1. The dynamics of the Rome Conference

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The Rome Statute of the International Criminal Court was adopted on 18 July 1998 following five weeks of negotiations at a Diplomatic Conference of Plenipotentiaries that was attended by thousands of delegates, observers and journalists. A dramatic vote taken shortly after midnight but with the clock stopped to preserve the fiction that the proceedings had concluded on 17 July—within the time frame set the previous year by the United Nations General Assembly—provided the necessary two-thirds majority for adoption of the text. One of the most complex international instruments ever concluded, it wove together several specialized bodies of law, including criminal law, international humanitarian law, international human rights law, the law of the United Nations, and the law of international organizations more generally.

When the delegates assembled in Rome in mid-June 1998, they were provided with a draft text of the statute of the international criminal court.¹ Some of the provisions were uncontroversial, agreement having been reached in several sessions of the Preparatory Committee held during 1996, 1997 and early 1998. But most were displayed with one or more options enclosed in square brackets to indicate the absence of any agreement. There were in excess of 1,700 sets of square brackets in the draft text. An additional 200 distinct written proposals were submitted during the Conference itself.² When they finished, a text consisting of a preamble and 128 articles, some of them many hundreds of words long, had been adopted. Inevitably, and quite deliberately, many of the provisions are ambiguous. For a few of them, like Article 121 on the amending procedure, the word enigmatic is an understatement.

The draft text that the Rome Conference used as a basis for negotiations had been many years in preparation. Precisely when the process began is a bit like asking the length of a piece of string. A few months prior to the Conference, Christopher Keith Hall of Amnesty International published an article in the *International Review of the Red Cross* describing what was apparently the first draft statute of a permanent international criminal court. It had been proposed by Gustave Moynier, one of the founders of the International Committee of the Red Cross, in 1872 in the aftermath of the Franco-Prussian War. Moynier's draft received mixed reviews from other specialists, and nothing indicates that it ever attracted the attention of governments whose support would have been essential were the project to see the light of day.³ Decades later, at the Hague Conferences of 1899 and 1907, delegates discussed various proposals relating to international adjudication, but while they reached some agreement on

¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/2, 14 April 1998.

² R. S. Lee, 'The Rome Conference and its Contribution to International Law', in R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague/London/Boston: Kluwer Law International, 1999) 1–39, at 14–15.

³ C. K. Hall, 'The First Proposal for a Permanent International Criminal Court', 38 *International Review of the Red Cross* (1998) 57–74. See also G. Moynier, *La création d'une institution judiciaire internationale, propre à prévenir et à réprimer les infractions à la Convention de Genève* (Geneva: Comité international de secours aux militaires blessés, 1872).

tribunals for inter-state disputes, there is no evidence of any consideration being given to an international criminal tribunal.

In August 1916, following reports of German atrocities in occupied Belgium, north-east France and on the high seas, French diplomats prepared a draft statute for an international criminal court.⁴ It appears to be the first initiative at the governmental level directed at establishing an international criminal court. A few years later, in the Commission on Responsibilities of the Paris Peace Conference, the United Kingdom (UK) circulated its own draft provisions for an international criminal court statute.⁵ Article 227 of the Treaty of Versailles contemplated an international court for trial of the former Emperor of Germany, but it was never established. Following study of the subject by professional bodies including the International Law Association and the Association Internationale de Droit Pénal, the League of Nations took a further step towards setting up an international criminal tribunal in 1937.⁶ Finally, after World War II, the first international criminal tribunals were actually created to try the perpetrators of crimes against peace, war crimes and crimes against humanity. But they were temporary in nature.

The genesis of the Rome Statute, however, really begins on 9 December 1948 with General Assembly Resolution 260(III). Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide was the primary purpose of the Resolution. But because Article 6 of the Convention pledged the prosecution of the crime ‘by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’, in a companion text the General Assembly requested the International Law Commission to study ‘the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes’. The Resolution stated that ‘in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law’.⁷ The International Law Commission worked sporadically on the task, pausing in 1954 for a three-decade hibernation. In the early 1980s, the Commission revived its study of the Code of Crimes Against the Peace and Security of Mankind. For several years, the Commission prodded the General Assembly to authorize it to renew its consideration of the international criminal court, arguing that while the Code might define the crimes, for it to have any real significance the creation of an international tribunal was imperative.⁸ In 1989, the General Assembly finally gave the green light. The International Law Commission then proceeded

⁴ ‘Projet de Convention entre tous les Alliés’ and ‘Projet de Convention entre la France et la Grande Bretagne’, A-1025-3, August 1916, p. 10.

⁵ ‘Memorandum Submitted by the British Delegation’, in *Minutes of Meetings of the Commission*, USNA 181/1201.16, 19 February 1919, 27–33, at 30–33.

⁶ Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937. V (1938).

⁷ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 260 (III) B, 9 December 1948.

⁸ *Report of the International Law Commission on the work of its thirty-fifth session*, UN Doc. A/38/10, 3 May–22 July 1983, § 69(c)(i); *Report of the International Law Commission on the work of its thirty-eighth session*, UN Doc. A/41/10, 5 May–11 July 1986, § 185.

in earnest, under the leadership of James Crawford, presenting the General Assembly with a working draft statute in 1994.⁹

The International Law Commission draft underwent considerable modifications over the next four years as preparations accelerated for a diplomatic conference where, it was hoped, agreement could be reached on a text.¹⁰ Each year, governments expressed their views on the progress of the negotiations at sessions of the Sixth Committee of the General Assembly. Substantive debate, and efforts at compromise, mainly occurred at meetings of the Ad Hoc Committee of the General Assembly, which met twice in 1995, and then in those of the Preparatory Committee, which held several sessions lasting many weeks in the years that followed. Various constituencies emerged as the process unfolded. Informal sessions were also held each year under the auspices of the Siracusa International Institute, whose director was one of the pre-eminent personalities of the entire process, M. Cherif Bassiouni.

