INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT: THE CONTRIBUTION OF NON-STATE ACTORS

Helen Durham
577 Nicholson St Carlton Nth 3054 Victoria
ph: 9388 9938
Student no.861084
30/6/99
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This paper examines practical methods to increase the effectiveness of the
International Criminal Court (ICC) by reviewing the potential contribution of non-
State actors. Non-State actors focused upon in this paper include non-Governmental
organizations (NGOs), international organizations and individual academics. An
effective ICC is one that is able to undertake its work in an environment as immune as
possible from politics and one in which the judiciary are exposed to a diversity of
ideas and legal interpretation. The paper argues that non-State actors can play a
significant role in international criminal prosecutions, in particular by gathering
evidence and submitting *amicus curiae* briefs.

The paper is divided into 4 sections. Section one sets the scene by undertaking a
critique of NGOs within international law and the United Nations system. This section
also describes, in Chapter 2, the process leading to the creation of a Statute for an
International Criminal Court and then briefly inspects the Statute. Section 2 reviews
the role non-State actors played in the creation of the Statute. Within this section
Chapter 3 deals with the NGO Coalition for and ICC and Chapter 4 the contribution
of the ICRC, an international organization.

Section 3, consisting of Chapter 5, investigates the activities of non-State actors, in
particular NGOs, at the *ad hoc* Tribunals in particular the gathering of evidence.
Section 4 focuses upon the submission of *amicus curiae* briefs with Chapter 6
exploring this mechanism in domestic courts and at the International Court of Justice.
Chapter 7 examines non-State actors' *amicus curiae* submissions at the *ad hoc*
Tribunals. The paper concludes with a range of practical suggestions increasing the
effectiveness of the ICC.
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PREFACE

The idea for this thesis, as well as much of its content, arose through practical experience. Sitting in the lounge-room with a few legal friends – horrified at the events unfolding in the Balkans during the early 1990s – we decided we should ‘do something’. After a long and frustrating investigation, which led to the realization that the Government had no intention of gathering evidence from the 14,000 refugees flooding to this country from the region, the Australian Committee of Investigation Into War Crimes (ACIWC) was established. This small NGO (with a big name) aimed to assist the Tribunal of the former Yugoslavia in the prosecution of those accused of war crimes by ‘screening’ witnesses recently arrived in Australia and passing this information onto the Hague.

As the first Chair of the Committee, I found myself talking to the Office of the Prosecutor regularly (often in my pyjamas) and coordinating the visits of investigators who came to Australia to interview witnesses who members of ACIWC had identified. I also found myself wondering how a group of young lawyers in Melbourne, armed with a fax machine and loads of enthusiasm, could become more actively involved in the prosecution of war criminals than their own Government.

As the process continued, it became apparent that the job of assisting the Tribunal was harder than initially envisaged. Complexities developed at all levels, from the fear of tainting the judicial process, to the potential dangers for those giving and taking the statements. Was this being done elsewhere? How could such experiences be harnessed and used in the future, potentially in the proposed International Criminal Court (ICC)? What other roles could NGOs play in the prosecution of those accused of atrocities? What was civil society doing to assist the creation of the ICC? To satisfy my curiosity an academic journey began with a very practical aim.

I was fortunate to be granted a Queen’s Trust Fellowship and an Evans Gravemeyer Scholarship both of which allowed me to attend a couple of Preparatory Committee Meetings on the ICC in New York and be part of the Diplomatic Conference in Rome.

(i)
I also spent considerable time with the NGO Coalition for an ICC – sitting in on long meetings, photocopying, drafting, arguing and generally learning first hand how such groups work. My funding also allowed me to visit the Tribunal in The Hague several times over a period of three years. There I collected documents, sat in on hearings, interviewed and discussed the role of NGOs with everyone from judges to administrative staff. I was able to note the changes in attitude over the years and reflect on the issues during a lengthy time frame rather than one intense examination. In order for me to achieve this, many people gave generously of their time.

Much of this thesis relies upon primary sources. Very little, to date, has been written on this specific topic. Non-State actors, including NGOs, do not have a strong precedent of involvement in international litigation. In order to be useful this thesis is deliberately written in an accessible style. It uses numerous case studies to highlight points and to stress the human agency involved in this area of international law. It is not a theoretical critique of the ICC. The international legal scene will soon see a glut of excellent analysis of the Statute, the processes the Court will apply and the potential jurisprudence arising from this extraordinary evolution.

This thesis aims to provide practical advice on how the ICC can best utilize the capacities of non-State actors to increase its effectiveness. To do so it explores the relationship between non-State actors and the expanding area of international criminal law. This relationship is and will continue to be a close one. Like all close relationships it has the potential for great good and great harm. Like all close relationships the harm primarily comes from a lack of understanding – over-estimation or under-estimation of capabilities, actions, and motives. The world of non-State actors, in particular NGOs, is not easy to study. It shifts and slides - at times political, passionate, committed and skilled; at other times it is ineffective, disruptive and angry. It is growing and feeds on technology.

This thesis praises the work of non-State actors, points out where they could do better and adds a note of caution, essential if the vast potential of this relationship is to be fully realized.
ACKNOWLEDGEMENTS

In the journey to create this paper I owe much thanks to many people. My sincere appreciation must be expressed to the Queen’s Trust and the Evans Grawemeyer Scholarship funds for making my travels and research possible. This paper would not have happened without the wisdom and kindness of my supervisor Professor Tim McCormack. My time spent at New York University under the guidance of Professor Theodor Meron was also extremely valuable. The superb assistance of Ram, Penny and Elizabeth has greatly increased the quality of this document. The understanding of my employer, Australian Red Cross, and the help from Sharon must also be noted.

Support from my family has been endless, in particular the encouragement from my parents and the computer assistance from my dear brothers. I would like to thank all members of the NGO Coalition for an ICC in New York for ‘letting me join in’ and especially Bill and Richard for giving generously of their limited time. Numerous people at the ad hoc Tribunals also provided ideas and information and in particular I would like to mention Alan, Gavin, Gideon, Graham, Sharon and Wendy. The experience of being a member of the ICRC delegation at the Rome Conference enriched my capacity to write on this topic and I would like to warmly thank Marie-Claude, Louise, Jean-Philippe and Yves. The Australian delegation, especially Mark and Geoff, always shared and gave me much to write about.

I would like to express gratitude to all my friends, of whom I haven’t seen much in the last few years because of this. In particular the assistance from Kelly, Son, George, Pen, Chris, and Ali often kept me together.

Finally, this paper is dedicated to Greg - my muse and my beloved.
INTRODUCTION

This paper examines methods to increase the effectiveness of the International Criminal Court (ICC) by reviewing the potential contributions of non-State actors, in particular non-Government organisations (NGOs), international organisations and academics. This section deals with the connections between international criminal law and non-State actors, especially NGOs, and defines the relevant terms. The paper then critiques NGOs within the United Nations system and briefly describes the process leading to the creation of the Statute for the ICC and the Statute itself. The role non-State actors played in the ICC negotiations is explored. An investigation of domestic courts use of amicus curiae briefs and a case study of the experiences at the International Court of Justice demonstrate the useful nature of non-party submissions. The paper then looks at the range of activities non-State actors have undertaken in the ad hoc International Criminal Tribunals, in particular, gathering evidence and submitting amicus curiae briefs. It concludes that there are a number of practical measures which can be implemented by the ICC to selectively harness the expertise and skills of non-State actors.

International criminal law has undergone spectacular advances in the last fifty years. At midnight on the 17 July 1998 in Rome, a Statute for an International Criminal Court (ICC) was agreed upon.¹ This was the result of over 50 years of discussion, five years of debate at the United Nations and an intense five week Diplomatic Conference. The Court will be able to try individuals accused of the most serious international offences. It is a major step forward for international criminal law, and brings the world closer to ending impunity for those who commit atrocities.

Over 160 States participated at the Rome Conference together with a large number of non-Governmental organisations (NGOs) and International Organisations, such as the International Committee of the Red Cross (ICRC). Negotiations at the Conference often lasted late into the night, due to the complexity of developing a Court that satisfied as many countries as possible, without creating a weak and ineffective institution. The Statute itself is a compromise reflecting the diverse interests,
opinions and standards throughout the world for dealing with the prosecution of those who plan or commit actions that cause profound and horrific human suffering. It is not a perfect institution, yet, as stated by Kofi Annan, the United Nations Secretary-General, at the ceremony adopting the Statute:

The establishment of the Court is still a gift of hope to future generations, and a giant step forwards in the march towards universal human rights and the rule of law. It is an achievement which, only a few years ago, nobody would have thought possible.²

Traditionally States are the exclusive subjects of international regulation. However, international criminal law is unique in that it represents a departure from the traditional approach because it imposes criminal responsibility upon individuals.³ It takes the political and makes it personal. It puts names and faces to horrible and complex historical events. It dissects activities often sanctioned by States and lays blame upon individual citizens. Focusing upon individuals highlights the point that:

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crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.\(^4\)

Non-State actors, in particular non-Governmental organisations (NGOs), also create synergies between the political and personal. They connect the global with the local. Global NGOs take international problems and translate them into activities which citizens can be involved in — be this fundraising, letter writing or lobbying. As will be discussed in detail in Chapter 1, NGOs are currently the most basic form of popular participation and representation in the modern world. Thus, the relationship between NGOs and international criminal law, philosophically, should be a close one. It is also a complicated one because it represents the interface between personal desires and the duties of the State.

The proverbial ‘bottom line’ is that it is ultimately governments which bear the responsibility not only for meting out justice to this or that individual criminal but for the preservation of society as well. This is the reason that it is so important that governments be convinced of the need to assume this responsibility. There is no comparison in terms of public impact and influence on the population of punishment implemented by the state at the conclusion of a judicial process and measures taken against such a person suspected of crimes by unknown individuals.\(^5\)

If the first permanent international criminal court is to maximise its effectiveness, it must take into account the vast possibilities of support that could be provided by a range of non-State actors, including NGOs, international organisations and individuals. As will be discussed later, it is important to acknowledge that non-State actors are outside the formal parameters of international law making and enforcement.

\(^4\) Trial of the Major War Criminals before the International Military Tribunal, Nuremberg (1945-1946), Judgment, 41; reprinted, Judicial Decisions (1947) 41 American Journal of International Law 17, 221.

Technically it is States and States alone which make and sign international treaties and States which exercise the exclusive role of enforcing these norms. However to conclude an analysis of international law making and practice at this point is too simplistic. As Chinkin writes:

[T]he international law-making process is more complex and deeply layered that this reasoning might suggest. It defies simple categorizations into ‘treaty or non-treaty’, ‘hard or soft’, ‘binding or non-binding’, and requires instead an analysis of expectations of conformity, institutional support and subsequent actions.  

This thesis rejects purely positivists theories, including the ‘Statist paradigm’, which claim that States are the only subjects of international law. Whilst this thesis will focus upon practical cases studies rather than theoretical debates, the author does acknowledge the importance of writings which review cosmopolitan and communitarian principles of international relations. In these theoretical discourses, individuals are deemed important subjects in international law, in the former as bearers of rights and in the later as part of given communities. Broadly locating itself within this paradigm, this thesis aims to demonstrate the sense of human agency involved in the creation of international institutions and the enforcement of international criminal law. As expressed by Harold Koh:

International human rights law is enforced...not just by nation-states, not just by government officials, not just by world historical figures, but by people with the courage and commitment to bring international human rights law home through a transnational legal process of interaction, interpretation and internalisation.

