definition of recklessness?

Grounds for excluding criminal responsibility (Possible grounds for excluding criminal responsibility specifically referring to war crimes).

Other grounds for excluding criminal responsibility: Should the ground of insanity be reconsidered? Should voluntary intoxication be a ground for excluding criminal responsibility?

Self-defense: How should self-defense be defined? Should the defense of property be a reason to exclude criminal responsibility? Should it make a difference if the threat acted against is legal or illegal?

Determination of applicability: unenumerated grounds: How much guidance and how much leeway does the Court need for the evaluation of grounds excluding criminal responsibility?

Mistake of fact or of law: Should mistake of fact or law matter? Because they negate intent or because they constitute a ground for the exclusion of criminal responsibility? If they matter, under what circumstances?

Superior orders and prescription of law: Should the fact of a superior order matter with regard to all, some or none of the crimes? Should superior orders constitute affirmatively or only potentially a ground to exclude criminal responsibility (i.e., a ground if versus no ground unless)?

Results of the Negotiations

Nullum Crimen: The repetitiveness has been alleviated and the prohibition against analogy sharpened. Ambiguous and imprecise definitions will be interpreted in favor of the suspect/accused.

Non-retroactivity: Emphasizing the difference to Art. 8 (now Art. 11), the provision in Part 3 concentrates explicitly on non-retroactivity ratione personae. To cover ongoing conduct, the verb "committed" was deleted. With regard to procedural and substantive changes alike, the law "more favorable" to the suspect/accused applies.

Individual criminal responsibility: Legal persons: The provisions regarding criminal responsibility for legal persons were deleted.

Incitement: The Working Group did not agree on criminal responsibility for the incitement of crimes other than genocide.

Conspiracy: The definition of conspiracy in the recent Convention for the Suppression of Terrorist Bombings was used as a model, further amendments resulted in a new version.

Attempt: The provision on attempt excludes liability for punishment in the case of voluntary abandonment.

Irrelevance of official capacity: While the article left the Working Group in the same form it had been submitted to the Conference, the Drafting Committee changed it significantly (A/CONF.183/C.1/L.65/Rev.1 of 14 July). Now the second paragraph reads: "Any immunities or special procedures... shall not bar the Court from exercising its jurisdiction," whereas it had said in the version of the Working Group: "Immunities or special procedures... shall not bar the Court from exercising its jurisdiction."
Penalties

Articles from the draft statute include Articles 75, 76, 77, 78, 79 and 100. Articles included in the schedule to the Rome Statute (for reference include Article 23 and articles 77, 78, 79, 80, 110.

Summary of Negotiations

The debate of the Working Group on Penalties (Part 7) proved to be more difficult and contentious than expected. Some delegations and NGOs underestimated the value of the death penalty issue as a bargaining chip for other unresolved and difficult matters, such as jurisdiction. In addition, domestic political considerations played a major role in the reluctance of states to accept a Court without the death penalty. The chairman of the Working Group on Part 7, Rolf Einar Fife, finished the discussion on all other issues before returning to the death penalty. Although issues such as life imprisonment, fines, the applicability of national legal standards and the transfer of fines were discussed first, consensus was difficult to reach. Delegations were waiting to see whether or not the death penalty would be included to decide whether to insist on life imprisonment or a reference to applicable local laws.

At the beginning of the discussion in the Working Group, a few provisions were deleted immediately from the draft statute. The issue of imprisonment for minors (article 75(a) of the Rome Statute) became obsolete because the Committee of the Whole decided that the Court does not have jurisdiction over persons under the age of 18. Countries did not feel strongly about the penalty of disqualification from public office (article 75(c)(ii) of the draft statute) and decided not to insist on it when a few states objected to its inclusion. Furthermore, the forfeiture of instrumentalities (article 75(d) of the draft statute) was deemed too broad because it potentially included everything from the machete to the aircraft carrier. The reference to reparations included in article 75(d) of the draft statute was also deleted. Some delegations, such as the Russian Federation felt that reparations are not an appropriate penalty. The reparations article can be found separately in article 75. The Russian Federation, aware of the likely agreement on reparations in article 78 of the draft statute (Applicable national legal standards) convinced the Working Group to delete this provision. The Mexican proposal that the national dimension of the principle of legality nulla poena sine lege, should be explicitly stated in the Statute met with general agreement. It was placed under article 23 in the ICC statute.

From the beginning of the discussion it was clear that the main penalty of the court would be imprisonment. The discussions on applicable penalties resulted in article 77 of the statute. This article provides for imprisonment for a specified number of years, which may not exceed a maximum of thirty years, or alternatively, life imprisonment “when justified by the extreme gravity of the crime.” As additional penalties, the article allows for fines and forfeiture of proceeds, property and assets derived directly or indirectly from that crime.

Many states, mostly European and Latin American had great difficulty accepting life imprisonment. Several European states were opposed to it being included, but indicated they were flexible and could accept life imprisonment providing that a scheme of mandatory parole revision existed. Some Latin American states, however, continued their opposition, citing provisions in their Constitutions that forbid life imprisonment and, in the cases of Venezuela and Nicaragua, sentences of thirty years or more.

Confrontation between major systems of criminal procedure (civil law - common law, and, in some cases, Islamic law) and relevant disputes over the different (often very similar) criminal justice systems.

Proceedings on an admission of guilt are allowed under article 65 and represent an abbreviated and simplified trial (common law prevals). However, the Court may decide to not be persuaded by the truthfulness of the admission of guilt and decide to install the ordinary process.

Definition of “the interests of justice”: Article 65(4), seems to recognize the direction of identifying the interests of the victim with the interest of justice (civil/French model prevals).

Methods of protection for witnesses, victims and the accused: The experience of the Ad Hoc International Criminal Tribunal for the former Yugoslavia and Rwanda had an essential impact on the drafting of article 68, which permits the Court (including the Prosecutor) “to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” (paragraph 1; see also the related provisions of paragraph 4); furthermore, in camera proceedings or presentation of evidence by electronic and other means are in principle mandatory in cases of sensitive evidence and violence or child victims and children-witnesses (paragraph 2); the mandate of the Victims and Witnesses Unit is defined by reference to article 43(6), which has been interpreted as limiting the Unit’s protective action to witnesses and particular categories of victims (43(6) has been proposed by the U.S. in a closed meeting of the Working Group on Composition). Legal representation of victims rights is possible under article 68(3) (second sentence) if “the Court considers it appropriate”; the principle is generally applied in civil law systems, and needs to be developed in the Rules of Procedure and Evidence.