Primarily, of course, the drafting was the work of sovereign states. The process was initially dominated by public international lawyers and diplomats. As it gained momentum, governments added specialists in various areas to their delegations. Many sought the guidance of criminal lawyers, some of whom had expertise in the development of multilateral and bilateral treaties on mutual legal assistance and related matters. When it became likely that the Statute would include 'core crimes', notably violations of the laws and customs of war, legal experts from the armed forces were summoned. Although each government had its own views on a range of issues, common interests soon became apparent and informal alliances and caucuses were created. Regional groupings, such as the European Union, the Southern African Development Community and the Caribbean Community, found their own voices, submitting discussion papers and amendments for consideration. The International Committee of the Red Cross contributed its expert knowledge in the area of the law of armed conflict. Interest from non-governmental organizations snowballed as international justice emerged as an important theme of human rights advocacy. Scholarly attention also grew at a stunning pace as the topic was taken up by individual academics but also by professional bodies, such as the Association Internationale de Droit Pénal, the International Law Association and the International Society for the Reform of Criminal Law. All of these constituencies converged on Rome in June 1998 with their hopes, expectations and priorities.

1. CONDUCT OF THE NEGOTIATIONS

The Rome Conference was convened by the United Nations pursuant to two General Assembly Resolutions.¹¹ Invitations were extended by the Secretary-General of the United Nations to all Member States as well as to members of specialized agencies and of the International

⁹ J. Crawford, 'The Work of the International Law Commission', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 23–34.

¹⁰ A. Bos, 'From the International Law Commission to the Rome Conference', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 35–66.

¹¹ *Establishment of an International Criminal Court*, UN Doc. A/RES/51/207, 16 January 1997; *Establishment of an International Criminal Court*, UN Doc. A/RES/52/160, 15 December 1997.

Atomic Energy Agency.¹² The credentials of some 162 Member States were recognized by the Conference.¹³ More than 20 intergovernmental organizations and entities with invitations to participate in the General Assembly also attended, including the Council of Europe, the League of Arab States and the International Committee of the Red Cross.¹⁴ Furthermore, the Conference was also attended by in excess of 200 intergovernmental organizations. Almost 500 journalists were accredited. The Conference was held in the headquarters of the Food and Agriculture Organization (FAO), a United Nations agency. The FAO building was constructed in the 1930s to house the Department of Italian East Africa. Just outside the building, on the corner facing the Porta Capena, Mussolini had placed the Obelisk of Axum, a trophy taken from Ethiopia by Italian armed forces. Despite a post-war promise that it would be returned to its owners, the monument was still there during the Diplomatic Conference. Every single day as they entered the building, delegates walked by this unhappy reminder of brutal Italian colonialism. The Obelisk was repatriated in 2005.

The Plenary of the Conference, at which all participating states were entitled to vote, was the ultimate decision-making body. The Plenary held several sessions during the first week of the Conference and then adjourned for four weeks, only to reconvene on the last evening to adopt the final text. The substantive work of drafting the Statute was mainly accomplished by the Committee of the Whole, chaired by Philippe Kirsch, and by several of its thematic working groups. A variety of informal groupings played a role in resolving specific issues. Kirsch and the chairmen of the various working groups formed the Bureau, which acted as the main executive organ throughout the Conference. Each of the working groups was assigned a part of the draft Statute. As soon as the working groups had reached agreement on one or more of the provisions for which they were responsible, the texts were forwarded to the Committee of the Whole. In due course, and generally without more than a brief explanation from the coordinators of the working groups, the Committee of the Whole would refer the text to the Drafting Committee, chaired by M. Cherif Bassiouni. The Secretariat of the Conference was assured by the United Nations under the overall direction of its senior legal officer, Hans Corell, with Roy Lee of the codification division as executive secretary.

Kofi Annan, the Secretary-General of the United Nations, opened the Conference and briefly served as temporary president until Giovanni Conso, a distinguished Italian diplomat, was elected President. After various formal matters were determined, including adoption of the Rules of Procedure, the Plenary provided a forum for delegations and observers to set out their positions on the draft Statute and, more generally, the establishment of the International Criminal Court. For this 'high-level' segment of the Conference, many delegations were represented by their most senior officials, often ministers of foreign affairs. By the time the Plenary adjourned on Thursday of the first week of the Conference, the centre of gravity had already shifted to the Committee of the Whole and the working groups. Initially, five working groups were established on General Principles of Criminal Law, Procedural Matters, Penalties,

¹² *Establishment of an International Criminal Court*, UN Doc. A/RES/52/160, OP 3, 15 December 1997.

¹³ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the Plenary Meetings of the Committee of the Whole*, A/CONF.183/13 (Vol. II), 15 June–17 July 1998, at 3–41.

¹⁴ *Ibid.* at 42–4.

International Cooperation and Judicial Assistance, and Enforcement.¹⁵ As the Conference proceeded, other groups were set up on Applicable Law, Composition and Administration of the Court, Financing of the Court and Assembly of States Parties, Crimes, and Preamble and Final Clauses. ‘Coordinators’ were designed for specific parts of the Statute, and even for specific provisions, such as the definitions of crimes against humanity and the crime of aggression.¹⁶ Some of the most sensitive provisions, essentially those of Part II of the Statute, were not assigned to any working group. Rather, they were debated in the Committee of the Whole and negotiated during informal sessions and ‘in the margins’ of the Conference.

The Official Records of the Conference contain ‘summary records’ of the sessions of the Plenary and of the Committee of the Whole. Summary records are a third-party *précis* of speeches. But there is nothing in the Official Records to indicate the content of the debates in the working groups. The lack of any summary record of the working groups was quite deliberate. It was felt that recording the debates might stifle discussion and discourage compromise. Thus, the only official documents from the working groups are the amendments that were formally proposed, either by delegations or by the coordinator, and the final text upon which agreement had been reached. Despite the absence of any formal record of the debates in the working groups, there was no Chatham House Rule preventing those in attendance from reporting on the discussions. Regularly, accounts appeared in the bulletins and in the newspapers published during the conference. Later, personal reports on the debates by the participants themselves were featured in books, such as the one edited by Roy Lee,¹⁷ and in the *Commentary* on the Statute produced by Otto Triffterer, which was actually subtitled ‘Observers’ Notes’.¹⁸ The case law of the International Criminal Court provides examples of debates in the working groups being considered as part of the preparatory work, with reliance upon the accounts in Lee and Triffterer but without reference to any documents in the Official Records.¹⁹ For example, in *Lubanga*, the Appeals Chamber invoked the *travaux préparatoires*, noting ‘concerns by some delegates’ that the term ‘recruiting’ in Article 8 might be taken to prohibit recruitment campaigns addressed to children under 15 even though these might not be intended to have them begin military training immediately.²⁰ To support its assertion, the Appeals Chamber referred to the second edition of the Triffterer *Commentary*,²¹ which in turn

¹⁵ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 2nd Plenary Meeting*, UN Doc. A/CONF.183/SR.2, 15 June 1998, §§ 1–2.