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8 Harold Koh, ‘International Human Rights Law’ (1999) 74 Indiana Law Journal 1417. Koh distinguishes between social internalisation, which occurs when a norm develops public legitimacy; political internalisation as government policy adopting international norms and legal internalisation as the process of incorporating an international norm into the domestic legal system.
At the essence, this thesis will argue that in order to assist the ICC to become an effective international institution, non-State actors must continue to raise domestically and internationally a 'consciousness of broader issues' and ensure that the Court is subject to global scrutiny. In doing so NGOs, international organisations and individuals will create 'a political consensus that may be morally difficult for states to repudiate'.

The definition of 'effectiveness' used in this thesis relates to the articulated mandate of the ICC as found in its own preamble. In particular, the Preamble states as follows:

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

Resolved to guarantee lasting respect of the enforcement of international justice.

These are extremely broad and somewhat nebulous aims. Ideas expressed by functionalist-rationalist theorists on international institutions, such as Keohane and Krasner, would evaluate 'effectiveness' of the ICC based on the reduction of economic risks and State perceived mutual benefit. An 'effective' ICC may reduce the costs of domestic prosecutions and it may also dissuade States from 'reneging' on their obligations to prosecute individuals accused of international crime. However this thesis will not explore such theories. Instead, the term 'effective' will relate to

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10 Chinkin, above n 5.
13 Keohane writes: 'a major function of international regimes is to facilitate the making of mutually beneficial agreements among governments' above n 11, 148.
three specifically practical areas: the independence of the ICC; the capacity for the ICC to gather evidence widely; and, the potential for judges to make informed judgments on the basis of evidence and information presented to them from a range of sources.

In arguing for a role for NGOs in the operation of the ICC once the Court is established and becomes operational, this thesis will first consider the role non-State actors, in particular NGOs and international organisations played in creating a Statute for the ICC and the transnational networks that will assist in pushing for broad ratification. In relation to the Statute itself, a widely used NGO definition of an ‘effective’ ICC included that it be independent and fair. As will be discussed in Part 2 and using this definition, non-State actors have already played a significant role in pushing for an effective ICC by influencing negotiations in the areas of the ‘trigger mechanism’, independent prosecutor and a more expansive subject matter in the Court’s jurisdiction.

Once the Rome Statute has entered into force, one essential requirement for it to be ‘effective’ will involve the capacity of the independent prosecutor to gather quality evidence to support the indictment of specific individuals. This will necessitate the identification of potential witnesses and the creation of environments where such people are comfortable and supported to come forward with their stories. Part 3 examines these issues and demonstrates that non-State actors can and have contributed to similar processes before the ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda. The capacity of the prosecutor to obtain evidence from various sources will also assist in keeping the ICC ‘independent’, as
gathering evidence from a range of sources — not exclusively from States — may reduce the possibilities for purely political indictments. Whilst there is no guarantee that non-State actors will be immune from politics, the wider the ‘gathering’ process, the more likely the ICC will have access to valid information concerning the commission of specific atrocities.

Finally, in order for the ICC to be fair and to continue to raise a ‘consciousness of broader issues’, as previously discussed, the ICC judiciary should be exposed to, or have available to them, diverse sources of jurisprudence and legal interpretations. This will assist in the delivery of sound judgments which in turn will contribute to an effective ICC. It is likely that many of the issues raised at the ICC will be in unchartered international legal territory. Part 4 provides examples of how non-State actors, through the formal provision of briefs, can play a role in judges’ reasoning during international prosecutions.

This paper deals with a range of non-State actors including NGOs, international organisations and individuals such as academics. The ICC Statute makes reference to ‘intergovernmental organizations’, ‘international organizations’ 14 as well ‘non-Governmental organizations’ 15 indicating that it will have different and individual relationships with each of these actors. All these actors make up part of the broader collective ‘civil society’ — that part of the international community which interacts with and attempts to influence State decision making. 16

14 Rome Statute, art 73.
15 Ibid, art 15.
The term ‘civil society’, in this thesis, is defined as the arena where a broad range of actors, both national and transnational, work to effect and influence State behaviour and the working of international institutions. In this context, whilst civil society embraces notions of the rise of ‘world citizenship’,\(^{17}\) it does not assume that these actors are always pushing for an international order based on humane governance.\(^{18}\)

As will be explored and demonstrated, the essence of civil society is the diversity of its actors and members. During the negotiations for the Rome Statute, for example, there were groups arguing for a reduced definition of crimes relating to gender as well as those arguing for an expansion of this area. To limit the parameters of civil society in this paper to actors working with a progressive and anti-Statism mandate, is to miss out on the rich internal debate found within the non-State actors' community. On the other hand, the author does acknowledge that the vast majority of members of global civil society engaged in reshaping State-society relations (such as Amnesty International and Human Rights Watch) are working to protect basic human rights by appealing to supranational law.\(^{19}\)

Those theorists positing a ‘cosmopolitan’ vision of civil society — one in which nation-States are enmeshed in complex interconnected relations with transnational

\(^{17}\) See Janna Thompson, 'Community Identity and World Citizenship' in Archibugi, Held & Köhler (eds), above n 7. Thompson argues pursuant to cosmopolitan theories that the international community has become a ‘world society’ involving the creation of world citizenship which overcomes many of the limitations of State sovereignty. However, she cautions that developments such as neoliberalism, the rejection of the impact of politics on market forces, and the resurgence of nationalism focused upon the preservation of specific ethnic heritage and customs, will curb the growth of cosmopolitan programmes.


\(^{19}\) See Richard Falk, Law in an Emerging Global Village: A Post-Westphalian Perspective (1998). In this book Falk explores the emergence of a new global jurisprudence which is challenging the
associations impacting upon decisions — are strongly rebutted by writers such as Zolo. Zolo argues that any attempts to use the international rule of law to protect human rights is theoretically inconsistent and involves practical risks. Furthermore, he advances that any attempts to strengthen international institutions, such as the United Nations or in the instance of this thesis the ICC, are dangerous and unproductive if the aim is global peace. Extreme forms of hostility could best be neutralized today by more effective types of preventive, flexible and decentralized intervention.

These important debates on the nature of civil society will not be the focus of this thesis. Suffice to say, the author rejects the notion of the impossibility of the international legal regime assisting to promote human rights. The creation of the ICC and the international criminal Tribunals are examples of the centralisation of international legal power, which not all theorists believe is productive. However this paper submits that such international institutions are to be applauded as attempts to undertake transnational regulation of behaviour deemed unacceptable by the international community in most cases for at least 50 years. Falk usefully draws a distinction between globalisation-from-above and globalisation-from-below. The former involves a restructuring of the world economy on a regional and global scale through the agency of the transnational corporation and financial markets.

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23 Zolo on the other hand would argue that in creation of such international legal institutions is dangerous and will lead to a ‘weak pacifism’. He writes ‘on both the cultural and economic level, phenomena of globalization appear to be destined to produce further differentiation and fragmentation
Globalisation-from-below, on the other hand, is the rise of transnational social forces concerned with international issues such as human rights and human security. This thesis focuses exclusively on globalisation-from-below.24

The fact that the vast majority of the States, (120 to be exact), from every geographical region in the world, voted for the Statute of the ICC, answers the empirical question: is there an adequate set of shared values among the world’s cultures and civilizations?25 Most States eventually agreed to the definition of three ‘serious crimes of concern to the international community’ and the need to include a fourth once it is defined. The premise of this thesis rests on this agreement and it does not intend to review the literature critical of the notion of an ICC.26

Much of this paper focuses upon NGOs. Defining NGOs is not an easy task. Domestically, such groups can be called ‘interest groups’, ‘pressure groups’, ‘community based groups’ or even ‘private voluntary organizations’. NGOs are diverse in size, subject matter, structure, membership and can be informal or formal associations. As stated above, to generalise about them is to obscure their most salient feature – diversity. NGOs are not always aiming for change as there are a growing number of NGOs advocating for the retention of the ‘status quo’ as well as ‘conservative’ NGOs advancing ‘radical’ dialogues. An example of this, which will be discussed in detail later in the thesis, is the role of the conservative women’s group

of the international arena over the next few decades': Danilo Zolo, above n 20, 153.
25 Bienen, Ritterger & Wagner, above n 7, 300.
‘REAL WOMEN’ advocating for the omission of the crime of ‘enforced pregnancy’ in the ICC Statute which could be seen as a ‘radical’ stance.

The United Nations (UN) recognised the potential for a role for ‘non-Governmental organizations’ and coined the term in the UN Charter.\textsuperscript{27} There are specific pre-requisites which must be satisfied before groups apply for consultative status as NGOs within the UN system.\textsuperscript{28} Whilst most of the work done in the UN is performed by international NGOs, there are some single country groups involved in a range of activities and the numbers of these are growing. One commentator has come up with the following definition of NGOs after reviewing a large range of such actors:

An NGO is any non-profit-making, non-violent, organized group of people who are not seeking government office. An international NGO is a non-violent, organized group of individuals who are not seeking government. The members of an international NGO will usually be NGOs from different countries, but they can also have any mixture of individuals, companies, political parties, NGOs or other international NGOs as members.\textsuperscript{29}

This is not an ideal interpretation as it is very broad. However, the definition does highlight the magnitude of organisations which could fit the definition of an NGO.

Since the 1945 San Francisco conference which created the United Nations, NGOs have been a driving force behind the UN’s policies on human rights. However, a number of recent factors relating to the emerging global community have heightened NGO activities and standing. The dramatic increase in the number of NGOs\textsuperscript{30}

\textsuperscript{27} Article 71 of the Charter provides:
The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.

\textsuperscript{28} For a discussion of this topic see Chapter 1.


\textsuperscript{30} Currently there are 1515 NGOs in consultative status with the Economic and Social Council
working directly with the UN, the ample NGO representation at the UN conferences and the credibility given to NGO ‘counter-conferences’ all demonstrate the important positions these organisations now occupy. The increased ease of international communication, which States are often powerless to stop, has resulted in a new paradigm where NGOs are becoming a significant force in global politics. Ordinary people can pool resources, obtain knowledge and expertise and make their concerns heard.

Some have claimed that this ‘associational revolution’ is as significant to the late 20th century as the rise of nationalism in the late 19th century. There is much written on NGOs and international relations in general and Chapter 1 reviews some of the writings on the relationship between NGOs and the emerging global community. Yet despite this significant shift in dynamics there are few articles on exactly what role NGOs are playing in international law:

This literature as a whole is based more on faith than fact. There are relatively few detailed studies of what is happening in particular places or relations of power among individuals, communities and the State.

This thesis aims to examine the State-society relationship in the context of international legal development and the workings of international institutions. Despite the extensive literature which discusses theoretical critiques of the place of

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31 The Earth Summit in Rio in 1992 was the first example of large NGO attendance with 1,500 accredited NGOs involved in the conference. In 1995, over 35,000 NGO representatives were present at the Fourth World Conference on Women. See, eg, R Dawson, ‘When women gather: the NGO forum of the fourth World Conference on Women, Beijing 1995’ (1996) 10 International Journal of Politics, Culture and Society 7.

32 Lester Salamon ‘The Rise of the Nonprofit Sector’ (1994) 73 Foreign Affairs 109
international institutions in international affairs, relatively little space has been
dedicated to practical analyses of the role of such institutions. As Martin and
Simmons write, 'attention needs to focus on how, not just whether international
institutions matter for world politics.'

This paper undertakes a number of detailed case studies to identify exactly what
members of civil society, in particular NGOs and international organisations, did to
assist the creation of the ICC Statute and other international institutions such as the
Yugoslav and Rwandan International Criminal Tribunals. It also uses case studies to
examine what non-State actors are doing at the ad hoc Tribunals. In so doing it aims
to contribute to the debate on the extraordinary rise of civil society in international
law and provide practical advice on how to increase the effectiveness of the ICC as
defined by this thesis.