System of sentencing: Article 76 permits that a sentence be imposed by the Trial Chamber at the same time as a decision of a conviction, but it obliges the judges to allow, “at the request of the Prosecutor of the accused”, a further sentence hearing before the Appeals Chamber. Quorum and requirements for Court’s decision:

A majority (not unanimity) of judges is sufficient for decisions of conviction and no separate and/or dissenting opinion is allowed: thus, under articles 74 and 83 the civil law model predominates (Islamic law); decisions are public (all systems).

System of admission of evidence: Article 69 makes a general scheme to be included in the Rules of Procedure and Evidence. The parties may submit evidence relevant to the case, but the judges may request all evidence relevant for the determination of the truth (most significant affirmation of the civil law model); the Court rules on admisibility of evidence (all systems) and decides the non-admissibility if internationally recognized human rights are violated when the evidence is obtained.

Functions and powers of the Trial and Post-Trial Chambers: Articles 64 and 83 provide for an active role for the presiding judge in the proceedings (common law prevals). These articles establish the principle that the trial shall be public, apart from special cases of protective measures under article 68 and security or sensitive information under articles 72 and 73; other essential procedural rules are included in the articles, thus reflecting in a balanced manner the different (often very similar) criminal justice systems.

The reparations article can be found separately in articles 81 to 85. The main issues monitored by the Working Group were: Fair Trial, including rights of the accused and rights of the victims; Trial Procedures, including the issue of trials in the presence or absence of the accused, and right to appeal and revision of conviction or sentence.

Issues of Contention

Victims rights: (1) the right to access international justice and obtain reparations; (2) the right to access to justice and participate in the proceedings; (3) the right to be protected (especially in cases in which victims are also witnesses).

Rights of the accused and presumption of innocence: (1) catalogue of rights as defined in the International Covenant on Civil and Political Rights; (2) additional rights as developed in contemporary legal practice.

Trials in absentia

Confrontation between major systems of criminal procedure (civil law - common law, and, in some cases, Islamic law) and relevant disputes on the different (often very similar) criminal justice systems.

Proceedings on an admission of guilt are allowed under article 65 and represent an abbreviated and simplified trial (common law prevals). However, the Court may decide to not be persuaded by the truthfulness of the admission of guilt and decide to install the ordinary process.

Definition of “the interests of justice”: Article 65(4), seems to recognize the direction of identifying the interests of the victims with the interest of justice (civil/French model prevals).

Methods of protection for witnesses, victims and the accused: The experience of the Ad Hoc International Criminal Tribunal for the former Yugoslavia and Rwanda had an essential impact on the drafting of article 68, which permits the Court (including the Prosecutor) “to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” (paragraph 1; see also the related provisions of paragraph 4); furthermore, in camera proceedings or presentation of evidence by electronic and other means are in principle mandatory in cases of sensitive evidence and violence or child victims and children-witnesses (paragraph 2); the mandate of the Victims and Witnesses Unit is defined by reference to article 43(6), which has been interpreted as limiting the Unit’s protective action to witnesses and particular categories of victims (43(6) has been proposed by the U.S. in a closed meeting of the Working Group on Composition). Legal representation of victims rights is possible under article 68(3) (second sentence) if “the Court considers it appropriate”; the principle is generally applied in civil law systems, and needs to be developed in the Rules of Procedure and Evidence.

System of sentencing: Article 76 permits that a sentence be imposed by the Trial Chamber at the same time as a decision of a conviction, but it obliges the judges to allow, “at the request of the Prosecutor of the accused”, a further sentence hearing before the Appeals Chamber. Quorum and requirements for Court’s decision:

A majority (not unanimity) of judges is sufficient for decisions of conviction and no separate and/or dissenting opinion is allowed: thus, under articles 74 and 83 the civil law model predominates (Islamic law); decisions are public (all systems).

System of admission of evidence: Article 69 makes a general scheme to be included in the Rules of Procedure and Evidence. The parties may submit evidence relevant to the case, but the judges may request all evidence relevant for the determination of the truth (most significant affirmation of the civil law model); the Court rules on admisibility of evidence (all systems) and decides the non-admissibility if internationally recognized human rights are violated when the evidence is obtained.

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System of sentencing: Article 76 permits that a sentence be imposed by the Trial Chamber at the same time as a decision of a conviction, but it obliges the judges to allow, “at the request of the Prosecutor of the accused”, a further sentence hearing before the Appeals Chamber.
Cooperation and National Security

The articles included in the statute adopted by the Diplomatic Conference are article 72 (Protection of national security information) in Part 10 (The trial), and all the provisions in Part 9 (International Cooperation and Judicial Assistance), i.e. articles 86 to 102.

Main Issues Monitored by the Team

Unlike national courts and the military tribunals of Nuremberg and Tokyo, the ICC will not be endowed with police or military forces authorized and empowered to gather evidence or apprehend suspects. For these tasks the ICC will depend, as the ad hoc tribunals for the former Yugoslavia and Rwanda do, on cooperation of existing national criminal justice systems.

The ad hoc tribunals were established by a decision of the UN Security Council on the basis of Chapter VII of the UN Charter. As a result, states are automatically under the obligation to cooperate with the Tribunals in order to allow them to effectively carry out their mandates. This legal basis not being available to the ICC, except for in the case of a Security Council referral on the basis of Chapter VII of the Charter, the extent to which states will be under the obligation to cooperate with the Court was the topic of the monitored negotiations. Cooperation with the Court via the protection of information relevant to national security was a particular focus of the team.

Main Issues of Contention

The main issue of contention and controversy was whether or not a system of cooperation would be established that would truly empower the ICC. A fairly effective cooperation system or a weak ineffective system could have emerged from the negotiations, depending on the combination and final formulation of the various options.

The principle issue was whether states parties should be under an unequivocal obligation to comply with requests for the handing over of persons and other forms of cooperation, or whether statutory provisions or national law might provide a justified basis for refusal. Related to this issue was the question regarding which of the following terms should be used for the handing over of persons to the Court: surrender, transfer or extradition. Extradition would imply the application of extradition laws and treaties and the possible conditions to extradition imposed therein (such as non-extradition of nationals and the requirement of dual criminality).