¹⁶ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 6th Plenary Meeting*, UN Doc. A/CONF.183/SR.6, 17 June 1998, § 1.

¹⁷ R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague/London/Boston: Kluwer Law International, 1999).

¹⁸ O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* (Baden-Baden: Nomos, 1999).

¹⁹ E.g., Separate and Partially Dissenting Opinion of Judge Fernández de Gurmendi, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, *Situation in the Republic of Côte d’Ivoire* (ICC-02/11), Pre-Trial Chamber III, 3 October 2011, §§ 8–9.

²⁰ Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, *Lubanga* (ICC-01/04-01/06 A 5), Appeals Chamber, 1 December 2014, § 285.

²¹ R. Arnold et al., ‘Article 8’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* (2nd edn., Munich: C.H. Beck, Hart Publishing, Nomos, 2008) 275–503, at 472–3.

cited the chapter by Herman von Hebel and Darryl Robinson in the volume edited by Roy Lee.²² But von Hebel and Robinson, both of whom were members of national delegations at the Rome Conference, did not cite any authority for their claim that ‘the word “recruiting” was replaced with “conscripting or enlisting”’. There is nothing in the Official Records of the Rome Conference to confirm this.

The negotiations themselves followed the method of consensus or ‘general agreement’. The General Assembly resolution convening the Conference referred to ‘the importance of concluding the work of the conference through the promotion of general agreement on matters of substance’.²³ The Rules of Procedure required that the Conference ‘make its best endeavours to ensure that the work of the Conference is accomplished by general agreement’. They specified that if, ‘in the consideration of any matter of substance, all feasible efforts to reach general agreement have failed, the President of the Conference shall consult the General Committee and recommend the steps to be taken, which may include the matter being put to the vote’.²⁴ There were complex discussions prior to the Conference about the requisite majorities,²⁵ it being agreed eventually that adoption of the Statute as a whole would require a two-thirds majority of those present and voting, provided that the majority itself contained a majority of states participating in the Conference.²⁶ Abstainers were not considered to be ‘present and voting’.²⁷ Consensus worked throughout the conference and only at the very end were there calls for a vote. Three such calls, in the last sitting of the Committee of the Whole, were dismissed through a procedural gambit known as a ‘no-action motion’.²⁸ When the delegates gathered for the final Plenary, the United States (US) called for a vote on the Statute as a whole. The result was 120 in favour and seven opposed, considerably more than two-thirds of those present and voting and comfortably above the minimum requirement of 81 in favour.²⁹

Negotiation by consensus can be traced to organs of the League of Nations, although it only came to dominate treaty-making in the 1970s and 1980s. The rise of negotiation by consensus is not unrelated to the numerical dominance of so-called non-aligned states from the Global South and the existence of powerful minorities in political, military and economic terms. According to Jonathan Charney, the consensus system

²² H. von Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’, in R. S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague/London/Boston: Kluwer Law International, 1999) 79–126, at 118.

²³ A/RES/52/160, 15 December 1997, *supra* note 11.

²⁴ *Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/6, 15 June 1998, at Rule 34.

²⁵ Lee, *supra* note 2, at 17–18.

²⁶ *Rules of Procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/6, 15 June 1998, at Rule 36(1).

²⁷ *Ibid.* at Rule 37.

²⁸ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 42nd Plenary Meeting*, UN Doc. A/CONF.183/C.1/SR.42, 17 July 1998, §§ 9–15 and §§ 23–31. See also Lee, *supra* note 2, at 23–5.

²⁹ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 6th Plenary Meeting*, UN Doc. A/CONF.183/SR.9, 17 June 1998, §§ 8–10. See also M. C. Bassiouni and W. A. Schabas, *The Legislative History of the International Criminal Court*, Vol. I (The Hague: Brill, 2016), at 100–101.

assures that decision-making at a multilateral negotiation of a convention will not be dominated by the numerical superiority of any group of nations ... Since it is difficult to obtain acceptance of voting systems that overtly recognize the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the participating nations.³⁰

There was also a practical advantage of proceeding by consensus. The Statute was an extraordinarily complicated legal instrument. If provisions were adopted in different working groups, they might result in contradictory provisions or texts that were simply incompatible. But this procedure is not without its critics. Writing after the Rome Conference, Bill Pace, of the Coalition for an International Criminal Court, complained of a tendency toward the adoption of treaty texts with a 'low common denominator' consisting of weak language dictated by countries that actually oppose the treaty and that often never ratify.³¹ Had the Rome Statute been adopted by majority vote, it might well have denied the Security Council any role whatsoever and it is likely that the use of nuclear weapons would have been included in the provision on war crimes.

In practice, the debates in the Committee on the Whole and in the Working Groups began with a session where interested delegations would set out their opening positions, often declaring matters on which they were prepared to compromise. They would conclude their initial statements saying things like 'We favour Option A, but we can be flexible on Option B, and we cannot accept Option C.' After this *tour de table*, the chairman of the proceedings might summarize the positions, indicating strong support for one option and more modest support for others, but always taking care not to offend those in the minority by suggesting their views were entirely marginal. Frequently, the chairman might submit his or her own suggestion as the basis of a compromise. The work was tedious and the sessions often painfully lengthy, sometimes because of a few stubborn delegations or individuals. The disputes could often be quite technical, particularly in the procedural part of the Statute where criminal law experts encountered a clash of legal cultures. Difficulties might result from mere misunderstandings about how one of the main procedural systems actually operated.