The rise of 'people power' in the international legal arena is not all positive. It is
responsible for the creation of the 'global idiot', and any individual or group with a
fax machine and a modem has the potential to distort public debate. There is no
guarantee that passion and commitment will always come evenly packaged with
awareness and intelligence. The increased amount of information to be found in
places such as the internet is of varied quality. Sifting mechanisms are essential.

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33 William Fisher, above n 16, 441
34 Martin and Simmons, above n 9, 730. These authors go on to state
    Too often over the last decade and a half the focal point of debate has been crudely
dichotomous: institutions matter or they do not. This shaping of the agenda has obscured
more productive and interesting questions about the variation in the types and degree of
institutional effect, variations that were in fact well documented in the less theoretical but well
researched case studies.
35 P Simmons, 'Learning to live with NGOs' (1998) Foreign Policy 84.
This issue is extremely relevant to the potential work of the ICC. The successful prosecution of those accused of serious international crimes relies upon due process and an environment isolated from politics and personal passion. In Justice Bates’ closing remarks at a post World War II war crimes trial he stated that:

The surest safeguard against totalitarian disregard for human life and liberty is uncompromising adherence to the principles of the administration of justice, which does not humour heat and revenge, but rather, protects man there from.\(^{36}\)

Non-State actors, in particular NGOs, are organisations which are often full of ‘heat’ and politics. To be involved in a group attempting to influence world politics individuals are bound to feel passionate about particular issues of concern. As one commentator writes about NGOs:

We should not deceive ourselves and say that these organizations are not political. They are perhaps not partisan, but they are political in several fundamental respects: they look for political space in society, adapt to new circumstances, try to be effective, and seek a significant measure of public credibility.\(^{37}\)

The challenge is to identify those areas in international criminal prosecutions where non-State actors can contribute and those where they should not. These are difficult notions to balance and attempts to limit any element of civil society’s involvement is bound to be controversial.

This thesis is divided into 4 distinct parts. Part 1 sets the scene with Chapter 1 examining NGOs in international law and Chapter 2 reviewing the historical

\(^{36}\) USA v Weiss Trial Transcripts, Roll 3, Target 3, Vol 5, 316.

development of the ICC and briefly describes the process of the creation of the ICC Statute. Part 2 critiques the role non-State actors played during the creation of the ICC Statute with Chapter 3 dealing with the NGO Coalition for an International Criminal Court and Chapter 4 the contributions of the International Committee of the Red Cross, an international organisation. Part 3, consisting of Chapter 5, investigates the activities of NGOs in assisting the ad hoc Tribunals for the former Yugoslavia and Rwanda, focusing upon the gathering and presenting of evidence and the complexities and dangers which can arise in this process. Part 4 surveys formal mechanisms for non-State actors to submit amicus curiae briefs. Chapter 6 looks at this procedure in domestic courts and then examines the involvement of non-State actors in international litigation before the International Court of Justice. Chapter 7 undertakes a detailed case study of amicus curiae submissions by non-State actors at the two ad hoc International Criminal Tribunals. The conclusion lists practical issues that the ICC should consider to ensure it harnesses the skills and benefits of NGOs balanced against the capacity for civil society to unnecessarily disrupt future legal proceedings.

In a recent Press Release from the Tribunal for the former Yugoslavia, relating to the indictment of President Milosevic, Prosecutor Louise Arbour stated 'we have received, and we are continuing to receive valuable information from governments, as well as from groups and individuals.'

Governments, politicians and diplomats are no longer the only participants in international law. ‘We the peoples’ have the opportunity, within international

(1990) 5 American University of International Law and Policy 989.
criminal law, to contribute significantly to the quest for international justice. However, the role played by non-State actors must be carefully considered. The creation of the ICC will place the international community in an historic position of guaranteeing those who commit atrocities do not do so in full assurance of impunity. Achieving this objective will require the assistance of States as well as non-State actors.

PART 1

SETTING THE SCENE:

NGOS IN INTERNATIONAL LAW

AND

THE INTERNATIONAL CRIMINAL COURT
CHAPTER 1

NGOs IN INTERNATIONAL LAW

This Chapter highlights the important and complex nature of NGOs in international law, the role NGOs play in the UN system, the historical development of NGOs, problems with NGOs and a case study of their impact in treaty making. Finally it is argued that their inclusion in new UN institutions is necessary, not only to ensure such institutions are effective, but also to reflect current NGO influence in international relations.

1. NGOS IN INTERNATIONAL RELATIONS

One of the most exciting developments in contemporary international relations is the emergence of non-Governmental organisations (NGOs) as influential actors in the development and enforcement of international law. Traditionally, international law has been concerned with relations between co-equal sovereign States, with a clear distinction between domestic and international issues. However, in the last decade questions have been raised as to the clarity of such distinctions and whether the nation-State is still functionally ‘the master of its own territory’.¹

State sovereignty, whilst the basis of international law, is being challenged by technology, religion, ecological concerns, ‘universal’ human rights, trade and finance, security and the development of common agendas not linked to territory.² The end of the Cold War has helped to reduce the exclusive focus upon State borders and has opened up the potential for a more active international civil society. Technological developments, particularly in the area of communications, such as email, the internet

and facsimile are independent of territory and in many countries are easily accessible. Some observers perceive such changes as increasing signs of pluralism and global democratisation. Classical power structures are no longer able to claim complete centralisation. In such a changing environment, international and national NGOs have become an increasingly powerful 'voicepiece for multi-layered transnational identities that are barely audible in the current State-dominated systems'.

The multipolarity of the 'new global order' recognises the enhanced influence and potential of smaller, non-State actors, including NGOs, in areas such as international diplomacy. The role of NGOs in preventative diplomacy, post-conflict peace building and the delivery of humanitarian assistance have been well documented. NGOs create local and transnational networks, mobilise public opinion and organise criticism, they advocate for and stimulate changes in international legal norms, provide significant amounts of independent information, as well as funds, and professional 'experts' to those institutions monitoring compliance on a range of international laws. NGOs are crucial to the process of 'granting of legitimacy' and

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6 Former United Nations Secretary-General Boutros Boutros-Ghali stated, [P]eace is too important to be entrusted to states alone. I believe NGOs can pursue their activities on three fronts. In the search for peace, they must obtain the means...to engage in assistance, mobilization, and democratization activities, all at the same time: 'Forward' in Thomas Weiss and Leon Gordenker (eds), NGOS, the UN and Global Governance (1996) 20.

7 See, eg, Michael Edwards and David Hulme (eds), Non-Governmental Organizations – Performance...
are currently the most basic form of popular participation and representation in the modern world.

The question facing national governments, multilateral institutions, and national and multinational corporations is not whether to include NGOs in their deliberations and activities. Although many traditional centers of power are fighting a rear-guard action against these new players, there is no real way to keep them out. Instead the challenge is figuring out how to incorporate NGOs into the international system in a way that takes account of their diversity and scope, their various strengths and weaknesses, and their capacity to disrupt as well as to create.8

2. **NGOs AND THE UNITED NATIONS**

The United Nations (UN), previously viewed as a theatre exclusively reserved for sovereign States, has no option but to acknowledge the impact NGOs now have upon its activities. NGOs are an intrinsic part of the international system and must be considered in all aspects of UN internal and external politics.9 NGOs hold governments accountable to promises made in the UN, they strengthen expectations, open up channels for dialogue and provide ample resources to international institutions. NGO personnel far out-number UN human rights staffers and NGO members often possess more knowledge than given diplomats.10 In order for the UN to remain relevant in an increasingly complex modern society it is necessary for it to consider ‘the taxonomy of linkages — formal and informal, in education, advocacy and operations — between NGOs and the UN system as a whole’.11 In 1994, the then

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8 P Simmons, 'Learning to live with NGOs' (1998) *Foreign Policy* 82.
9 As Peter Willetts states, ‘UN politics cannot be understood without assessing the impact of NGOs on each issue’: ‘Consultative Status for NGOs at the United Nations’ in Peter Willetts (ed), *The Conscience of the World: The Influence of Non-Governmental Organizations in the UN System* (1996)
11.
11 Thomas Weiss and Leon Gordenker (eds), above n 6, 20.
Secretary-General Boutros Boutros-Ghali stated at a conference of NGOs at the UN’s headquarters:

I want you to consider this your home. Until recently these words might have caused astonishment. The United Nations was considered to be a forum of sovereign states alone. Within the space of a few short years, this attitude has changed. Non-Governmental organizations are now considered full participants in international life.\(^\text{12}\)

Such a statement does not acknowledge the intrinsic limitations NGOs experience in their ‘home’ due to the fact that they are not accorded rights as full participants in the UN. However this optimistic assessment does highlight that NGOs participate in a wide range of activities within the UN and the international legal system. As Donni writes the UN ‘is one of the privileged venues for this escalating dialectical relationship between states and non-states.\(^\text{13}\)

There is no element of UN activity that is not influenced by the diverse NGO community. In the area of environmental law they contribute substantially to global environmental politics\(^\text{14}\) and also provide valuable input to international trade law.\(^\text{15}\) However, due to the scope of this paper the role of NGOs in enforcing and developing human rights law will be focused upon.

\(^{12}\) Statement by the Secretary General on the Occasion of the Forty-Seventh Conference of Non-Governmental Organizations, cited in Peter Willetts, ‘Consultative Status for NGOs at the United Nations’ in Peter Willetts (ed), above n 9, footnote 43.

\(^{13}\) Antonio Donni, ‘The bureaucracy and the free spirits: stagnation and innovation in the relationship between the UN and NGOs’ (1995) 1 Global Governance 421.


(a) **History**

There is a long and comprehensive history of NGOs playing a significant role in the debates on the creation of international legal institutions. Not only did they ensure that the United Nations Charter referred to human rights, but much earlier the international Peace Movement was active and vocal at the 1899 Hague Peace Conference.¹⁶

NGOs, in the form we know them today, began to appear on the international scene in the 19th century. Early NGOs include the 1838 British Anti-Slavery Society, the World Alliance of YMCAs of 1855 and the private organisation of the International Committee of the Red Cross.¹⁷ After World War I a larger number of international NGOs began to surface including groups such as the International Federation of Trade Unions, Save the Children International Union, the World's Student Christian Federation and the Associated Country to name a few.¹⁸ It is estimated that by the end of the 1930s there were approximately 700 NGOs on the international scene.¹⁹

Reasons advanced as to why such organisations appeared at this time in history rather than earlier relate to the dramatic growth of the middle classes, resulting in increased numbers of educated people with resources and time on their hands. Improved

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¹⁸ L White *International Non-Governmental Organizations* (1951) 181.

¹⁹ Bill Seary, ‘The Early History from the Congress of Vienna to the San Francisco Conference’ in Peter Willetts (ed), above n 9, 17.
communication, with the development of the international postage and telegraph service, meant that citizens were able to gain access to international information in an unprecedented manner. Increased mobility, not only in the design of carriages and better roads but also with the rail system, saw more individuals travel and exchange ideas.\textsuperscript{20} People began to become concerned about social conditions and created ‘voluntary societies’ committed to activity.

The League of Nations gave limited formal recognition to NGOs, with Article 25 of the Covenant of the League specifically mentioning only ‘voluntary national Red Cross organizations’. In 1921 the League of Nations Council agreed that international organisations, under certain conditions, would be given patronage of the League. This offer was recalled a few years later supposedly for philosophical reasons. The Council stated:

> It is not desirable to risk diminishing the activities of these voluntary organizations, the number of which is fortunately increasing, by even the appearance of an official supervision.\textsuperscript{21}

The lasting debate relating to the tension between NGOs being co-opted or chaotic, pragmatic or principled, had commenced.