“States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”

- Article 86 of the Rome Statute
“General obligation to cooperate”

Regarding article 79 (Sensitive national security information), the main issue at stake was whether it would be for the Court or for a state to decide whether or not sensitive information required for the purpose of a criminal trial should be disclosed.

The Objective and Factual Results of the Negotiations

In summary: without prejudice to the rights of non-states parties, states parties are under an obligation to cooperate with the Court in order to allow them to effectively carry out their mandates. States parties will be under the obligation to cooperate with the Court in order to allow them to effectively carry out their mandates.

The Results of the Negotiations

States parties will volunteer to host prisoners and the Court will choose a state from a list. States can put conditions on their willingness to enforce the sentence, but the Court can reject those conditions by not choosing that state. If no state is available to host the prisoner, the state party (the Netherlands) will provide prison facilities.

The standards for prisons are “widely accepted international treaty standards governing the treatment of prisoners.” National laws will not control the early release of prisoners. The statute contains a rule of priority for serving sentences.

States parties are obligated to give effect to ICC orders of fines or forfeitures under the procedures of their national law. If this is not possible, the state party must take measures to recover the value of the proceeds.

Decisions regarding enforcement will be made by the Court which can delegate that responsibility to the Presidency.

Prepared by Steven Gerber, ICC Director, World Federalist Association.

CICC Meets with Government and NGO Leaders in Latin America

by Eduardo Gonzalez

As part of a global process of consultations with Coalition members, government officials and parliamentarians, a delegation of the CICC secretariat toured Colombia, Ecuador, Peru and Chile from October 8-24. The trip was organized by the NGO advocacy groups in those countries, and included extensive discussion of the Rome Statute and strategies to obtain its ratification by a significant number of Latin American countries.

Mr. William Pace, convenor of the CICC, and Mr. Eduardo Gonzalez, the CICC Latin American coordinator, explained to members of government, NGOs and the media the advantages of a speedy process of signature and ratification of the Rome Statute, particularly for societies struggling to consolidate democracy and to protect human rights. The governments of the countries visited showed the highest consideration and kindness toward the Coalition envoys, who were received by ministers of justice, foreign affairs, members of the judiciary and parliamentarian leaders from a variety of political perspectives.

In the four countries visited, the delegation discovered immediate and compelling reasons for the creation of an ICC, capable of preventing the emergence of conflict and dictatorships. In Colombia, the government and civil society were...Continued on page 12.
Scenes from the Rome Conference

Republic of Korea representatives meet with the CICC at an NGO-government dialogue. Mr. Kak-soo Shin (center) spoke on behalf of his delegation.

Delegates and observers crowd into the final Committee of the Whole meeting of the Rome Conference. (Photo by Ms. Elaine Harvey)

Amnesty International “Tutti Giu Per Terra” Demonstration for the ICC.

Committee of the Whole chairman Philippe Kirsch (left) consults with US delegates Dr. Theodore Meron and David Scheffer before final Committee of the Whole session. (Photo by Ms. Elaine Harvey)

NGO representatives addressing the conference Plenary Session: Marino Busdachin of No Peace Without Justice, Barbara Bedont of the Women's International League for Peace and Freedom, and Dr. Benjamin Ferencz, former Nuremberg prosecutor.

About the CICC Rome Report

The CICC secretariat is preparing a book on the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Tentatively titled The Construction of Justice the report brings together the combined experience and analysis of veteran NGO experts from around the world.

In this compilation, we include the reports drafted by the CICC NGO Teams that monitored the negotiations in Rome and the national, regional and sectoral Caucuses and Working Groups. The team and sectoral reports in particular will provide interested students, scholars and academics with a detailed account of the negotiations on the various issues as stake. The strengthened impact of civil society as a whole through cooperation within the framework of the CICC in regional or national coalitions is documented in the reports of these networks.

The book is scheduled for publication in late December 1998.
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Selected Media Coverage of Rome Conference

"U.S. Conservatives Campaign Against World Court," Reuters, June 12

"Republican Sen. John Ashcroft and conservative groups announced Friday a campaign to fight a proposed United Nations International Criminal Court, which they warned could undermine U.S. laws on criminal prosecution."

"High Hopes for International Criminal Court," Inter Press Service, June 14

"Caribbean Community (CARICOM) nations are expecting good progress when diplomats from around the world gather in Rome Monday June 15 to kick off their monthlong meeting to create an International Criminal Court. Trinidad and Tobago's Foreign Affairs Minister, Ralph Maraj, says his country, which has, over the years, led the CARICOM lobby on this issue, is very happy that this matter is coming to fruition."

"New Court Carries the Torch From Nuremberg," The Independent (UK), June 15

"Delegates from more than 120 countries gather in Rome today to finalise a treaty setting up a permanent International Criminal Court under the aegis of the UN. The 175-page draft they will pore over has been four years in the making. At least five more weeks of gruelling negotiations lie ahead, pitting supranational idealism against the dictates of raison d'etat."

"Blunt Words Punctuate Debate on Global Court," The International Herald Tribune, June 17

"The rhetoric of Monday's opening day - a chorus of calls for a truly independent International Criminal Court - soon fizzled out as China, Algeria and Pakistan delivered blunt messages and Beijing blocked a news conference to which a Chinese doctor was to have accused his nation of killing children."

"Long stung by international criticism over its human rights record, China said the court should have jurisdiction only when the countries concerned gave their consent."

"The court should not become a tool of political struggles or a means of interfering in other countries' internal affairs," Wang Guangya, head of the Chinese delegation, said.

"Rights Groups Denounce Position on Tribunal as a Double Standard," The Boston Globe, June 18

"A coalition of international scholars and human rights activists said the United States is siding with rogue states who also oppose the idea of an independent prosecutor. They accused the United States of undermining the efforts of its closest allies to prosecute war criminals."

"What's wrong with this picture? All of the US's closest allies are supporting the position of an effective independent court," said Richard Dicker, an expert on the court at Human Rights Watch. "And yet the US finds itself standing with the likes of the most regressive governments in the world.""


"Delegates of several major powers acknowledge that No Peace Without Justice and some 200 other nongovernmental international lobbies are agenda-setting players in the late-century world of global summits on big issues like genocide, women's rights, population and the earth."

"Let me tell you, they are very, very, very, very important here," said one Western ambassador with grudging admiration.

"Momentum Building for Strong ICC Prosecutor," Inter Press Service, June 22

"A growing number of nations are getting behind the drive for an 'ex officio' prosecutor who can initiate proceedings on his or her own initiative at the proposed International Criminal Court, said conference sources."