For example, in the area of penalties, there were some extreme views reflecting the spectrum of approaches in national systems. This made consensus difficult. On one end of the spectrum was a group of states that spoke in favour of the Court being able to impose capital punishment. On the other end were states opposed to life imprisonment as a maximum sentence. Finding an acceptable compromise was not only a question of reconciling quite different views but also of finding a workable solution for an international organization. If

³⁰ J. Charney, 'United States Interest in a Convention on the Law of the Sea: The Case for Continued Efforts', 11 *Vanderbilt Journal of Transnational Law* (*Van J Transnatl L*) (1978) 39–75, at 43. See also W. Jenks, 'Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organization', in D. W. Bowett (ed.), *Cambridge Essays in International Law, Essays in Honour of Lord McNair* (London: Stevens and Sons, 1965) 48–61; D. Vignes, 'Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?', 69 *American Journal of International Law* (*AJIL*) (1975) 119–29, at 119; B. Buzan, 'Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea', 75 *AJIL* (1981) 324–48, at 324.

³¹ W. R. Pace, 'The Relationship between the International Criminal Court and Non-Governmental Organizations', in H. von Hebel, J. G. Lammers, and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser, 1999) 189–211, at 206–7.

some states could not cooperate with an institution that imposed capital punishment, because of constitutional safeguards or international human rights obligations, authorizing the death penalty would doom any prospect of wide acceptance for the Court's Statute. When it came to trial procedure, lawyers from inquisitorial systems were puzzled at the willingness of their colleagues from the adversarial tradition to allow accused persons to plead guilty, thinking this was a judgment by consent, immune to judicial scrutiny. Those from the adversarial system could not see how a genuine prosecutor might take responsibility for investigating the case for the defence as well as evidence for conviction.

Despite such challenges, there was a general willingness to find common ground and a recognition that compromise was necessary. But even when delegates reluctantly accept a text, they might repeat a familiar mantra: 'Nothing is agreed until everything is agreed.' It was a signal that they expected their colleagues to give ground when there were other disputes.

2. GROUPS, CAUCUSES AND INDIVIDUALS

Several groups of states operated in a concerted fashion at the Conference, although none acted as a monolithic bloc.³² Most prominent among them, if only because of its determination that a Statute be adopted and a Court created, was the 'like-minded group'. The origins of the like-minded group or caucus can be traced to the 1995 sessions of the Ad Hoc Committee of the General Assembly, born from the frustration of 'a handful of Western European and Latin American states' with the opposition of the major powers to the establishment of a Court.³³ It quickly grew in size, comprising more than 60 states by the time of the Rome Conference, including Argentina, Australia, Chile, Egypt, Guatemala, Lesotho, New Zealand, Samoa, South Africa, Trinidad and Tobago (representing 12 Caricom states), Uruguay and Venezuela, as well as a large number of European states. According to M. Cherif Bassiouni, '[b]y all accounts, that group of States and their delegates were among the driving forces behind the successful outcome of this endeavour'.³⁴ Chaired by Canada, the like-minded group often found itself in informal alliance with the main human rights non-governmental organizations and with the Coalition for an International Criminal Court.³⁵ The like-minded states were committed to a successful outcome but were also insistent on important changes to the vision of the Court that had been advanced in 1994 by the International Law Commission. They united around four 'cornerstone' principles or ideas, of which probably the most significant, and the most controversial in a political sense, was the removal of a 'filter' role for the Security Council. Other important objectives of the like-minded included automatic jurisdiction of the Court over core crimes, a definition of war crimes that included those committed during non-international armed conflict, an obligation of cooperation imposed upon States Parties,

³² P. Kirsch, 'Introduction', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) xxiii–xxviii, at xxv.

³³ M. H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 12, at 23–4.

³⁴ Bassiouni and Schabas, *supra* note 29, at 82.

³⁵ Pace, *supra* note 31, at 205–8.

and determination of admissibility and jurisdiction by the Court itself.³⁶ There was also broad agreement among the like-minded that the Court should be able to exercise universal jurisdiction, but this was not formally a part of its credo.³⁷

The International Law Commission had conceived of a Court that was essentially subordinate to the Security Council, a tribunal similar to the ad hoc tribunals for the former Yugoslavia and Rwanda but established on a permanent basis.³⁸ The essence of Security Council control would be a veto on the selection of situations for prosecution. The like-minded favoured a Court with more independence. The way to achieve this was to assign the selection of situations to an independent prosecutor, and this became another key demand of the like-minded. On this issue in particular, there was a real meeting of the minds with the human rights non-governmental organizations who believed that the independence of the prosecutor was an essential feature of a fair tribunal. The like-minded may have shared this position, but they were also driven by a more plainly political objective of taming the authority of the Security Council. In this way, the Rome Statute became an instrument to achieve indirectly what it had been impossible to achieve directly, the reform of the Charter of the United Nations.

Considerable significance was attached to the decision of the UK to join the like-minded, precisely because of its status as a permanent member of the United Nations Security Council. Six months prior to the Rome Conference, the UK endorsed an amendment to what became Article 16 of the Statute.³⁹ It is one of two provisions in the 1998 text of the Statute that delineate the intervention of the Security Council in the determination of situations for prosecution. Momentum had been building at the sessions of the Preparatory Conference for provisions that would dramatically reduce the role of the Security Council from what had been contemplated in the International Law Commission draft. By subscribing to a compromise amendment, the UK successfully managed to put the brakes on what might have become a runaway train. Its compromise preserved a degree of recognition of a role for the Security Council that could otherwise have disappeared as the negotiations progressed, becoming more and more remote from the vision of the International Law Commission. The change of heart in London, which has been associated with the election of the Labour Government under Prime Minister Tony Blair, thrilled the 'like-minded' but it also unsettled the other permanent members. David Scheffer of the US described a telephone call from the British legal advisor, Frank Berman, to tell him of the development. '[O]ur common-law ally was going its own way – with the "like-minded" – and I was stuck with favourable nods from Russia and China but practically no one else given their hatred of Security Council powers', he wrote.⁴⁰

³⁶ M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (London and New York: Routledge, 2006), at 22–6.