There is little recorded on the activities of NGOs at the Dumbarton Oaks Conference, which formed the early basis of discussion on the United Nations among the four major post-World War II Allies. However there is ample evidence that at the 1945 San Francisco Conference NGOs were instrumental in ensuring the United Nations Charter included references to human rights and provided for the role of NGOs within

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.
the UN system. 160 NGOs, mostly American, attended the Conference as observers. The United States delegation had invited 42 US organisations to be present at San Francisco as ‘consultants’. Led by members of the American Jewish Committee, this group was appalled on hearing that human rights would not appear in the Charter. In response they wrote a strong memorandum arguing that human rights are essential not only to domestic life but also crucial to international peace and security. They rallied all NGOs present at San Francisco to sign the memorandum.22 Eventually the States present agreed to include human rights as one of the purposes of the United Nations set out in the Charter, with specific mention of a Commission on Human Rights. NGOs were also granted status within the United Nations Economic and Social Council (ECOSOC).

In particular, women’s NGOs played a significant role during the early history of both the creation of the League of Nations and the formation of the United Nations Charter. The Charter was influenced by a number of women’s activists and organisations working as the Inter-American Commission of the Status of Women, which was successful in ensuring that equal treatment of men and women was included as a principle in the Charter.23

There is a rich and interesting history of the activities of NGO within the UN in a range of areas from global governance24 to specific issues such as social reform25.

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21 Ibid, 22.
22 Felice Gaer, ‘Reality Check: Human Rights NGOs Confront Governments at the UN’ in Thomas Weiss and Leon Gordenker (eds), above n 6, 51.
23 For more details on the activities of women’s groups and the UN see Jane Connors, ‘NGOs and the Human Rights of Women at the United Nations’ in Peter Willets, above n 9, 147.
24 See, UN Non-Governmental Liaison Service20th Anniversary Conference, The United Nations,
However, as previously stated, this thesis will focus upon the role of NGOs in enforcing and developing human rights law and in particular international criminal law.

(b) **ECOSOC Status**

Article 71 of the UN Charter states that:

The Economic and Social Council may make suitable arrangements for consultation with non-Governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

NGOs being limited to a consultative status rather than having the capacity to participate indicates States’ defensive attitude towards such organisations. This position has not altered much in the last 50 years. There is no doubt that NGO involvement in the UN has now dramatically transcended the original drafters’ intention, however, the regulations articulating NGOs formal standing have remained restrictive. This may account for the plethora of ‘informal’ work and relationships many NGOs have adopted within the UN system.

A year after the United Nations came into being, the first session of ECOSOC established an NGO Committee (‘the Committee’) to consider ‘suitable arrangements’ for NGOs. The Committee determined that for an NGO to receive consultative status it should concern itself with matters within the competence of ECOSOC and in

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25 See Richard Hoggart, ‘UNESCO and NGOs: a memoir’ in Peter Willets, above n 9, 98.

26 In contrast, art 69 allows any Member of the UN to participate in ECOSOC deliberations and art 70 accords the same rights to specialized agencies.
conformity with the aims of the UN Charter. It should also represent a large number of people in its field and have authorised representatives to speak for members. International NGOs were the focus of deliberations although it was decided that national organisations were to be accepted only after consultation with the relevant governments.\textsuperscript{27} Three categories of NGO status were created. Category A, for organisations with a basic interest in most of the activities of the ECOSOC; Category B, for those with a special competence in a few fields of activity; and Category C, for groups with an aim of developing public opinion and disseminating information. Category C was abolished in 1950 and replaced by a Register of organisations. In 1946 only four NGOs were granted consultative status, all in Category A.\textsuperscript{28}

In the early 1960s many UN committees were reviewed in the context of increased representation within the system from African and Asian States. During the height of the Cold War a number of NGOs had been involved in controversies relating to political alliances.\textsuperscript{29} A major review of NGOs' consultative status was embarked upon resulting with ECOSOC resolution 1296 (XLIV) of 27 May 1968 (resolution 1296). Four major issues are reflected in the results of the review: fears of a domination of Western NGOs in the UN system; concern about the extent of government influence on NGO activities; the rapidly expanding number of NGOs and the increasing criticism some NGOs were levelling at certain governments on human rights issues.\textsuperscript{30}

\textsuperscript{27} Peter Willetts, 'Consultative Status for NGOs at the United Nations' in Peter Willetts (ed), above n 9, 32.
\textsuperscript{28} Ibid, 33.
\textsuperscript{29} Some NGOs were seen as too sympathetic to communists whilst there were accusations in the media of the CIA financing anti-communist NGOs within the UN system: ibid, 41.
\textsuperscript{30} Otto, above n 4.
Resolution 1296 changed the name of Category A and B to I and II respectively and changed the Register to the Roster. All categories are provided with papers from ECOSOC, such as provisional agendas. Category I NGOs are able to propose items be placed on the ECOSOC agenda and may be invited to give oral presentations. Category I and II NGOs may submit written statements and have representatives sit as observers in meetings. Those NGOs on the Roster may have representatives at meetings if the meetings are concerned with matters within their field of competence.

Resolution 1296 also resulted in a list of requirements for granting consultative status to NGOs, some items similar to previous requirements as well as some new elements. The major elements included:

- NGOs to be concerned with matters falling within the competence of ECOSOC (Article 1);
- conformity with the spirit and purpose of the UN Charter (Article 2);
- an undertaking to support and promote the work of the UN (Article 3);
- to be broadly representative of its field, have recognised international standing and if possible broad geographic representation (Article 4);
- an established headquarters and a democratic constitution (Article 5);
- authority to speak for its members through authorised representatives (Article 6);
- not to be established by an inter-governmental agreement (Article 7);
- to declare sources of funding (Article 8);
- national organisations normally represented by international groups may, however, be admitted after consultation with the Member State concerned (Article 9).
Many of the requirements reflect the concerns and mood of the time of drafting, and are still in use today.

In 1996 ECOSOC adopted Resolution 1996/31\textsuperscript{31} which now replaces Resolution 1296. Resolution 1996/31 changes the terminology used a second time with Category I now called ‘General Category’ and Category II becoming ‘Special Category’. Limited substantial changes were made, however the resolution does increase the eligibility for consultative status of national, regional and sub-regional NGOs. Its intended goal is to promote greater participation of NGOs from economies in transition.\textsuperscript{32}

Resolution 1996/31 was the result of considerable pressure from NGOs for the UN to review and update the arrangements for consultative status. Many NGOs saw these debates as an historic opportunity to revise the position of NGOs within the UN. Concepts voiced included proposals to broaden NGO participation rights to include access to the General Assembly and beyond. The World Federalist Movement wrote:

\begin{quote}
Extension of NGOs rights of access and participation to the General Assembly, and consideration of extending these arrangements to other areas of the UN, is essential to achieving a more efficient, strengthened and democratic International Organization.\textsuperscript{33}
\end{quote}

It was widely hoped that this review would produce formal and structural changes that adequately reflected the growing influence and effective contributions NGOs provide to the whole UN system.

\textsuperscript{31} ESC Res 31, UN ESCOR (49\textsuperscript{th} plen.mtg.), UN Doc E/1996/31 (1996).

\textsuperscript{32} For further details relating to Res 1996/31 see 'Partners in Civil Society: Department of Economics and Social Affairs – NGO Section'. Text available at <http://www.org/partners/civil_society/desango>.
The debates surrounding the topic of NGOs access to the UN raised a number of important issues pertaining to this relationship. Whilst strengthening the formal role of NGOs in the UN system would be desirable, there are dangers in trading increased access for expanded restrictive requirements. NGOs are complex and range dramatically in their subject matter and format. This is an essential element of groups tasked with reflecting the divergence of transnational identities. In fact, the terminology used to describe NGOs — not a government — indicates that their relevance, input and usefulness comes from being ‘outside’ the formal parameters of governance. Many of the activities undertaken by NGOs at the UN do not have to be limited by the pragmatism that often restricts States. NGOs are generally unburdened with large bureaucracies, relatively flexible, open to innovations and able to identify and respond to grassroots needs quickly. The avoidance of formal power and accountability to a broad audience can allow certain freedoms of thought and the ability to focus upon specific non-national issues such as gender, universal human rights, environment and indigenous rights.

An update of NGOs’ positions is needed to demonstrate the current status of NGOs at the UN. However their role — as vehicles to articulate protest and collective action, thus shaping participatory democracy — must not be forgotten. Increased responsibility and accountability is likely to be the result of increased power. Spiro writes:

33 Letter from the World Federalist Movement to General Assembly Vice President Ambassador Ahmad Kamal, 9 December 1996.
NGOs might be required to subscribe to a code of conduct defining their basic mechanisms of accountability. This may imply some loss of independence, but that is the inevitable implication of power responsibility exercised.\textsuperscript{35}

Yet the ‘alternative’ voice of NGOs, the ability to be truly critical of a process they watch rather than fully participate in, is essential in the development and enforcement of international law. An overly formal or complex procedure for NGOs to fulfill in order to gain increased participation could be restrictive and the UN is already rife with bureaucracy for States. Such developments would further perpetuate the division between ‘Northern’ and ‘Southern’ NGOs, with organisations from wealthier countries more likely to have access to resources to fulfill such procedures. Hence, there would be an increase of limited views at the UN and the vital role of civil society would not be developed.

Such issues are matters for caution, not reasons to avoid future procedural changes. However any changes must consider the reason for ‘non-Government’ involvement and dialogue in an institution populated by government representatives. The changes must allow the creation of a simple and clear process for the increased involvement of NGOs in order to encourage true participation. Most importantly any further changes must continue to allow for the most salient and powerful feature of NGOs — diversity.

(c) Problems with NGOs

Embracing a bewildering array of beliefs, interests, and agendas, they have the potential to do as much harm as good. Hailed as the exemplars of grassroots democracy in action, many NGOs are, in fact, decidedly undemocratic and unaccountable to the people they claim to represent. Dedicated to promoting openness and participation in decision making, they can instead lapse into old-fashioned interest group politics that produces a gridlock on a global scale.36

Criticisms of NGOs abound and it is naive to assume that their involvement in international relations is not highly controversial on a number of levels. The turbulent pluralism caused by increased participation from civil society in a State-centric system worries not only countries uncomfortable with growing global democracy. Concerns have been raised over the need for NGOs to be sincerely independent from States. Situations have arisen when States utilise and control NGOs in order to serve their own national agendas.

Similarly international institutions have been known to use NGOs for their own purposes. An example of this is the claim that a small number of NGOs serve as a 'fig-leaf of respectability' for the activities of the World Bank, providing public relations cover for criticisms of the Bank's activities.37 Whilst it must be acknowledged that such criticism ignores the potential benefits that could flow from a relationship between the World Bank and NGOs, it is important to continue to analyse the dynamics of a 'partnership' between economic institutions and civil society. In certain situations the fear of NGOs being 'co-opted' by powerful forces beyond their control may outweigh the likelihood of NGOs influencing policies. In this instance, however, the nature of the World Bank renders consultation with NGOs working in

36 Simmons, above n 9, 82.
the very countries the Bank is ‘servicing’ as essential. Other dangers can arise, for example NGOs have also been used by numerous governments to justify reduced social welfare spending and infrastructure.38

As well as issues relating to the credibility of NGOs, methods of fund-raising, including accusations of ‘relief pornography’, plague many international organisations.39 Fierce competition between NGOs can result in certain groups seizing upon issues that promote their image and fundraising purposes rather than develop public interests. Questions have been raised about the use of advertising undertaken by large international NGOs which denigrate local rebuilding efforts. Large scale advertising itself begs the question of where funds are being utilised. Reproach has also been levelled at NGOs in humanitarian activities in the Sudan and Somalia.40 NGOs have been accused of subsidising warring factions by making direct and indirect payments to gain access to areas needing assistance.41 In other theatres of armed conflict such as Ethiopia and Rwanda, NGOs constructed roads and camps for civilian assistance which were eventually well used by the warring combatants.