"War India Plans Clause by Clause Support," Inter Press Service, June 26

"As a post-colonial power long opposed to the International Criminal Court, said conference sources."

"Protest for Victims Amid Court Debate," United Press International, July 4

"Italian citizens and movers and shakers from non-government organizations blocked traffic for two hours tonight as they sprawled across the pavement of Rome's famous Road of the Emperor - which it is to be replaced by an International Criminal Court convention which spells a dilution of national sovereignty, officials indicate."

"Let me tell you, they are very, very, very, very important here," said one Western ambassador with grudging admiration.

"Three World Calls for Nuclear Weapons to be War Crimes," Jane's Defence Weekly, July 8

"The 113-member Non-Aligned Movement (NAM) wants to include nuclear weapons on the list of prohibited weapons in the statute of the soon-to-be-established International Criminal Court."

"The proposal is being opposed by the USA and countries of the North Atlantic Treaty Organization (NATO)."

"War Crime Court May Be Killed Off by UN Arguments," The Independent (UK) July 10

"... supporters of a powerful and independent court have increasingly been forced to accept that such is the resistance of a disparate bloc of countries ranging from the US to France, China, and a clutch of Arab states, that a watered down and circumscribed ICC is the best to be hoped for.

"...the chances of a comprehensive deal being struck before the deadline of 17 July look slim at best, despite marathon negotiating sessions which continue until 10pm, night after night, often with hours of drafting and redrafting work after that.""

"War Crimes Treaty Stalls Over Inclusion of Rapes," The International Herald Tribune, July 10

"A dispute between women's groups and the Vatican over a legal term has broadened into a battle of religion and gender politics that could jeopardize agreement on whether rape will be declared a war crime by an international criminal court...Women's groups have fought to have the treaty include "enforced pregnancy" as a war crime for the act of impregnating women and forcing them to bear children as tools of ethnic reprisal."

"The Vatican agrees that such rapes are war crimes, but it is troubled by the term "enforced pregnancy," fearing it could be interpreted as an invitation to challenge anti-abortion laws in many countries.""

"U.S. Presses Case Against War Court," The International Herald Tribune, July 16

"The United States has been putting pressure on some of its closest European allies to limit the scope of the court. Taking points said to have been prepared for Defense Secretary William Cohen, for example, suggested that if Germany succeeded in lobbying for "universal jurisdiction" for the court, the United States might retaliate by removing its overseas troops, including those in Europe."

"The Minneapolis Star-Tribune editorial, July 23

"The Clinton administration is developing a worrisome habit of getting on the wrong side of history. On top of its refusal last year to support an international ban on anti-personnel land mines, the White House has now added rejection of a new international criminal court to deal with war crimes, genocide and crimes against humanity. This is what happens when you let the Pentagon guide American thinking on humanitarian issues."
### Final Clauses

The articles included in the draft statute are articles 108 to 116, Draft Final Act and Preamble. The articles included in the draft statute are articles 119 to 128, Draft Final Act and Preamble.

**Key Issues of Debate and How Resolved**

**Settlement of Disputes:** Most states favored formulations which allow the Court to be the body which settles disputes of a judicial nature. Regarding settlement of disputes relating to administrative issues or application of the statute, roughly equal numbers of states favored options including: (a) rules for the ICC (e.g. Mexican proposal), the ICC’s Assembly of States Parties (option 2), or the ICC itself (option 1); (b) a few states (Arab states, China) favored no article on dispute settlement. The result of these negotiations is a mixed dispute settlement regime whereby (a) disputes concerning the judicial functions of the Court are to be settled by the decision of the Court; and (b) disputes between states parties regarding application of the statute are to be settled through the following: (i) negotiations; (ii) referral to Assembly of States Parties which can try to settle disputes, make further recommendations, or refer to the ICC.

**Reservations:** Most states favored a provision stating that no reservations to the statute may be made. In the Working Group, the issue was only briefly debated, out of a recognition that the issue of reservations would be tied to larger package deals and bargaining over controversial elements of the statute. Allowing targeted reservations was considered in the course of package negotiations (e.g. discussion of weapons/war crimes; death penalty) but, in the final version of the statute no reservations are permitted.

**Amendments:** Key points of negotiation focused on which body would consider amendments; the threshold/size of majority for adopting an amendment; the final version of the statute allows for amendments at either a review conference or by the Assembly of States Parties. The statute makes a distinction between three types of articles to be amended: article 5 amendments (crimes); death penalty amendments; other amendments. In the Final Clauses Working Group, the issue was only briefly debated, out of concern that this delicate mosaic may be shattered at any time...

- From the preamble to the Rome Statute for an ICC

### Financing the Court

The articles from the draft statute are Assembly of States Parties, article 102 and financing articles 103-107. The Assembly’s functions and responsibilities were referred to in various other sections of the two texts, for example, article 86, section G of the Rome Statute for an ICC. These references are listed in the Team reports.


**Main Issues of Contention**

The Assembly was not particularly controversial, although there was intense debate over some of the powers to be given to it (e.g. Review of pardons). Financing was extremely difficult and contentious: whether from the UN or states parties, or through a combination of assessment formulas and payments by the Security Council for cases it refers.

The Results of the Negotiations on these Articles

Negotiations on the Assembly left the Final Clauses largely untouched. Clearing of blank checks was mostly a choice among Courmayeur options. Two subsections provided crossovers in articles 36 (judges) and 87 (non-cooperation). Other functions were left to the sections covering the relevant issues.

Negotiations on Financing produced an agreement on funding by states parties, but left UN funding up to the UN General Assembly.

Prepared by John Washburn, co-chair, Washington Working Group on the ICC.

Working Group also spent considerable time discussing versions of the Preamble to the Draft Final Act. Discussion of the preamble was finally to solicit a frictional experience for those involved, i.e. a bunch of lawyers trying to write poetically and then editing by Committee. Major issues in discussion of the Draft Final Act included who should convene the first meeting of the Preparatory Commission (the UN Secretary-General) and who should be allowed to participate in the work of the Commission (states which have signed the Final Act and “other States which have been invited to participate in the Conference”). Inserted in the Annex to the Final Act as part of the last-minute bargaining and cobbling together of an acceptable package is a section recommending that a Review Conference be called to consider terrorism and drug crimes with a view to including them as crimes within the jurisdiction of the ICC.