³⁷ F. Benedetti and J. L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference', 5 *Global Governance* (1999) 1–37, at 1; P. Kirsch and D. Robinson, 'Reaching Agreement at the Rome Conference', in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 67–91, at 70–71.

³⁸ *Report of the International Law Commission on the work of its forty-sixth session*, UN Doc. A/49/10, 2 May–22 July 1994, at 43–5.

³⁹ *Proposal Submitted by the United Kingdom of Great Britain and Northern Ireland*, UN Doc. A/AC.249/1998/WG.3/DP.1, 25 March 1998, at Article 3.

⁴⁰ D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012) at 195–6.

In contrast with the 'like-minded', which coalesced during the sessions of the Preparatory Committee and was devoted exclusively to the International Criminal Court, the Non-Aligned Movement had a history dating back to the Bandung Conference of 1954. In common with the 'like-minded' group, the Non-Aligned Movement was energized by a post-Cold War global environment that presented opportunities to reduce some of the prerogatives of the Security Council. Philippe Kirsch has written that '[a] few NAM members' were opposed to any role for the Security Council.⁴¹ But according to David Scheffer, '[t]he Non-Aligned Movement of over one hundred countries opposed any Security Council role with only a few exceptions'.⁴² At the final session of the Committee of the Whole, India put forward two resolutions that were said to reflect an official position taken by the Non-Aligned Movement: the first was to deprive the Security Council of the right to refer situations to the Court; and the second to include the use of nuclear weapons in the catalogue of war crimes.⁴³

Inclusion of the crime of aggression within the jurisdiction of the Court was an issue cherished by the Non-Aligned but a matter of indifference to many members of the 'like-minded' (as well as many of the human rights NGOs). Just as the impact of the 'like-minded' can be seen in Articles 15 and 16 of the Rome Statute, that of the Non-Aligned is visible in the reference to the crime of aggression in Article 5 and, ultimately, in the amendments adopted at the Kampala Review Conference in 2010.⁴⁴ The Non-Aligned also manifested strong support for inclusion of drug crimes and terrorism. Although several states insisted that the Statute authorize capital punishment, this position cannot be attributed to the Non-Aligned. Although several of its members favoured such a position, a large number were firmly on the path to abolition. Furthermore, there were also a few supporters of capital punishment within the 'like-minded'.

Coordination among the permanent members of the Security Council was not visible in the same way as it was for the other groups. However, the five permanent members certainly shared common views. There is evidence that they coordinated their positions. In the first days of July, they held a working dinner at the French embassy.⁴⁵ Then, '[d]uring the final week of the Rome Conference, the delegations of the governments of the five permanent members of the Security Council (the US, Russia, France, the UK and China, also known as the P-5) met intensively to arrive at a compromise package that could be presented to the conference', wrote David Scheffer in his account in the *American Journal of International Law*.⁴⁶ He described the reaction of the like-minded to the P-5 proposal as being 'almost violent',⁴⁷ but many of its concerns were reflected in the final draft of Part II that was proposed by the Bureau. According to Philippe Kirsch and John Holmes, '[t]heir solidarity was clearest on two points: a strong role for the Council vis-a-vis the court, and the exclusion of nuclear weapons from the weapons prohibited by the statute'.⁴⁸ They objected to the notion of an independent prosecutor with the

⁴¹ Kirsch and Robinson, *supra* note 37, at 71.

⁴² Scheffer, *All the Missing Souls*, *supra* note 40, at 193.

⁴³ UN Doc. A/CONF.183/C.1/94, date and UN Doc. A/CONF.183/C.1/95, date. Discussed in Lee, *supra* note 2, at 24.

⁴⁴ Resolution RC/Res.6, *The Crime of Aggression*, UN Doc. RC/Res.6, 11 June 2010.

⁴⁵ Scheffer, *All the Missing Souls*, *supra* note 40, at 204–5.

⁴⁶ D. Scheffer, 'The United States and the International Criminal Court', 93 *AJIL* (1999) 12, at 19–20.

⁴⁷ Scheffer, *All the Missing Souls*, *supra* note 40, at 220.

⁴⁸ P. Kirsch and J. T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 *AJIL* (1999) 2–12, at 4.

power to initiate proceedings. The permanent members were also opposed to the Court being able to prosecute the crime of aggression without prior authorization by the Council.

Foremost among the five permanent members was the US. In the 1990s, following the break-up of the Soviet Union, the US was being described as the only remaining superpower. Many saw the US as an adversary of the Court, and for a few years following entry into force of the Rome Statute in 2002, it was indeed quite hostile to the institution. But at the Rome Conference there can be no doubt that the US was a keen supporter of the project. After initial opposition to international justice at the Paris Peace Conference, in 1919, the US became one of its most enthusiastic proponents. It contributed hugely to the work of the International Military Tribunal and the International Military Tribunal for the Far East. Much later, the US was decisive in the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Throughout the negotiations of the Rome Statute, including the Conference itself, the US made many constructive proposals and interventions in the debates. Had it wanted to sabotage the Conference, there was no shortage of opportunities.

The US had the biggest team of any country at the Conference yet, as John Washburn explained, because it 'belonged to no group or bloc in the negotiations ... it had too much to cover and no friends to represent its interests in meetings it could not physically attend. Ironically, this large delegation from the remaining superpower found itself in somewhat the same situation as tiny delegations from small countries that also complained about being swamped by too many concurrent meetings.'⁴⁹ The US was in general favourable to the model proposed by the International Law Commission in 1994. However, as the negotiations unfolded, and the amendments put forward by bodies such as the 'like-minded' gained momentum, Washington's discomfort grew.