NGOs are often distrustful of each other and instances of such groups collaborating together and creating coalitions do not guarantee greater effectiveness or savings. Many individuals who are employed by NGOs feel under-resourced, under-paid and

37 Seamus Cleary, ‘The World Bank and NGOs’ in Peter Willetts (ed), above n 10, 70.
39 Andrew Natsios, ‘NGOs and the UN System in Complex Humanitarian Emergencies: Conflict or Cooperation’ in Thomas Weiss and Leon Gordenker (eds), above, n 6, 71.
41 Mark Duffield, ‘NGO Relief in War Zones: Towards an Analysis of the New Aid Paradigm’ in
under-valued. The passionate nature of work done for NGOs can result in increased internal politics as workers deeply care about the issues before them. Decisions made in such a context have a strong ideological element as well as traditional management considerations. Large international NGOs have difficulties in presenting a united front on policy issues when they consist of autonomous chapters in various countries with different leadership styles and domestic political pressures. Tensions between workers in the field, sometimes deemed ‘too close’ to the issues, and those involved in management are rife. Indeed, NGOs are vulnerable to the problems experienced by all other institutions, including internal failure to fulfil their own egalitarian rhetoric.

The most problematic area for NGOs can be seen in the difficulties involved in balancing accountability with autonomy and independence. Whilst there is often the call for NGOs to become more accountable, the question that must be asked is accountable to whom? NGOs are not and should not be accountable to States, but are they accountable to their donors or to their beneficiaries? Legally NGOs must be transparent for their trustees and donors but ideologically they must listen to their beneficiaries. This tension is complex and not easily solved. In a time of shrinking resources and increasing cynicism in public perception of the accountability of NGOs, it is essential that these institutions continue to act as social mobilisation agencies not merely service providers with easily demonstrable outcomes. Much important work accomplished by NGOs, such as the role they played in the creation of the ICC, cannot be accurately estimated compared to specific tasks such as aid delivery to a

Thomas Weiss (ed), Beyond UN Subcontracting (1998) 139.
42 David Kelleher, Kate McKaren and Ronald Bisson, Grabbing the Tiger by the Tail: NGOs Learning for Organizational Change (1996) 2.
refugee camp. The pressures for NGOs to survive economically, rather than ideological, can at times impact upon policy and strategic decisions.

Many of the problems facing NGOs in this field arise because NGOs are problematic organizations. By their very nature, NGOs must live and work in situations of necessary ambiguity. Some of these ambiguities are the result of the characteristics of NGOs as a form of organization – accountable to trustees in one country but working with communities in others; committed to fundamental reforms but funded by donors and supporters who (by and large) demand short-term results; wanting to ‘democratize development’ but forbidden from entering formal politics.45

Whilst NGOs at times claim that their legitimacy and mandate to speak stems from ‘popular representation’46 there is little literature examining the validity of this concept. Overestimating the capacity for NGOs to always allow true ‘participation’ untainted by mismanagement, power politics, greed and pressures from governments is as dangerous as underestimating their influence.

(d) **NGOs providing evidence**

The Commission on Human Rights would not be able to function the way it does without the indefatigable and courageous individuals and NGOs who are, as it were, the eyes and ears of the Commission and who provide essential information to enable it to fulfil its task of upholding the universal application of human rights.47

NGOs play a crucial role in gathering and providing information for a range of purposes in the international system. From press releases exposing human rights abuses to the worldwide media, to formal submissions before UN bodies, NGOs

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43 William Fischer, above n 34, 456.
44 For a detailed discussion of this topic see Chapter 3.
46 Anne Marie Clark, above n 10, 508.
educate and inform the public and policy makers alike. In doing so they mobilise shame in attempts to hold governments to account, thus assisting in enforcing international law. Providing evidence to international mechanisms monitoring the implementation of legal norms is an essential service provided by NGOs.

The Human Rights Committee of the UN, established under the International Covenant on Civil and Political Rights48 (ICCPR) informally accepts NGO submissions with respect to periodic State reporting under Article 40. In this system a prominent role is also played by NGOs in individual communications, as the Optional Protocol to the ICCPR permits individuals to submit complaints of any violations of the Covenant. NGOs often assist individuals in this process providing support and resources.49 The Committee against Torture is empowered to invite NGOs with consultative status to submit information and written statements. Numerous NGOs, particularly strong advocacy groups such as Amnesty International, provide up-to-date information that is often more comprehensive than that submitted by government representatives.50 The Committee on the Elimination of Discrimination Against Women (CEDAW) also receives valuable information from NGOs.51 In addition, the


51 See, eg, the report submitted by a coalition of Australian women’s organizations for consideration by the CEDAW Committee in respect of Australia’s third periodic report (UN Doc CEDAW/C/1997/II/L.1/Add.8, 22 July 1997): Coalition of Australian Participating Organizations of Women, *Australian NGO Report to the Committee on the Elimination of Discrimination Against*
Sub-Commission on Prevention of Discrimination and Protection of Minorities provides for consultation with NGOs upon invitation or at the request of the organisation.\textsuperscript{52} Similarly, the International Labour Organisation (ILO) entitles ‘an industrial association of employers or of workers’ to submit representations regarding a Member’s failure to observe any Convention administered by the ILO.\textsuperscript{53}

The Commission on Human Rights deals with violations in individual countries. Whilst the Commission has no real power of enforcement it can appoint experts to study certain situations which often results in international public censure for countries singled out. NGOs play a particularly influential role here as the Commission is able to seek and receive credible and reliable information from governments, the specialised agencies, and inter-Governmental and non-Governmental organisations.

In this forum, like all others, it is essential that NGOs provide reliable, balanced, comprehensive and up-to-date information to ensure that credibility is maintained.\textsuperscript{54} Whilst there has been no detailed public accounting on the exact role played by NGOs in this mechanism, there are statements by members of the Commission appealing to NGOs,

\begin{quote}
[w]hose work and information is crucial to human rights protection and to the effective discharge of our own mandates to continue providing us with relevant information and ideas.\textsuperscript{55}
\end{quote}

\textit{Women}. Copy on file with the author.
\textsuperscript{53} \textit{International Labour Organization Constitution}, art 24.
In 1994 the UN High Commissioner for Human Rights established a ‘human rights hot line’ which enables victims, relatives and informed NGOs to fax emergency information to the Commissioner to be dealt with rapidly.\textsuperscript{56} The creation of new procedures to allow input from NGOs indicates the value gained by UN mechanisms from these influential actors.

3. **NGOS AND TREATY MAKING**

Beyond their traditional role in international law in mobilising shame, educating and documenting abuses, NGOs’ contribution to the development of international human rights norms, policy and structures is often overlooked. Perhaps one reason for the lack of analysis of the role NGOs play in the creation of norms is the difficulty of measuring the success of such involvement. There are complexities involved in trying to extract the exact value of input from one group due to the range of contributions from various forces and actors. The sensitive nature of the work of NGOs at Diplomatic Conferences often restricts publicity:

> Most of their influence is invisible except to the immediate participants, and it is therefore very easy to underestimate the impact of NGOs in UN proceedings.\textsuperscript{57}

However, there are a number of strong and positive examples of the success of NGOs in international legal norm development. NGOs’ influence is often due to individual members expertise and prestige as much as the power of the organisation they represented. The informal and personal contact with delegates, who are often under-

\textsuperscript{55} Felice Gaer, above n 22, 55.

\textsuperscript{56} Amnesty International sends more than 500 such communications to the UN special procedures branch every year: ibid.

\textsuperscript{57} Peter Willetts, ‘Consultative Status for NGOs at the United Nations’, in Peter Willetts (ed), above n 9, 54.
resourced and with limited time to research, can be a powerful mechanism for input into drafting sessions. NGOs were instrumental in the drafting of the Universal Declaration of Human Rights.\textsuperscript{58} Specific sections of this Declaration have been attributed to various groups. For example, Article 16, dealing with the Rights of the Family, owes much to the inspiration of Catholic NGOs, and the negotiations of the World Council of Churches influenced the development of Article 18, covering Freedom of Religion or Belief.\textsuperscript{59}

Amnesty International played a major role in the creation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{60} With a range of other NGOs, Amnesty International called internationally for a legally binding treaty to prohibit torture. NGOs submitted documents to the UN on this topic and sponsored seminars. Amnesty participated actively throughout the Diplomatic Conference, attending drafting sessions and lobbying governments to ensure key principles were included in the text.\textsuperscript{61} Save the Children and other NGOs made considerable contributions to the development on the treaty dealing with Rights of the Child, and the 1992 Conventions on Biodiversity relied on input and suggestions from the International Union for the Conservation for Nature.\textsuperscript{62} Furthermore the International Commission of Jurists played a strong role in the preparations of draft

\textsuperscript{58} Universal Declaration of Human Rights, GA Res 217A, 3 UN GAOR (183\textsuperscript{rd} plen mtg), UN Doc A/Res/217A (1948).
\textsuperscript{59} Theo van Boven, above n 17, 211.
\textsuperscript{60} Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). As at 16 June 1999, there were 114 States Parties.
\textsuperscript{61} Helena Cook, above n 54, 190.
\textsuperscript{62} Peter Spiro, above n 35.
principles for a number of Conventions, including the African Charter on Human and Peoples’ Rights.\textsuperscript{63}

The 1994 creation of a UN High Commissioner for Human Rights owes much to the contributions of NGOs. During the drafting process, from the World Conference on Human Rights to the four preparatory conferences, NGOs maintained pressure both domestically and internationally for a strong and effective High Commissioner. As one commentator stated:

NGOs exerted pressure through strategic interventions, with the chair of the committee set up to consider the question, as well as through reports in the press and comments on various draft papers proposed by governments. Local sections and national affiliates of these groups were encouraged to intervene with their governments.\textsuperscript{64}

The numerous and often complex levels of communication between NGOs and the formal power channels of the UN do allow a wider degree of participation from members of civil society than the articulated rules would indicate. Furthermore there is often a transfer of staff from NGOs to high level advisory bodies at the UN, in particular in areas dealing with sustainable development, social and gender issues.\textsuperscript{65} In this capacity NGOs are not only ‘training grounds’ for future UN officials but such individuals carry across their views and experience of civil society into their new positions. Attempting to quantify the impact of staff transfers is difficult. However as demonstrated previously there are numerous examples of NGOs influencing governments in a range of ways at Diplomatic Conferences and multilateral


\textsuperscript{64} Felice Gaer, above n 22, 61.

\textsuperscript{65} Antonio Donini, ‘The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship between the UN and NGOs’ in Thomas Weiss and Leon Gordenker (eds), above n 6, 85.
negotiations.66 To examine this proposition a short case study has been undertaken as an instructive example of the role of NGOs played in the creation of the ‘Ottawa Treaty’.

(a) Case study on NGOs and the creation of the ‘Ottawa Treaty’

A recent startling and unusual example of the power, both formal and informal, of NGOs in assisting to develop international treaties is that of the creation of the Ottawa Convention on anti-personnel landmines.67 Non-State actors, in particular the NGO grouping called the International Campaign to Ban Landmines (ICBL), played a major role in urging States to take a ‘fast track’ approach to treaty negotiation. Civil society also created favorable domestic environments for the negotiations by ‘stigmatising’ these weapons through an intense educational and emotional landmine ‘awareness’ campaign.