Prepared by Fergus Watt, convenor, Canadian Network for an International Criminal Court.
NGO Activities in Rome

Not content to merely monitor the negotiations, NGO (non-governmental organization) representatives engaged in a flurry of activities during the Rome conference - from gala receptions in elegant Rome nightclubs to dense policy papers on issues before the Rome delegations. The Sudan Room, a large meeting space assigned to NGOs at the conference, was the site of frenetic activity as NGO representatives debated with each other, drafted text, faxed and emailed reports to their headquarters, and tried to follow the official meetings broadcast on close circuit television from two monitors in the room. Here is a brief description of some of their activities:

Government-NGO Dialogues

In addition to less formal meetings between government delegates and NGO representatives, the CICC organized a large number of government-NGO dialogues to discuss current issues and find solutions to difficulties in the negotiations. During the course of the conference, the CICC met with all the major regional groupings of governments, the like-minded group, the permanent Security Council members, and others.

Regional Caucuses

NGOs from Africa, Asia, Europe, Latin America, and other regional groupings met with each other to coordinate advocacy efforts, to share information, and to plan dialogues with governments. The CICC was able to sponsor a large number of legal experts from all regions of the world, with other NGOs assisting others to attend.

The regional caucuses were a key mechanism for the Coalition to reach out to governments and stay informed of up-to-the-minute developments. Towards the end of the conference, NGO representatives from Africa, Africa and Latin America agreed on a joint statement of principle in support of the ICC, called the "Declaration of the Alliance of Three Continents."

The Sectoral Caucuses

NGOs organized themselves by issue area, collaborating and cooperating to a high degree. Among the sectoral caucuses in Rome were the Women's Caucus for Gender Justice in the ICC, the Victim's Rights Working Group, the Faith-based Caucus, the Children's Rights Caucus, and the Peace Caucus.

Much of the ground-breaking language in the Rome Treaty on such areas as gender crimes, the victims and witnesses unit, and the age of responsibility of the accused were heavily influenced by the work of the NGO caucuses and working groups.

Teams Monitoring the Negotiations

As described on page 1, NGO representatives organized themselves into twelve teams to monitor the various parts of the statute and the working groups. About 50 people were active participants in the teams, as team leaders, team deputies, team assistants and team members. A small secretariat headed by Pascale Norris coordinated the teams and distributed the teams reports to other NGO representatives.

The morning strategy sessions of the Coalition were an opportunity for team leaders to brief the rest of the NGOs on important developments the previous day or which were upcoming. In the course of the conference, team reports became the bank and only mechanism for NGOs to keep up with the debates.

Reporting

NGOs and interested individuals were able to stay informed about developments at the treaty conference through reporting from the Coalition and its partners that went out daily onto the internet. The "On the RECORD" team of journalists, activists and volunteers, headed by Iain Guest, issued a detailed email newsletter on the Rome conference, with coverage of important developments, interviews with key NGO representatives and analysis of the issues. The Coalition regularly uploaded it to its web page UN and NGO documents from the conference.

Within the FAO, the Interpress Service, with the support of the Coalition and No Peace Without Justice, produced a daily conference newspaper, which became required reading for all government and non-governmental delegations. The newspaper, entitled Terra Viva, featured a Rome edition of the ICC Monitor in its center section.

Press briefings and Conferences

NGOs organized press briefings and conferences to brief the international media on current developments in the conference and present their positions and analyses. These briefings were often the only way for the media to get frank assessments of how the negotiations were progressing, since almost the entire conference was closed to the press.

Shelly Cryer, the CICC's media consultant, and her assistants also arranged individual interviews between the press and experts from the Coalition.

Other Events in Rome

Local Italian NGOs organized a number of events in the city of Rome in conjunction with the Rome conference. Amnesty International-Italy erected a huge tent complex near the conference site where press conferences, panel discussions, concerts, plays, and other events were held.

A number of demonstrations in support of the International Criminal Court were held in Rome. No Peace Without Justice held a 24-hour vigil just outside the FAO building, after which everyone lay on the pavement, symbolizing the victims of human rights violations who demand an ICC.

The Coalition organized a well-attended reception on the roof of the FAO building. Local musicians entertained government and NGO representatives as the sun set gloriously over the Roman skyline.
can trigger the Court’s jurisdiction. There were three options in the drafting at the beginning of the Conference: one stating that only states parties could refer a situation, one stating that a certain category of “interested states” could do so, and a further option, which had been opposed by the UK and simplifying the language of the first option. The UK text was retained – i.e. any state party can refer a situation – though the third paragraph was deleted, which stated that “The Prosecutor shall not notify the Security Council of all situations referred under this article.”

Article 15[12 and 13] Prosecutor: Article 12 of the draft statute empowered the Prosecutor to initiate an investigation without having to wait for a referral from either a state or the Security Council (“proprio motu”). There had been huge debate since the beginning of the ILC’s work in 1994, as to whether or not the Prosecutor should have this kind of discretion, and the Argentine proposal from the March-April 1998 PrepCom addressed this in a provision which was incorporated as Article 13. It requires a Pre-trial Chamber (a panel of judges) to authorize an investigation when it finds that there is a reasonable basis to proceed. This allayed the concerns of most states and, throughout the Conference, about 60 countries consistently expressed their overwhelming and unwavering support of this article. However, other countries such as China, Cuba, Ethiopia, India, Iraq, Russia and the U.S. remained staunchly opposed.

The final Article 15 merges the language of the former two articles. In other words, the Prosecutor can initiate investigations on her/his own, following information received from sources including NGOs and victims, subject to approval by the Pre-Trial Chamber. Of the 200 countries, the only ones that opposed or had concerns were seen to have set a precedent of allowing the Security Council to have a role at all, whether or not it would have to determine that an act of aggression had been committed in order for the Court to be able to proceed in a case, and whether or not the Security Council could in any way veto or delay investigation by the Court.

Only a few countries were opposed to any role at all for the Security Council. The Security Council’s ability to refer a situation under Chapter VII of the UN Charter is now reflected in Article 15 (10) Deferral of investigation or prosecution (Role of the Security Council): The main issue during the Security Council’s discussions was whether or not it should have a role at all, whether or not it would have to determine that an act of aggression had been committed in order for the Court to be able to proceed in a case, and whether or not the Security Council could in any way veto or delay investigation by the Court.

The question of aggression remains pending because this provision (Article 15(10)) has not yet been adopted (Article 52).