The participation of non-governmental organizations had been formally requested by the General Assembly when it convened the Rome Conference. The Resolution contemplated their robust participation in the process, specifying:

the understanding that participation means attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate.⁵⁰

This was all confirmed in the Rules of Procedure of the Conference.⁵¹ Invitations were sent by the Secretary-General and more than 200 of them, such as Amnesty International, the Salvation Army, and the Royal Commonwealth Society, as well as groups of more modest proportions such as the Committee of Former Nuremberg Prosecutors, were formally accredited.⁵² As a general observation, 'the NGOs pressed for a strong court with automatic jurisdic-

⁴⁹ J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', 11 *Pace International Law Review* (*Pace Intl L Rev*) (1999) 361–78, at 374.

⁵⁰ *Establishment of an International Criminal Court*, UN Doc. A/RES/52/160, OP 9, 15 December 1998.

⁵¹ *Rules of Procedure*, UN Doc. A/CONF.183/6, at Rule 63, 15 June 1998.

⁵² *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Non-Governmental Organizations Accredited to Participate in the Conference*, UN Doc. A/CONF.183/INF/3, 5 June 1998.

tion, an independent prosecutor, sensitivity to gender concerns, and jurisdiction over internal armed conflict'.⁵³ Alan Baker, the chief counsel to the Israeli delegation, told the *Wall Street Journal* that he had never seen NGOs play a more powerful role. 'They were in on nearly every meeting. They were in on everything,' he wrote.⁵⁴ But the NGOs were a complex mosaic and they did not always share the same perspective. Feminist organizations found their efforts being challenged by Real Women of Canada, a conservative body determined to make sure that the Rome Statute did nothing to strengthen campaigns for the right to abortion.

The vast majority of the non-governmental organizations, including large and influential groups like Amnesty International, Human Rights Watch, the International Commission of Jurists, No Peace Without Justice and the Fédération internationale des ligues des droits de l'homme, were affiliated with the Coalition for an International Criminal Court. The Coalition was founded early in 1995. It resulted from an initiative of Christopher Keith Hall of Amnesty International and Bill Pace of the World Federalist Movement, two of the handful of observers present when the General Assembly decided to set up an ad hoc committee in light of the report of the International Law Commission.⁵⁵ By June 1998, the Coalition claimed more than 800 organizational members, of which more than 200 sent representatives, making it the largest 'delegation' at the Conference. A steering committee of the Coalition ensured an NGO presence in the Working Groups and informal sessions. The Coalition also organized a network of 'legal advisors' who were offered as assistants to smaller delegations. As the conference wore on, some of the NGO experts on national delegations found themselves actually addressing the working groups. An autonomous Women's Caucus for Gender Justice was also created, driven by concerns that certain matters were not being adequately addressed by the Coalition. The two bodies worked in harmony, however, and the Women's Caucus had a representative on the steering committee of the Coalition.⁵⁶

Three daily newspapers or bulletins were produced during the Rome Conference. The Coalition for an International Criminal Court issued its *CICC Monitor*, previously published every second month, on a daily basis.⁵⁷ The Advocacy Project established a newspaper called *On the Record*. Finally, the Inter Press Service, which publishes at all United Nations conferences, issued the *Terra Viva* newspaper. Philippe Kirsch and John Holmes described the growing interest in *Terra Viva*, noting that delegates turned to it for news of events at the conference in which they had not participated, as well as comments about their own positions. '*Terra Viva* had its share of inaccuracies,' they wrote, 'but it was generally well-written, well-informed, and provocative enough to ensure wide readership'.⁵⁸

⁵³ Kirsch and Holmes, *The Negotiating Process*, *supra* note 48, at 5.

⁵⁴ *Wall Street Journal*, 24 July 1998, p. 1.

⁵⁵ Glasius, *supra* note 36, at 26. See also B. Bedont and K. H. Martinez, 'Ending Impunity for Gender Crimes under the International Criminal Court', 6 *Brown Journal of World Affairs* (1999) 65–85; V. L. Oosterveld, 'The Making of a Gender-Sensitive International Criminal Court', 1 *International Law FORUM du droit international* (1999) 38–41.

⁵⁶ Glasius, *supra* note 36, at 80; K. D. Askin, 'Crimes Within the Jurisdiction of the International Criminal Court', 10 *Criminal Law Forum (Crim LF)* (1999) 33–59, at 45.

⁵⁷ W. R. Pace and M. Thieroff, 'Participation of Non-Governmental Organizations', in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague/London/Boston: Kluwer Law International, 1999) 391–8, at 394.

⁵⁸ See also P. Kirsch and J. T. Holmes, 'The Birth of the International Criminal Court: The 1998 Rome Conference', 36 *Canadian Yearbook of International Law (Can YB Intl L)* (1999) 3–40, at 11.

Academics also made an important contribution to the negotiations. Prior to the Conference, they had mobilized through professional bodies such as the American Society of International Law, the American branch of the International Law Association and the Association Internationale de Droit Pénal.⁵⁹ Several participating states recruited distinguished scholars to join their delegations. Often, their credibility and expert knowledge proved influential in the debates. Among them were Theodor Meron, Roger Clark, Andrew Clapham, Claus Kress, Kai Ambos, Andreas Zimmermann, Tim McCormack, Gerry Simpson, Gerhard Hafner, Raul Pangalangan, Sharon Williams, Paulo Sérgio Pinheiro, Maurice Kamto, Fred Harhoff, Philippe Sands, Angela Del Vecchio, Flavia Lattanzi, Ivo Josipović and Concepción Escobar. Other academics attended as observers, generally by associating themselves with an NGO delegation, including Otto Triffterer, Eric David, Leila Sadat and Diane Orentlicher. Not only did the academic participation enrich the debates, it also consolidated a cohort of experts who would write and lecture for many years about the Rome Conference and the creation of the Court.

Although many individuals made remarkable contributions to the adoption of the Rome Statute, some stand out for their quite exceptional role. Space here only permits a few to be identified and discussed. First and foremost is the diplomat who steered the negotiations through to a successful completion, Ambassador Philippe Kirsch of Canada. He was recruited to chair the Committee of the Whole in the days prior to the start of the Conference after the Dutch diplomat who held the position, Adriaan Bos, withdrew for health reasons. Kirsch had already chaired international conferences with fruitful results. He had mastered the technique of negotiation by consensus, skilfully building agreement and finding ways to make progress without jeopardizing the final result or alienating significant constituencies. Almost intuitively, he seemed to understand how to craft a final version of the Statute that could withstand a vote on the text, should one be requested. After the Statute entered into force, Kirsch was elected by the Assembly of States Parties to its first roster of judges, and subsequently, he was designated President of the International Criminal Court by his colleagues, a position he held for two terms.