International Committee of the Red Cross (ICRC) surgeons in the late 1980s found that they could not ignore the effects of landmines in countries such as Mozambique, Cambodia, Angola, Afghanistan and several other countries and began to count the number of victims and record the horror. This information became a central part of the educational campaign in years to come. The campaign was formally created in

67 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, opened for signature 18 September 1997, 36 ILM 1507 (entered into force 1 March 1999) (‘The Ottawa Convention’). As at 22 October 1998, there were 47 States Parties.
1992 as a result of the union of Medico International, a German NGO, the Vietnam Veterans of America and Jody Williams, a well experienced NGO activist.\textsuperscript{68}

In 1996, frustrated at the limitations of revised Protocol II\textsuperscript{69} to the 1980 Conventional Weapons Convention (CCWC),\textsuperscript{70} a small group of States and members of civil society began to consider methods to create a legal norm involving a total ban of anti-personnel landmines. The Revised Protocol II only restricted the use of certain landmines and did not ban these weapons outright.\textsuperscript{71} Other formal arms control negotiations, such as the United Nations Conference on Disarmament in Geneva were deemed too slow, requiring consensus from all States involved in the negotiations. As a result of these concerns Canada hosted a Conference in Ottawa to discuss the eradication of landmines in late 1996. At the end of the Conference the Canadian Foreign Minister, Lord Axworthy, invited States to return in a year's time to sign a treaty banning the use, production, transfer and stockpiling of anti-personnel landmines. Thus began the Ottawa process.

\textsuperscript{68} N Greenaway, 'Stopping a Scourge', \textit{The Ottawa Citizen} (Ottawa, Canada), 29 October 1997, 7.
This process gave ICBL a strong purpose and a definitive goal. Civil society quickly moved into action and the number of organisations who became members of the Campaign grew to over 1,000 in 60 countries. Church groups, women’s groups, human rights activists, development advocates and a range of other civil society organisations joined the ICBL to push for a total ban to landmines. Information technology played a major part, with the ICBL making strong use of the Internet, emails, faxes and telephones to coordinate activities around the globe.

Famous personalities were added to the call to ban landmines including the UN Secretary-General, Pope John Paul II, Archbishop Desmond Tutu, and the Dalai Lama. The late Princess Diana was the most famous individual to be involved in the debate:

Princess Diana brought celebrity firepower to the cause. With the international media in tow, she visited mine victims in Angola and Bosnia...[after her death] momentum for a ban swelled. Some of the mine victims Diana had visited walked on prosthetics or rode in wheelchairs in her funeral.

Acknowledging that the military were major stakeholders in this debate, the ICRC convened a number of seminars and produced a study which questioned the military value of these weapons. A number of well know military figures added their views on the drawbacks of anti-personnel landmines, including the former Philippines

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72 K Roth, ‘New Minefields for NGOs’ The Nation, (United States) 13 April 1998, 22.
President, Fidel Ramos, whose rank as a General added credibility to the call to ban these weapons.

One reason for the speed of the creation of the Ottawa Treaty was the process implemented for negotiations, requiring States to sign a Final Declaration in order to participate. Those States which did not sign were only allowed limited access as observers and not as full participants in subsequent Conferences. It is also important to note that NGOs such as the ICBL had the capacity to contribute to the debates in a formal sense, speaking on the floor like any other participant. A Conference held in Oslo in September 1997 was attended by 87 States and 33 others participated in the capacity of observers. Negotiations continued for the next few months and by December 1997 the number of States signing the Ottawa Convention, in Ottawa was over 100. In March 1999, 6 months after the 60th ratification, the treaty entered into force as civil society across the world celebrated by ringing bells.

In the history of arms control negotiations, the Ottawa Convention is a remarkable instrument in terms of the alacrity with which it created a legal norm, the significant input from NGOs and their close working relationship with certain States during the negotiations. Hailed as a great victory for civil society, some commentators view the Ottawa process as revolutionary:

[T]he landmine process reveals a new texture in the international system where negotiating tables have new players and shapes, where linkages and networks transcend state limits, and, even perhaps, where moral sensibilities have a voice.  

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77 Ibid, 126.
There are critics of both the process and the Ottawa Treaty itself. The lack of participation in the development of the legal norm by major producers and users of landmines, such as China and India and the absence of support for the treaty from superpowers such as the United States and Russia results in concerns raised in relation to the practical effectiveness of the treaty. A number of States were not impressed with the Canadian Government's close relationship with ICBL nor of the 'fast track' approach which abandoned traditional modes of verification. Questions have also been raised about the composition of the ICBL — predominantly comprising members from North America — particularly considering the attitude of the United States government to the treaty in refusing to sign or ratify this instrument to date.

Yet, the speed of the Convention's ratification is unprecedented, considering that not all States signing the Convention were from the 'West.' Furthermore, discussions on this topic are still underway in other fora such as the Conference on Disarmament in Geneva and issues such as the need to de-mine and provide rehabilitation for landmine victims are still given high profile.

NGOs did play a catena of roles during the Ottawa process:

The case of AP landmines confirms the oft-argued thesis among international relations scholars that the perception of a crisis or shock is the crucial factor in precipitating ideological or normative change.\(^{78}\)

ICBL and other NGOs continued to 'shock' citizens of the world throughout the campaign. Focusing on victims and the horrors of landmine injuries and deaths, these organisations highlighted to the public that these weapons cause 'superfluous injury
and unnecessary suffering and are indiscriminate, killing and maiming combatants and children alike. Civil society engaged in debates and education, organisations such as the ICRC with the military and others with politicians, the media and the diplomats. The simplicity of the norm demanded no doubt influenced the speed of the legal development. In this sense this example is unique. A number of focus groups and a questionnaire was presented to ‘Ottawa’ conference participants after the event.

When asked to identify the factors that influenced their country’s decision to sign the Convention, delegates most frequently cited the pressure exercised by NGOs, particularly as a presence at the table during the treaty negotiation process where they were able to influence policy decisions.

It is unusual to be able to so clearly identify the area of NGO influence in multilateral negotiations and, as this thesis will demonstrate, no such statement can be made about the role of NGOs in the creation of the ICC. Obviously a call for a total ban, with no exceptions, to a weapon proven to be destructive to humanity and the environment and with questions raised about its military efficacy, sent a clear and strong message to the international community. It was impossible for a large number of States to ignore this call.

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   It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

80 Ibid, art 51(4):
   Indiscriminate attacks are prohibited.

81 Maxwell Cameron, Robert Lawson and Brian Tomlin (eds), To Walk without fear: the Global Movement to Ban Landmines (1998) 10.
CONCLUSION

Unlike States, NGOs do not have the power to make, implement or enforce international law. However, the decentralisation of the authority of the State has facilitated the growth of NGOs pursuing goals which transcend national and local identities. As this Chapter has demonstrated, NGOs are an intrinsic part of international law and play a significant role in the United Nations system. It is to such organisations that much credit can be given for the inclusion of human rights in the UN Charter. NGOs have also been influential in the establishment of human rights mechanisms such as the UN High Commissioner for Human Rights, and strengthening expectations for the creation of numerous human rights treaties. By providing information, resources, expertise and shaping international public opinion, NGOs greatly contribute to multilateral reporting and enforcement mechanisms of human rights within the UN. NGOs are also excellent channels for the dissemination of UN policies and information.

Due to the restrictive formal capacity for NGOs to work within the UN system, much work is undertaken in an informal environment building upon webs of relationships, networks, lobbying and mobilising shame. The role of communication technology plays a crucial part in the capacity for NGOs to fulfil their mandate, and was central to the rise of this sector. Some commentators have labelled NGOs as ‘shadow States’, bodies without power whose role is to provide alternative policies and criticism.\textsuperscript{82} Concerns have been raised that much of the coordination between NGOs and the UN, especially in forums such as drafting committees, is \textit{ad hoc}, informal and not

\textsuperscript{82} Paul Ghils, above n 3, 420.
procedurally based. As one commentator writes, ‘NGO influence should not hinge on which groups happen to best ingratiate themselves with nation-State representative’.\footnote{Peter Spiro, above n 35, 64.} The debates on the revision of Resolution 1296 indicated the dangers involved in incorporating NGOs too heavily into the formal bureaucratic mechanisms of the UN. NGOs must continue to struggle to maintain their unique identity as the main social countervailing power to the State, without being co-opted or rendered irrelevant. This dichotomy, between principle and pragmatism plays itself out within NGOs in the trade-offs between voluntarism and professionalism, informality and the institutionalisation necessary to implement long term changes.

The scope and topic of this thesis means that this Chapter has not explored a range of issues critical to the UN and NGO relationship. The fact that the ideology and origin of NGOs within the UN system is predominantly Western orientated must not be forgotten.\footnote{Chiang Pei-heng, Non-Governmental Organizations at the United Nations: Identity, Role and Function (1981) 257.} Writers like Donni argue that the Treaty of Westphalia and Western cannons such as Hegel’s ‘Philosophy of Rights’, by defining the parameters of sovereignty, determine many of the theories of how NGOs interact with the State today.\footnote{Antio Donni, above n 62, footnote 30.} Furthermore, within the human rights dialogue this results in stress between the Western focus upon civil/political rights and ‘developing nations’ economic, social and cultural agendas which NGOs in this area cannot ignore.\footnote{See, eg, Dianne Otto, ‘Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law’ (1997) 18 Australian Yearbook of International Law 1.}
NGOs are only able to flourish domestically in 'sympathetic public spaces provided by Governments'. Not all governments are sympathetic, nor provide such public spaces. Whilst NGOs can be very effective in pushing responsive States to adhere to international human rights norms, stress must be placed upon the word ‘responsive’. To a vast number of the world’s population, concepts such as participation and empowerment are not relevant to their daily lives. Even within countries with a robust and civil society, inevitable tensions arise when NGOs criticise the State. The relationship between NGOs aiming to influence governments and the State will never be easy.

The importance of accountability appears to be some of the answer to the question of how to coordinate NGOs in the UN system. At the same time there are calls for the UN to increase its capacity to interface and dialogue with non-State actors. At the closure of the UN Non-Governmental Liaison Service’s 20th Anniversary Conference it was acknowledged that:

[T]he United Nations has been challenged to become more democratic, effective and coherent in the pursuit of its goals, and more flexible and user-friendly vis-à-vis the NGO community. At the same time NGOs are challenged to improve the effectiveness and transparency of their work at the international level and to link this clearly to the concerns of people in their countries.

There are a growing number of NGO codes of conduct, particularly in the area of relief delivery. Such mechanisms not only provide guidance for the delivery of services, but allow governments, donors and international institutions like the UN to

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87 William Fischer, above n 34, 451.
88 The United Nations, NGOs and Global Governance, see above n 24, 67.
89 See the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-
have some sort of ‘yardstick’ to measure activities and behaviour. Yet in the area of NGOs shaping policy and assisting in the creation of legal norms, there is very little attempt at coordination by the UN above and beyond the basic restrictions of access to treaty making meetings or granting of ECOSOC status.

The problems involved in attempts to coordinate the activities of NGOs within the UN system, in particular, in the area of developing legal norms, are the very strengths that make this relationship unique. As Gordenker and Weiss write:

> The dynamism and variety in the NGO universe ensures that no monolithic march in any direction may be expected. Yet it is that very untidiness, which can irritate diplomats and administrators, that opens opportunities for collaboration...

There is no one answer as to how to coordinate NGOs in their interaction with the UN.\(^{91}\) Whilst some advocate tight controls and restrictions for NGO involvement in the UN this thesis examines the benefits that a broad range of non-State actors bring to the development and enforcement of international criminal law. Perhaps one of the most critical questions remaining unanswered on the topic of civil societies is what gives certain stakeholders the representative authority to speak for the broader community? The details and validity of the concept of ‘popular sovereignty’ is, as yet, widely unexplored.