One of the main battles was over the Court’s ability to veto or defer action by the Court. The text as initially proposed in the August 1997 PrepCom draft statute was that the ICC could not commence a prosecution that was on the Security Council’s agenda unless the Security Council decided otherwise. In other words, any one of the P-5 could stop an investigation. A provision was introduced at the August 1997 PrepCom, known as the “Singapore proposal” (Article 10(7) Option 2 in the Draft statute), which effectively reversed the burden by setting out that the Court could act unless the Security Council expressly decides otherwise, in which case it could defer the investigation for a specified period of time (12 months was suggested), which could be renewed.

A simplified and slightly modified version of this proposal (based on Article 10(2) of Further Proposals in the Draft Statute) was adopted, although many countries had called for a shorter period of deferral and a limit on the number of renewals, and there was overwhelming support for the addition of a provision to preserve admissibility when a deferral is mainly on a Belgian proposal contained in document A/CONF.183/C.1/L.7). Article 17(15) Issues of admissibility: This article was a compromise resulting from extension debate at the August 1997 PrepCom concerning the issue of “complementarity” (reflected in Articles 17-19) which ensures that national authorities have precedence over the Court in investigating and prosecuting cases: the ICC is based on the concept that it will only act when national Courts cannot or will not try a case.

At issue in the debate was whether states would be willing to support the Chair’s suggestion from the beginning of the Conference to keep the text as it stands or to reopen the debate for modifications. Nonetheless, a significant amount of discussion was held on the subject, with several proposals put forth despite the fact that the majority strongly opposed reopening the discussion should not be reopened. Two modifications were made in the final text, based on a Mexican proposal contained in document A/CONF.183/C.1/L.14 22 June 1998, which states that (Article 17(2)(b)) there must have been an “unjustified” delay instead of “undue” and (para 31) that the national judicial system would have to have suffered a “total or substantial collapse” rather than “total or partial collapse.”

Former Article 19 had been suggested by Belgium and Portugal to refer to a situation under Article 58) could challenge the admissibility of a case (though many delegations felt that only the person officially accused should be able to do so). The states which can challenge are those whose prior acceptance of the jurisdiction for the Court is a pre-condition for its exercise thereof (Article 127-7(e)), as well as any state which claims jurisdiction over a case on the basis that it is in the process of investigating or prosecuting. This includes non-party states.

Former Article 14, on the duty of the Court as to Jurisdiction, was deleted because it could be considered to overlap with article 19(17).

Article 20(18) Ne bis in idem: Owing to widespread agreement on this text (codifying the internationally-recognized law of “ne bis in idem” being tried more than once, the same crime), the Chair had asked delegates if they would be willing to retain the text as it stood. There was a broad consensus that it should be supported by countries such as Algeria, Angola, Iran, Pakistan and Sudan, about deleting paragraph (3), which sets out exceptions to the rule in the case of bad faith. However, as the article was retained almost exactly as it was: the only change was the insertion of “in accordance with the norms of due process recognized by international law” after the words “independently or impartially.”

Article 21(20) Applicable Law: Article 21 sets out the sequence of sources of law to which the Court shall refer in a given case. The article was a whole as well supported by delegations and little discussion was expected, yet the debates lasted four days and were fierce, mainly because of the adverse discrimination clause enumerating “gender” among other grounds of discrimination. This term was strongly rejected by Arab States, led to the U.S. introducing a new version (based on Article 10(2) of Further Proposals in the Draft Statute) was introduced in document A/CONF.183/C.1/L.25, 29 June 1998 and discussed only in informal).

In spite of continued opposition to the article as a whole, or at least a strong concern (including a desire to put the burden of proof more clearly on the challenging state, and to increase the possibility of exceptions in which the Prosecutor could still request the Court to act), it was retained almost entirely. Some of the changes which were incorporated into the final article made the text more consistent with Article 19(17), so that a state can only challenge admissibility twice in exceptional circumstances. It also added some provisions concerning protection of evidence and witnesses.

Article 19(17): Challenges to the Jurisdiction of the Court or the Admissibility of a Case: The main issues of concern with this article were whether a suspect as well as the accused could challenge the admissibility of a case, and which States should be allowed to do so. A third issue was whether the Prosecutor should be allowed, after a case was found inadmissible under Article 17(15), to submit a request for review based on new facts or a change of situation (para 6 of Article 15).

France worked closely with Argentina in bilateral meetings, to reach the result which was that “an accused or a person for whom a warrant of arrest or a summons” (Issued by the Pre-Trial chamber under Article 58) could challenge the admissibility of a case (though many delegations felt that only the person officially accused should be able to do so). The states which can challenge are those whose prior acceptance of the jurisdiction for the Court is a pre-condition for its exercise thereof (Article 127-7(e)), as well as any state which claims jurisdiction over a case on the basis that it is in the process of investigating or prosecuting. This includes non-party states.

Another noteworthy change was the replacement of “where those national laws are not inconsistent…” (in Article 21(11)), with “provided that those principles are not inconsistent…” This wording was suggested by Canada and reconciled the fears of some states that their national laws could come under the scrutiny of the Court. In the second line second line “...including, as appropriate” was added, following a suggestion by Slovenia.

Prepared by Laura Bray and Jelena Pejić

Latin trip, continued from page 7. engaged in complex peace negotiations to end a guerrilla war that had bled the country for the last 40 years. Ecuador and Peru were finishing the details of a comprehensive agreement that would settle a generation-long border dispute. And Chile was hit by news of the arrest of former dictator Augusto Pinochet.

In all of those cases, the existence of an ICC can be seen as part of a process by which Latin American societies find negotiated solutions to longstanding conflicts, develop the rule of law and mechanisms of civilian control over the military. The creation of an ICC poses an opportunity for peace and it finally gives to the victims of atrocities and conflicts the access to justice.
The prohibition of analogy serves as a safeguard. The Statute uses at times the term 'conduct' as an indication that it covers both acts and omissions.

Mental element: The Statute does not include a definition of recklessness.

Unless otherwise provided, a crime must be committed with intent and knowledge. The intent, a person means to engage in conduct. In relation to consequences, intent, a person means to cause the consequence also if he or she is simply aware that it will occur in the ordinary course of events.

Grounds for excluding criminal responsibility includes insanity, intoxication and self-defense. The ground of insanity remained in the form agreed upon before the Conference. Voluntary intoxication is now phrased as a conditional exception to the exclusion of criminal responsibility due to intoxication. To constitute a defense a defendant must establised that he did not disregard the risk of committing a crime.