M. Cherif Bassiouni, a professor of law at DePaul University in Chicago, had been campaigning for an international criminal court since the 1970s, patiently defending the future of an idea that many believed had seen its final days at Nuremberg. When international justice revived in the early 1990s, he chaired the fact-finding Commission on the Balkan Wars established by the Security Council but was eliminated as a candidate for Prosecutor of the International Criminal Tribunal for the former Yugoslavia because of his religion. Bassiouni served as chair of the Drafting Committee during the Rome Conference and sat as a member of the Bureau of the Committee of the Whole. The Drafting Committee was charged with producing final texts of the Statute in the six official languages. Bassiouni mastered four of them. Just as Kirsch was responsible for the political alignments that assured a successful outcome, Bassiouni must be credited with ensuring the legal coherence of the Statute.⁶⁰

⁵⁹ See, e.g., L. S. Wexler, 'Observations on the Consolidated ICC Text before the Final Session of the Preparatory Committee' (1998) 13*bis Nouvelles études pénales*; L. S. Wexler, 'Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15–July 17 1998', (1998) 13*ter Nouvelles études pénales*.

⁶⁰ For Bassiouni's discussion of the challenges facing the Drafting Committee, see Bassiouni and Schabas, *supra* note 29, at 91–5.

An important, if controversial, contribution was made by David Scheffer, the head of the American delegation at the Rome Conference. From his desk in the Department of State, Scheffer had pushed forward the International Criminal Court project within a reluctant government. At the Conference, he often found himself defending positions that made him unpopular with the ‘like-minded’ and the NGOs, although they always respected him for his courtesy and charm, as well as his expert grasp of the issues. Under Scheffer’s leadership, the US made many constructive contributions to the process of drafting the Statute. When delegations from the Caribbean and from some states in the Middle East continued to push for inclusion of the death penalty, Scheffer surprised many by explaining to the Working Group that this would fatally undermine the Statute given widespread opposition to capital punishment.⁶¹ His call for a vote on the Statute at the final Plenary was done with aplomb. He specified that his instructions required him to insist upon a recorded vote. He had vainly argued against doing so, urging Washington to let the Statute be adopted by consensus, but the Pentagon insisted that the US record its opposition. The result only confirmed the broad support for the Statute and the isolation of its opponents, as Scheffer had predicted.⁶²

3. STRUGGLING TO REACH CONSENSUS

By Friday of the first week of the Conference agreement had been reached on the provisions in Part I. These were approved by the Committee of the Whole and transmitted to the Drafting Committee.⁶³ During the second and third weeks, the Working Groups were very active and many more provisions were put to bed. But as a general rule, this initial progress consisted of fine-tuning texts on which there was already general agreement before the Conference had begun, or resolving relatively technical and perfunctory matters that did not go to vital concerns. The real challenge was negotiating Part II. It contained the definitions of the crimes, the description of the temporal, territorial and personal jurisdiction of the Court, the selection of situations for prosecution, and issues relating to the admissibility of cases. There was much controversy about the definitions of the crimes but this was familiar territory. Compromise could be found, as it had been with earlier efforts at international justice, at the close of World War II and when the ad hoc tribunals were created in the early 1990s. The only real sore point was the crime of aggression. On the other hand, describing the means of selecting situations (‘triggering’, as it was called) and the conditions of admissibility—principally the question of complementarity between the Court and national jurisdictions—was groundbreaking. Moreover, it went to the heart of the relationship between the Court and the Security Council, which was central to the concerns of all three of the main interest groups: the like-minded, the Non-Aligned and the Permanent-5.

By the close of the third week, progress on the Part II issues ‘had ground to a standstill’.⁶⁴ States were reluctant to compromise on particular issues because they did not know what the

⁶¹ See his account: Scheffer, *All the Missing Souls*, *supra* note 40, at 206–7.

⁶² *Ibid.* at 223–4.

⁶³ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 7th Meeting*, UN Doc. A/CONF.183/SR.7, 18 June 1998, § 4.

⁶⁴ Kirsch and Holmes, *The Negotiating Process*, *supra* note 48, at 4.

final draft would look like. If they made a concession on one point they could not be sure they would see the quid pro quo on another. In an attempt to 'break the logjam', and 'to test reactions of delegations',⁶⁵ the President of the Committee of the Whole, Philippe Kirsch, invited a select group of delegations to a Sunday afternoon meeting at the residence of the Canadian ambassador in Rome.⁶⁶ A proposal by the Bureau setting out a limited range of options for Part II formed the basis of discussion.⁶⁷ It was already clear that some provisions enjoyed the support of very broad majorities, but the Bureau was careful not to exclude minority positions as this might entirely alienate certain delegations and turn them against the entire enterprise. With respect to crimes within the jurisdiction of the Court (Article 5), the discussion paper assumed that there was agreement on genocide, crimes against humanity and war crimes, but for aggression it listed alternatives: 'Option 1. The crime of aggression. Option 2. No such provision'. Kirsch told the meeting that the crime of aggression would probably have to be excluded if there was no significant progress on formulating a provision. He wrote later that '[t]he meeting was less successful than had been hoped'.⁶⁸

The Bureau proposals were reformulated and then debated within the Committee of the Whole.⁶⁹ On the crime of aggression (as well as certain 'treaty crimes': terrorism, drug trafficking, crimes against UN personnel), the revised Bureau text stated explicitly that it 'may be inserted in the draft Statute if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July. If this is not possible, the Bureau will propose that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference.' Already there was some progress by comparison with the Bureau discussion paper of a few days earlier. The provision entitled 'Prosecutor', where the authority of an independent prosecutor to select situations for prosecution was defined, had been presented in the alternative, with 'No such article', in the earlier document. Now, the Bureau's Option 2 said '[a] provision for additional safeguards before the Prosecutor can act'. The existence of an independent prosecutor was no longer up for debate. But in the assessment of Kirsch, writing some years after the Conference, 'the discussions simply reaffirmed existing trends' and may even have 'revealed a hardening of positions'.⁷⁰

Until the final days of the Conference, the Bureau of the Committee of the Whole seriously contemplated announcing that no agreement could be reached and that a second Conference should be convened.⁷¹ Instead, it decided to present a 'package deal', a final proposal that would weave together various compromises calculated to meet enough of the concerns of most of the delegations and, in the final hour, obtain the agreement of the Conference, by consensus if possible. A package was necessary because although there were 'clear numerical trends' on the key issues, 'different majorities could be discerned on different issues', necessitating

⁶⁵ Kirsch and Robinson, *supra* note 37, at 74.