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Yet despite these uncertainties and broad unresolved questions, the important and complex nature of NGOs in international law cannot be underestimated. The process of creating new international legal norms is no longer owned exclusively by States isolated from other input. Furthermore the inclusion of some sort of role for NGOs in new UN institutions is necessary, not only to ensure that such institutions are effective, but also to reflect the growing NGO influence in international law.
CHAPTER 2

THE HISTORY OF THE INTERNATIONAL CRIMINAL COURT

This Chapter briefly examines the history leading to the agreement to a Statute for the International Criminal Court (ICC). It explores the reasons behind the creation of the ICC and the previous historical attempts to establish an international legal institution to enforce international criminal law. The ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda are dealt with as precedents, encouraging the international community to acknowledge that international prosecutions are possible. A summary of some of the issues raised at the Diplomatic Conference is also undertaken.

1. THE INTERNATIONAL CRIMINAL COURT

The creation of the Statute for an International Criminal Court (ICC) in July of 1998 represented a major advance for international criminal law and the attempts to cease impunity for those committing atrocities. The ICC will enter into force after 60 States have ratified the Statute and the Court will be located in The Hague with links to the United Nations. The ICC will not replace national prosecution, but will complement national courts, except in the situation when the Security Council, acting under Chapter VII of the Charter of the United Nations, refers a matter to the ICC (Article 13 (b)). Excluding situations referred under Article 13(b), Article 17 states that the ICC will have jurisdiction when a State is ‘unwilling or unable genuinely to carry out the investigation or prosecution’. In such situations the permission of either the State on whose territory the crime occurred or the State of which the person accused is a national is required before the ICC can exercise jurisdiction (Article 12).

The Court will have jurisdiction over the crimes of genocide, crimes against humanity and war crimes. The crime of aggression will also be included in the ICC Statute after
further work has been done to create a clear and widely accepted definition of this crime. There are three methods for a case to be referred to the ICC. Article 13 allows a case to be referred to the ICC by the Security Council acting under Chapter VII of the Charter of the United Nations. Additionally, referrals can also be made by States Parties and by the Prosecutor.

Over the years there have been claims that international criminal trials erode the rights of the State. This sentiment was strongly expressed by Dr Jahreiss, a German defence Counsel for one of the accused in his opening address at the first international war crimes trials in Nuremberg:

What the prosecution is doing, when in the name of the world community as an entity it desires to have individuals legally sentenced for their decisions regarding war and peace, is destroying the spirit of the State.¹

Whilst State sovereignty is an extremely important notion today, there is little doubt that the developments in international criminal law, particularly enforcement mechanisms, highlight the fact that individuals have international duties which transcend national obligations of obedience imposed by their governments.² Historically, the prosecution of those accused of crimes under international criminal law, both domestically and internationally, raised grave issues of partiality, legal

² This question raises the issue of the distinction between criminal responsibility of states, norms of jus cogens (those crimes holding the highest position in the hierarchy of international norms or ‘compelling law’) and obligatio Erga Omnes (obligations owed to all States and other subjects of international law to the international community of states). Some jurist such as Harris submit that all three are used to describe similar conduct whilst others, such as Ragazzi advocate that a precondition for international legal norm as obligatio erga omnes is its emergence as jus cogens. This thesis will not embark on such discussions however for further details see, M Cherif Bassioumi, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 Law and Contemporary Problems 63,67; Maurizio Ragazzi, The Concept of International Obligations Erga Omnes (1996) 134 and Giorgio Gaja, ‘Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of three Related
credibility, cultural and historical relativity and conceptual difficulties associated with international criminality. During the many years of debates leading to the development of the ICC Statute these matters were visited on numerous occasions. However, at the final hour of the Diplomatic Conference, over 120 States, despite the inherent flaws in the Treaty, voted to support the Statute for the first permanent legal institution dedicated to enforcing international criminal law:

The question in the end becomes not whether we are privileged to judge but whether we have the tools, the capacity and the will to do so consistently and fairly.

(i) **Why create an International Criminal Court?**

There is a plethora of legal, political, intellectual and even emotional arguments on the need for an international criminal court. The creation of the *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) by the United Nations Security Council in 1993 and 1994 respectively, injected massive momentum into the development of a permanent institution. The proceedings of the ICTY and ICTR demonstrate to the international community that international trials are possible. They also indicate the capacity for such bodies to develop rigorous and fair international

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3 Raising the historical and political complexities of the Eichmann trial, Hannah Arendt wrote 'it was history that, as far as the prosecution was concerned, stood in the center of the trial': Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994) 19. See also, Gerry Simpson, 'War Crimes: A Critical Introduction' in Tim McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997).

4 Simpson, above n 3.4.

5 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, SC Res 827, 48 UN SCOR (3217 th mtg), UN Doc S/Res/827 (1993); 32 ILM 1203 (‘Statute of the ICTY’).

6 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994*, SC Res 955, 49 UN SCOR (3452th mtg), UN Doc S/RES/955 (1994); 33 ILM 1598 (‘Statute of the ICTR’).
criminal jurisprudence. At the same time, the end of Cold War paralysis of the Security Council resulted in States realising that a treaty based court may protect national interests more than a Security Council Resolution.\textsuperscript{7} Added to this political dimension were the rowdy cries from a range of non-State actors demanding a permanent institution to try those accused of breaching international criminal law.\textsuperscript{8} Pol Pot died a frail old man after a questionable domestic trial. The media and information technology allowed citizens increased access to global events. Time was ripe for a dramatic international legal development.

Arguments advanced on the benefits of an ICC include the capacity to provide 'justice', and in so doing, assist with the healing of survivors of atrocities and victims' families\textsuperscript{9}, the development of international law\textsuperscript{10} and the assistance such a mechanism provides to attempts to move towards international peace and security. There is also a belief by many that recording what has happened during horrific periods of history creates a better understanding of what has occurred and is often essential in national reconciliation. Whatever the Nuremberg trials did, they thoroughly documented the activities of the Nazis, making it more difficult to refute the horrors of that regime.\textsuperscript{11}

\textsuperscript{8} Amnesty International wrote 'the real danger is that \textit{ad hoc} tribunals will be no more than a token political gesture, set up to satisfy short-term political interests of States': Amnesty International, Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the former Yugoslavia, AI Index: EUR (1993) 2.
\textsuperscript{10} Meron writes: '[T]he reaction of the international community to the appalling abuses in the former Yugoslavia has brought about certain advances in international criminal and humanitarian law': Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law' (1994) 88 American Journal of International Law 87.
\textsuperscript{11} 'The public trials of [Nazis] criminals have played an important role in educating the public regarding the Holocaust and undermining the propaganda of Holocaust deniers': Efrain Zuroff, Occupation: Nazi-Hunter – the Continuing Search for the Perpetrators of the Holocaust (1994) 224. However, on the problems associated with motivation for war crimes trials, see G Simpson, above n 3.
Just as domestic penal law was invented to maintain peace and security in national societies, so too international penal law must be created to help maintain peace and security on an international level.\textsuperscript{12}

The correlation between the raison d'\'être of domestic criminal systems and international criminal law is obvious. In undertaking this comparison, the need for an international enforcement mechanism is apparent. Providing a deterrent to potential aggressors fearful of personal liability, establishing a system to curb 'retributive' justice and symbolically stating what the international community deems right and wrong are roles the ICC will hopefully fulfil. As Madeleine Albright stated in relation to the ICTY:

[It will not] revolutionize human behaviour...but it will at least place the force and prestige of international law squarely on the side of the victim... it will enhance the prospects for a durable peace. It will add a measure of caution to the scales in the minds of would-be aggressors.\textsuperscript{13}

On the other hand, some commentators claim that there are tensions between peace and justice, with war crime prosecutions actually creating stumbling blocks in potential efforts to create peace. It is true that in many cases the perpetrators of atrocities are those still in government or acting as Heads of State. Thus, potential defendants may be the only ones with the control to cease violations and the instigation of proceedings against such individuals may not cease the problem but rather entrench the conflict.\textsuperscript{14}

\textsuperscript{12} Benjamin Ferencz, An International Criminal Court: A step towards world peace – A Documentary History and Analysis, vol 1 (1979) 22.
\textsuperscript{13} Madeleine Albright, 'Address at the U.S. Holocaust Memorial Museum', USIA Wireless File EUR 303 4/13/94 4.
(ii) The historical development of the International Criminal Court

International criminal law encompasses a range of legal norms dealing with international criminal responsibility. It is neither a coherent nor an autonomous system and is wider than the decisions from previous international tribunals such as Nuremberg and Tokyo and the current ad hoc institutions for the former Yugoslavia and Rwanda.\(^{15}\) International criminal law is based on customary international rules and treaties which prohibit a range of activities deemed to harm the fundamental interests of the international community as a whole. International crimes include activities such as piracy;\(^ {16}\) war crimes;\(^ {17}\) crimes against peace;\(^ {18}\) crimes against humanity\(^ {19}\) (including genocide);\(^ {20}\) enslavement and slave trade;\(^ {21}\) traffic in persons for prostitution;\(^ {22}\) production and sale of narcotic drugs and aircraft hijacking.\(^ {23}\) Only


\(^{18}\) *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, 8 UNTS 279, art 6(a) ("Nuremberg Charter").

\(^{19}\) Ibid, art 6(c).


\(^{21}\) *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957). As at 11 May 1999, there were 117 States Parties.


international offences can be subject to universal jurisdiction, which allows offenders
to be tried in any country, irrespective of the *locus* of the offence and the nationality
of both the offender and the victims.\(^{24}\) Contracting States are also bound to prosecute
international offenders. In many jurisdictions this requires implementation of the
international crime within the domestic law. However, even those countries with such
legislation rarely prosecute their own citizens or others for these crimes.\(^{25}\) The
recognition by the international community that national courts have failed to
prosecute or deter the commission of international crimes was one of the driving
forces behind the cry for a permanent international criminal court.

(a) First War Crimes Trials

The idea of such a court has been mooted for over 100 years.\(^{26}\) Discussions were held
during and after World War I in relation to trying individuals responsible for
international crimes committed during the armed conflict. Particular focus was given
to the atrocities committed by the Turkish in attempts to exterminate the Armenian
people. No such prosecutions were held and despite serious discussions at the 1919
Preliminary Peace Conference for an international legal institution, it did not
eventuate. The Allied Governments allowed the German Government to try their own
people in German courts. This resulted in the Leipzig Trials which were subsequently

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\(^{24}\) For a detailed analysis of these crimes see, P Alston and H Steiner 'Universal Jurisdiction and International Crimes' in *International Human Rights in Context: Law, Politics, Morals* (1996) 1021-40


deemed unsuccessful due, amongst other factors, to the Allied Governments’ belief that extremely lenient sentences were handed down.\textsuperscript{27}

Debate ensued on the need to set up an international penal enforcement mechanism over the next few decades.\textsuperscript{28} The International Law Association completed a Draft Statute for an international criminal court in the mid-1920s.\textsuperscript{29} However, it was not until post World War II that the idea of international criminal trials became a reality.

In August of 1945, the four major victorious Allies of World War II agreed in London upon the Charter for an International Military Tribunal (IMT).\textsuperscript{30} This Tribunal was empowered to try major German officials accused of war crimes, crimes against the peace, and crimes against humanity. Not long after, a Charter for the Far East was created through a proclamation to establish a similar Tribunal in Tokyo to try Japanese officials.\textsuperscript{31} Despite being deemed ‘victor’s courts’, involving selective and retrospective justice, these were the first attempts at international criminal proceedings. For many years they remained the last.