The definition of self-defense clarifies that involvement in a conflict is a basis for exclusion of criminal responsibility. Defense of property is only relevant in cases of armed conflict. The defendant property must be essential for survival or essential for accomplishing a military mission. In the case of self-defense, the threat to the person or property must have been unlawful.

Determination of applicability; unenumerated grounds. The Court has the discretion to consider additional excluding grounds derived from applicable law as set out in Art. 21[20]. At the same time, it must determine the applicability of the grounds excluding criminal responsibility to the case before it.

Superior orders and prescription of law: A superior order does not relieve a person of criminal responsibility unless... One of the requirements for the exception, the person must know or consciously disregard information clearly indicating the crimes. Here, the crimes must have also concerned activities within the effective responsibility and control of the superior.

Criminal responsibility for conduct that occurred under a predecessor is not included.

Actus reus (act and omission): The provision no longer exists. The understanding was that the question of criminal responsibility for omissions should be left to the Court and to the definition of crimes. Also, one important case of omission is covered in the provision on the responsibility of commanders and other superiors.

The prohibition of analogy serves as a safeguard.

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Results of Negotiations

Arguments were not made to the Composition, continued from page 4.

The only other problematic provision related to the question of whether the Victims and Witnesses Unit should be housed in the Prosecutor or Registry.

Duties of the Registry: the main difficulty in this section centered on the question of whether a Victims and Witnesses Unit should be located in the Office of the Registry or split between the Office of the Prosecutor (victims and prosecution witnesses) and the Office of the Registry (defense witnesses). The U.S. argued for a split between the two offices while the Women’s and Children’s Caucus preferred it to be located in the Registry. The U.S. was concerned that prosecution witnesses might not be protected anywhere in the Registry and the Caucus was concerned that the Prosecutor’s Office might be more interested in obtaining convictions than in protecting victims and witnesses from psychological and physical harm before, during, and after the trial.

Working languages: initially the delegations agreed on English and French as the working languages of the Court; however, approximately 16 Spanish speaking-countries proposed that all UN languages be official languages of the Court. The contentious debate then arose as to what extent the UN languages should be used in the work of the Court.

Rules of Procedure and Evidence and regulations of the Court: the draft statute provided for two sets of rules, one for disputes concerning the nature and adoption of the Rules of Procedure and Evidence. Whereas some delegations considered the Rules to be an integral part of the statute, which would require their drafting before a treaty could be adopted, other delegations wanted the rules to be drafted late and adopted separately by the assembly of states parties. No time had been allocated for drafting the rules at the PrepCom sessions.

Results of Negotiations

Tenure and number of Judges: after negotiations, the delegates agreed to a full-time judiciary composed of 18 Judges; provided, however, that the number of Judges can be increased if necessary and appropriate. They also agreed that Judges in the pre-trial and trial divisions can sit in either division but that Judges in the appellate division can only sit in that division. The reason for prohibiting rotation into or out of the appellate division is found in article 41(2)(a), which states that a Judge shall not participate in a case in which his or her impartiality might reasonably be doubted on any ground. A Judge should not have the power to review her or his own lower Court decision.

Qualification of Judges: the proposal to set aside certain judicial seats for persons with criminal and international law expertise was dropped, Judges must have either criminal or international law expertise. The gender issue was the last one to be settled in the entire section on Court Composition. After Informals in which no consensus developed, one Informal was held solely to discuss the issue of gender balance and expertise on gender and sexual violence. The Team leader and deputy and the Children’s Caucus (lobbied and negotiated with delegates and finally reached a compromise replacing “gender balance” with “fair representation of female and male Judges” and “the need to include Judges with legal expertise on specific issues, including, but not limited to, violence against women or children.” While neither provision is mandatory, they look at least recognize the right of women to be Judges and the need for particular types of expertise. NGOs will have to lobby states parties to ensure that these goals are realized.

Election of Judges and composition of Chambers: after further discussions, the delegations reached a compromise in which the advisory committee would be optional and have no power and the two pools of candidates would be reconfigured to consist of nine Judges with criminal law background and five Judges with international law background, with the remaining Judges having either criminal and/or international law expertise. Thus, at least half of the Judges will have criminal trial experience. In addition, the requirement that Judges in the trial and pre-trial divisions have criminal law experience was added to article 39(1).

Removal and duties of the Prosecutor: in the end, the compromise reached provided that the Deputy Prosecutor shall be elected by the Assembly of States from a list of candidates provided by the Prosecutor. Accordingly, the Deputy Prosecutor shall be removed by the states parties upon the recommendation of the Prosecutor. The Prosecutor was granted “ex officio” powers but the powers are highly restricted (see discussion on Part 5, Investigation and Prosecution). The Women’s Caucus had asked for a permanent position of a gender legal adviser but the final draft instead empowers the Prosecutor to appoint advisers with specific expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children. This is very weak language because the expert need not be a Prosecutor and the expert’s advice can be ignored. NGOs will have to lobby strongly for an expert who is also a Deputy Prosecutor with some power over cases of gender or sexual violence.

Duties of the Registry: although a number of delegations agreed with the U.S. on the need for the Prosecutor to control prosecution witnesses, delegates finally agreed to house the Victims and Witnesses Unit in the office of the Registry. The Unit will consult with the Prosecutor concerning protective measures and security arrangements for victims and prosecution witnesses. In the draft text, the Registry was given power to advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of victims, witnesses, their family members and others at risk. However, in the final version, these provisions were deleted and provisions concerning the protection of victims and witnesses are all located in article 68. The Women’s and Children’s Caucus expressed their disappointment over the fact that the protection would only apply to those cases and witnesses who appear before the Court. Article 68 does not provide protections for victims or witnesses who never appear before the Court but are still at risk on account of their having cooperated with the Prosecutor or investigations. The Caucuses were, however, successful in including “expertise in trauma, including trauma related to crimes of sexual violence” in the Registry staff.

In working languages, the delegates finally agreed that judgments and other decisions “resolving fundamental issues” will be in the official languages of Arabic, Chinese, English, French, Russian and Spanish. For other purposes, the working languages of English and French would be used. In addition, parties or states allowed to intervene in a case may obtain permission to use a language other than the working languages.

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State Consent, continued from page 3.