⁶⁶ Kirsch and Holmes, *The Negotiating Process*, *supra* note 48, at 4.

⁶⁷ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Bureau Proposal: Discussion Paper Regarding Part 2*, UN Doc. A/CONF.183/C.1/L.53, 6 July 1998.

⁶⁸ Kirsch and Holmes, *The Negotiating Process*, *supra* note 48, at 5.

⁶⁹ *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Bureau Proposal: Discussion Paper Regarding Part 2*, UN Doc. A/CONF.183/C.1/L.59, 10 July 1998.

⁷⁰ Kirsch and Robinson, *supra* note 37, at 75.

⁷¹ Kirsch and Holmes, *The Negotiating Process*, *supra* note 48, at 9.

‘a combination of preferred options and bottom lines’.⁷² There was much anticipation as delegates awaited the Bureau proposal in the final days. It was only circulated early in the morning of 17 July.

The ‘package deal’ contained no real surprises as the issues had been thoroughly debated, but there were some creative developments. Among the most important were the jurisdictional preconditions based upon territory and nationality (Article 12), closing the door on the dream of the NGOs and many of the ‘like-minded’ that the Court might be authorized to exercise universal jurisdiction. There were warnings that the provision would doom the Court to ineffectiveness because only ‘good states’ would ratify the Statute,⁷³ but this did not prove to be the case. Another was the opt-out clause for war crimes (Article 124), a source of much discontent. This was the ‘joker’ that France insisted upon *in extremis*.⁷⁴ Little more than a damp squib, it was invoked by only two of the 124 states to ratify the Statute and withdrawn by one of them, France, even before it had expired.⁷⁵ Finally, the Bureau draft included the crime of aggression as one of the crimes within the jurisdiction of the Court (Article 5). It took a peculiar form because the crime of aggression would not become operational until an amendment was adopted providing a definition and ‘setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime’ and specifying that this be ‘consistent with the relevant provisions of the Charter of the United Nations’. Elizabeth Wilmshurst, of the British delegation, described this as ‘code’ for a requirement of Security Council authorization before prosecution of aggression may be undertaken.⁷⁶ But in 2010, when the amendment was finally adopted, the UK joined the consensus on a provision allowing the Court to proceed even without a Security Council blessing.⁷⁷ Responding to charges that there was a lack of transparency as the Bureau prepared the final proposal on Part II of the Statute, John Holmes, a member of the Canadian delegation who acted as Kirsch’s assistant, noted that if this were really the case, then ‘some, perhaps many, delegations would have objected’, invoking a rule requiring that 24 hours’ advance notice be provided before a vote may be taken on any proposal.⁷⁸

The Committee of the Whole did not convene until six o’clock that evening. The first part of the day was consumed by informal discussions and negotiations. Russia and France expressed satisfaction with the result while the US lobbied intensively for changes to the proposal. Most

⁷² H. von Hebel, ‘An International Criminal Court—A Historical Perspective’, in H. von Hebel, J. G. Lammers and J. Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser, 1999) 13–38, at 36.

⁷³ E.g., S. Williams, ‘Article 12’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* (Baden-Baden: Nomos, 1999), 329–42, at 341; H. Kaul, ‘The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions’, in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, UK: Ashgate, 2001) 59–62 at 61–2.

⁷⁴ W. Bourdon, *La Cour pénale internationale, Le statut de Rome* (Paris: Seuil, 2000), at 24.

⁷⁵ *France: Withdrawal of Declaration*, (2008) 2533 UNTS 265.

⁷⁶ E. Wilmshurst, ‘The International Criminal Court: The Role of the Security Council’, in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, UK: Ashgate, 2001) 39–41, at 41.

⁷⁷ *Statement by the United Kingdom*, RC 11, at 124.

⁷⁸ J. T. Holmes, ‘The International Criminal Court in Perspective: From the Rome Conference to the Years to Come’, in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, UK: Ashgate, 2001) 29–37, at 31.

delegations understood that there was no room for modification, as a change to one provision in order to satisfy concerns of a few might then provoke demands from other delegations for similar concessions. The non-governmental organizations, for whom a package acceptable to the Conference ought to have been understood as a huge victory, quibbled about issues in the Bureau text, hoping to get a little more. But there would be no changes.

The Rome Conference was an extraordinary exercise in international law-making. In July 1998, immediately following its adoption, those who had longed for the creation of an institution were euphoric. The result was better than most had anticipated. Four years later, when the Statute entered into force, the 'package deal' seemed responsible for the unprecedented and unexpected pace of ratification. Had this chapter been written then, it would have concluded with an enthusiastic and uncritical tribute to the accomplishments of the Rome Conference. But perspectives change with time, and two decades after the Rome Conference there are more questions about the scale of the achievement. Although the Court seems a permanent fixture on the international scene, the performance of the institution has been lacklustre. There have been only a handful of completed trials. Many of those charged have been insignificant personalities in obscure conflicts. With average sentences in the range of 12 or 13 years' imprisonment, it is hard to believe that the Court is dealing with 'those who bear the greatest responsibility' for 'the most serious crimes of concern to the international community'. There is as yet not much soul-searching about the role that the Rome Conference, for all of its glory, may have played in the creation of an institution whose achievements remain a disappointment. Perhaps the architecture of the Court has some serious flaws. Possibly some of the compromises were not as brilliant as was once thought.