The results of the State Consent issue can be found in articles 12, 13 and 124. Article 12 - Preconditions to the exercise of jurisdiction: Paragraph 1 of article 12 provides for automatic jurisdiction. Paragraph 2 deals with the preconditions to the exercise of jurisdiction. According to this provision the ICC can exercise its jurisdiction if either the territorial state or the state of the nationality of the accused is party to the statute or has accepted the jurisdiction of the Court.

Article 13 - Exercise of jurisdiction: According to this article the Court may exercise its jurisdiction if a) a situation is referred to the Prosecutor by a state party; b) a situation 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.

Article 124 - Transitional Provision: According to this provision, a state may “opt-out” for war crimes for a period of 7 years after the entry into force of the statute for that state. Prepared by Tanya Karanasios (Parliamentarians for Global Action), Mette Dammgard (European Law Students Association), and Lindsay Zelniker (CICC)
Penalties, continued from page 6.

compromise that emerged provided for the option of life imprisonment in the statute while at the same time requiring a mandatory review (see article 79). The compromise wording of article 77(b) was based on a Mexican proposal. It only provided for the application of life imprisonment when "justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Sierra Leone and Syria were two prominent members of a group of states insisting on the inclusion of life imprisonment to ensure justice. These two states felt that the emphasis should be on harsh sentences and criticized the compromise proposal as being too lenient. Sierra Leone, for example, insisted on deleting the word "only" from the phrase "only when justified by the extreme gravity of the crime." The delegate of Sierra Leone was of the view that his delegation had compromised to such an extent that he could not further weaken the application of life imprisonment by allowing the inclusion in the statute of the death penalty. Many delegations, however, indicated that this was harder than what their own domestic systems provided for. To meet the concerns of a number of delegations regarding the severity of long sentences of imprisonment, a note was sent to the Working Group on Enforcement stating that it would be necessary to provide for a mandatory mechanism in Part 10 by which the prisoner's sentence would be re-examined by the Court after a certain period of time. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the state where they served their sentence. The Working Group on Part 10 included this parole mechanism in article 110. With regard to the periods of imprisonment to be served before a review may take place, it was determined that they be set at not less than two thirds of the term of imprisonment. In the case of life imprisonment, the period to be served before a review may take place is not less than twenty-five years (see article 110(3)).

The discussion on fines resulted in the determination that fines should be included, but only as an additional penalty. The principle problems discussed were the establishment of the upper limit and eventually agreed on 30 years of imprisonment. Many delegations, however, pointed out that the sum of the fines and the techniques to enforce payment as well as the legitimacy of imposing fines on indigent criminals. The general view, that the setting of precise amounts is probably impracticable because it would be time consuming and require frequent revaluation, prevailed at the end. The chair reminded delegations that if not all, of the accused in the Hague and Arusha are without visible means of support, thereby implicitly questioning the existence of a fines provision. The Working Group recommended the establishment of a trust fund for the benefit of the victims that would store money and fines collected through fines or forfeiture (article 79).

At the official final meeting of the Working Group, the chairman finally allowed a discussion of the death penalty. Many Informals and additional Working Group sessions followed. In the draft statute, the death penalty had remained an option. It was clear from the beginning that a vast majority of states would not be able to sign the statute unless the death penalty was removed as an option. Nevertheless, the issue became so contentious that it remained open until the very last day of the Conference. Pro-death penalty states, such as Egypt, Trinidad and Tobago, Kuwait, Syria, Oman, Sudan and Iran, brought up religious and cultural concerns, the heightened deterrent effect of the death penalty, the rights of victims, the need to apprise domestic public opinion, all to stress the need for the inclusion of the death penalty in the statute. All that in favor of the death penalty were concerned about the effect the absence of such a penalty would have on their domestic systems. Abolitionist states, such as Norway, Greece, and Venezuela cited their international human rights treaty obligations, as well as difficulties with international judicial cooperation. Several said that they could not ratify the statute if it included the death penalty. Early on, Trinidad and Tobago suggested a compromise proposal which allowed for an exchange of the death penalty provision in the statute for a statement by the chair declaring that national penalty standards are unaffected. This proposal was immediately accepted by Portugal and Norway. It took one more week of discussions for this proposal to be adopted. During that week Trinidad and Tobago retreated and insisted again on the inclusion of the death penalty, in concert with Barbados, Jamaica, Singapore, and Dominica. The Arab states and Iran introduced a proposal that did not mention the death penalty but provided for the imposition of the death penalty in force in the state where the crime was committed. The Ambassador of the U.S. made an important statement in which he explained that pursuant to the principle of complementarity, states themselves have the principle responsibility for the punishment of international crimes and that in this context they may employ capital punishment. Many states were persuaded by this and other arguments. But the delegation of Trinidad and Tobago did not yield until their Attorney General arrived at the Conference and was convinced that the inclusion of the death penalty was impossible.

The presence of the Minister of Justice from Sudan and the Attorney General from Trinidad and Tobago highlighted the importance of the issue to the states. Finally, a modified version of the original Trinidad and Tobago compromise was adopted. The option of the death penalty was deleted. In exchange, article 80 was included which stresses the non-prejudice of the penalties in the statute to a national application of penalties. In addition, a statement was agreed upon that was read by the president of the Conference at the final plenary session. Chairman Fife pointed out that the proposed statement is not only aimed at lawyers who are interpreting the statute but sends a political message to the states ensuring that their national penalty provisions are untouched. The Sudanese Minister claimed that the absence of the death penalty from the statute must not be interpreted as evidence of a universal trend towards abolition. Singapore, Sudan, Trinidad and Tobago, Ethiopia, Egypt, Barbados, Jamaica and Dominica all made statements supporting the compromise while reminding the Working Group of their attachment to capital punishment.

The following day, in the Committee of the Whole, Jamaica, Singapore, Ethiopia, Rwanda, Saudi Arabia and Sudan made similar declarations. In addition, the President of the Conference, Mr. Conzo, made the agreed statement in the final plenary session of the Conference.

Prepared by Anne Rubesame
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About the NGO Coalition for an ICC

The main purpose of the NGO Coalition for an International Criminal Court is to advocate the creation of an effective, just and independent International Criminal Court. The Coalition brings together a broad-based network of NGOs and international law experts to develop strategies on substantive legal and political issues relating to the proposed statute. A key goal is to foster awareness and support among a wide range of civil society organizations: human rights, international law, judicial, humanitarian, religious, peace, women's, parliamentary and others. To these ends, we engage in the following activities:

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