It is relatively easy to criticise these Tribunals for their lack of due process and extremely limited rules of procedure.\textsuperscript{32} Numerous other prosecutions were carried out

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\textsuperscript{27} For a full examination of post-World War I and World War II developments see Timothy McCormack, ‘From Sun Tzu to the Sixth Committee’ in McCormack and Simpson (eds), above n 3, 31.
\textsuperscript{28} See, eg, Ferencz, An International Criminal Court: A step towards world peace, above n 12.
\textsuperscript{29} ILA, Proposal for an International Criminal Court, Report of the Thirty-Fourth Conference of the International Law Association, Vienna, August 11, 1926.
\textsuperscript{30} Nuremberg Charter, above n 18.
\textsuperscript{31} Charter of the International Military Tribunal for the Far East, TIAS no 1589.
\textsuperscript{32} ‘Rules of Procedure of the International Military Tribunal’ (1945) 1 Trial of Major War Criminals 19-23.
\end{flushleft}
by Allied Forces pursuant to Control Council Law No 10 and national laws in
countries including Great Britain, Australia, France, Greece, the Netherlands, Poland
and Russia. However the impact of the proceedings of the international Tribunals on
international law cannot be underestimated. As well as developing the subject matter
jurisdiction still utilised today, the post World War II trials quashed any dispute on
whether individuals could constitute subjects under international law.

Momentum was gained from the experiences of the Nuremberg and Tokyo trials. In
the early 1950s, the General Assembly requested the International Law Commission
(ILC) to draft a Statute establishing an ICC as well as a Draft Code of Crimes
Against the Peace and Security of Mankind in an attempt to codify this area of
international law. Drafts were undertaken and reviewed but difficulties arose with
attempts to define the crime of ‘aggression’. The General Assembly concluded that
further consideration should be deferred until this matter was resolved. The
commencement of the Cold War stifled any prospects for the practical development of
an international criminal court due to the fact that many States perceived it as an
institution requiring them to surrender elements of their sovereignty.

33 Control Council Law No 10 established the jurisdiction of military tribunals operating in the Allied
Powers’ zones of occupation: Control Council Law No. 10: Punishment of Persons Guilty of War
Crimes, Crimes Against Peace And Against Humanity, December 20 1945.
34 Roger Clark, ‘Nuremberg and Tokyo in Contemporary Perspective’ in McCormack and Simpson
(eds), above n 3, 184.
35 See, eg, Robert Wolfe, ‘Flaws in the Nuremberg Legacy: An Impediment to International War
Crimes Tribunals’ Prosecution of Crimes Against Humanity’ (1998) 12 Holocaust and Genocide
Studies 434.
36 Draft Statute for an International Criminal Court Report (Annex to the Report of the Committee on
International Criminal Jurisdiction, 31 August 1951) 7 GAOR Supp 11, UN Doc A/2136 (1952);
Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on
37 9 UN GAOR Supp 9, UN Doc A/2693 (1954).
(b) The ad hoc International Criminal Tribunals

All was quiet on the international front relating to the development of enforcement mechanisms for international criminal law for a couple of decades, despite numerous trials being held in domestic courts all over the world.39 However, in the early 1990s, the alleged atrocities occurring in the Balkans conflict resulted in a re-assessment of the need for national security matters to be tempered by the international legal system. As Professor Bassiouni noted:

The events in Yugoslavia and Rwanda shocked the world out of its complacency and the idea of prosecuting those who committed international crimes acquired a broad base of support in world public opinion and in many countries.40

The Tribunal for the former Yugoslavia was established by the Security Council pursuant to unanimous Resolutions 808 of February 1993 and 827 of May 1993. The Council acted pursuant to Chapter VII of the United Nations Charter and, accordingly, created a binding obligation on all member States to assist and cooperate fully with the Tribunal, if so requested (Article 29 of the Statute). The Tribunal has attempted to balance States’ concerns over issues of sovereignty, against responding appropriately to the international outcry of the violations of international humanitarian law committed in the former Yugoslavia. Thus, prosecutions can also be held domestically by the national courts in relation to war crimes and crimes against humanity committed in the territory of the former Yugoslavia since 1991 (Article 91).

38 Sunga Lyal, above n 15, 15.
39 For details on trials held in Europe, see Axel Marschik, ‘The Politics of Prosecution: European National Approaches to War Crimes’ in T McCormack and G Simpson (eds), above n 3, 65.
However, whilst attempts have been made to deal with such concerns within the structure of the Tribunal, there are criticisms from many States about the process used to create the ICTY. The decision of the Security Council, representing only a very few States, to impose such a Tribunal which all States are technically bound to assist, raises a number of concerns. Furthermore, in appropriate circumstances the Tribunal can exercise primacy over national courts (Article 92 of the ICTY Statute). It is also important to note that the Federal Republic of Yugoslavia and other key parties to the Balkan conflict strongly opposed the establishment of the Yugoslav Tribunal.\(^4\)

In November 1994, pursuant to Security Council Resolution 955, a similar international criminal tribunal was created to try breaches of international criminal law in Rwanda (ICTR). Although the Security Council established separate Tribunals for these two regions, it recognised the need to make institutional and organisational links. Thus, the Appeals Chamber of both Tribunals is the same and the Prosecutor for the Yugoslavia Tribunal also serves as the Prosecutor for the Rwanda Tribunal, although extra staff are available and Rwanda has a separate Deputy Prosecutor.

The two Tribunals also share the same Rules of Procedure and Evidence. Unlike the situation of the Yugoslav Tribunal, the Rwandan Government supported, at least initially, the establishment of an *ad hoc* international criminal jurisdiction within its own boundaries. Rwanda eventually voted against the creation of the Tribunal in the Security Council due, amongst other things, to the international institution’s lack of

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\(^4\) See, eg, the claims of Serbia and Montenegro against the discriminatory nature of the creation of the ICTY in the Letter dated May 17, 1993 from the Deputy Prime Minister for Foreign Affairs of the Federal Republic of Yugoslavia to the Secretary-General, UN Doc S/25801 (21 May 1993).
the death penalty.\textsuperscript{42} This raises another irony in the interface between domestic and international war crimes prosecutions: for countries like Rwanda, those prosecuted domestically can receive capital punishment whilst those who stand trial internationally do not face such a penalty.

Due to the fact that the \textit{ad hoc} Tribunals were created through the speedy process of Security Council Resolutions rather than the drafting of a treaty, there was limited opportunity for lengthy debate on much of the legal technicalities. The vast bulk of drafting for both the Tribunals was done by the United Nations Department of Legal Affairs. Due to the focus of the UN lawyers, there is a greater influence of common law rather than civil law.\textsuperscript{43}

Perhaps the area where the Tribunals differ most is in subject matter jurisdiction. Both Tribunals have the capacity to try individuals for genocide and the definition is reproduced from the Genocide Convention. Both can try individuals who perpetrate crimes against humanity, although the ICTR Statute does not require a nexus with armed conflict. Whilst the ICTY also has jurisdiction over grave breaches of the Geneva Conventions and war crimes, the fact that the Rwandan conflict is not characterised as international results in the exclusion of these two crimes from its Statutes. Instead, Article 4 of the ICTR Statute deals with violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

\textsuperscript{42}Resolution 955 was adopted with 13 votes for, China abstaining and Rwanda voting against: Lyal, above \textit{n} 15, 5.
\textsuperscript{43} P Tavernier, ‘The experience of the International Criminal Tribunals for the former Yugoslavia and
At this stage in the proceedings, the former Yugoslav Tribunal has publicly indicted 64 individuals and has 29 in custody.\(^{44}\) The Rwandan Tribunal has indicted 35 persons and has 26 in custody.\(^{45}\) Indictments from both Tribunals include a range of actors from ‘small fish’ to extremely powerful individuals such as President Milosevic from the former Yugoslavia, and Jean Kambanda, the former Prime Minister of Rwanda. The judgments from these Tribunals to date have made significant advances in international criminal jurisprudence on topics such as the Security Council’s authority to create such bodies; their relationship with national courts; jurisdiction; trials in absentia; evidentiary matters; challenges to Judges and elements of the crimes to name a few.\(^{46}\) Decisions from these Tribunals have also had a crucial impact on the way the international community views and prosecutes sexual violence.\(^{47}\)

(iii) The International Criminal Court Statute

(a) History

On 25 November 1992 the General Assembly (GA) requested the ILC to draft a Statute for an international criminal court.\(^{48}\) This request was prompted by a specific call from a coalition of Caribbean States, who perceived an international criminal court could assist them with the transnational problem of drug traders.\(^{49}\) In 1994 the


\(^{46}\) For a detailed examination of recent legal developments in the ICTY, see Sean Murphy ‘Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (1999) 93 American Journal of International Law 57.

\(^{47}\) Much has been written on this topic: See, eg, Kelly Askin ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’ (1999) 93 American Journal of International Law 97.

\(^{48}\) GA Res 47/33, UN GAOR (73rd mtg), UN Doc A/RES/47/33 (1992) 3.

\(^{49}\) Benjamin Ferencz, ‘An International Criminal Code and Court: Where They Stand and Where
ILC provided the GA with a Draft Statute. In submitting the Draft Statute the ILC recommended that the GA call a conference to finalise the process, however, due to a lack of agreement on various issues among States an Ad Hoc Committee was created to continue discussions. When this Committee failed to arrive at a consensus on the ICC, the GA established a Preparatory Committee (PrepCom) to work with the Draft Statute and to develop:

a widely accepted consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

Six PrepComs were held at the United Nations in New York from March 1996 until April 1998. Not long after the 5th PrepCom of December 1997 the General Assembly proclaimed that a United Nations Conference of Plenipotentiaries (Conference) on the establishment of an international criminal court would be held in Rome from 15 June to 17 July 1998. The task of the Conference was to finalise the Statute and work towards the establishment of an international criminal court.

In order to assist in the consolidation of a text for the purposes of deliberations at the Conference, an intersessional meeting was held in the Dutch city of Zutphen in January 1998 and produced a revised ‘Zutphen’ text. This text, covered in a mass of square brackets reflecting the huge number of unresolved issues, formed the basis for the 5 weeks of negotiations in Rome.

51 GA Res 49/53, 49 UN GAOR (Supp 49) UN Doc A/49/49 (1994).
(b) **ILC Draft Statute**

The 1994 ILC Draft Statute has been at the core of all recent deliberations on the ICC. The ILC had numerous precedents to consider, including the Nuremberg and Tokyo Tribunal Statutes, the previous 1951 and 1952 Draft Statutes, and the ICTY and ICTR Statutes. It also considered the other broad range of crimes under international criminal law such as crimes defined in Conventions dealing with apartheid;\(^{55}\) torture;\(^{56}\) hijacking\(^{57}\) and drug trafficking.\(^{58}\) The five major principles in the ILC draft were:

1) That the ICC should be established by treaty rather than by resolution of a UN organ (such as the *ad hoc* tribunals) or as a Charter amendment;

2) That the ICC’s subject matter be limited to crimes already articulated in international treaties in force;

3) That the ICC have jurisdiction over private persons as distinct from States;

4) That the ICC should not have compulsory jurisdiction, rather jurisdiction would be consensual, thus supplementing rather than substituting national criminal systems;

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\(^{56}\) *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). As at 16 June 1999, there were 114 States Parties.


5) That the ICC not be a full time standing body, rather only called into operation when it was required.\textsuperscript{59}

These elements and many others were discussed at length during the PrepComs.\textsuperscript{60}

\textbf{(c) Rome Conference}

The Rome Conference commenced with broad State agreement on the structure of the Draft Statute, the basic framework of the international criminal justice system (including the merging of civil and common law systems) and some of the substantive issues, such as ‘complementarity’ (the relationship between the ICC and national courts).\textsuperscript{61}

In order to deal with the mass of work needed to be undertaken to complete its task, the Conference created three major organs, the Committee of the Whole, the Drafting Committee and the Plenary. The Plenary was responsible for the organisation of the work, the delivery of States’ policies and the formal adoption of the Statute. The Committee of the Whole undertook the development of the Statute and the Draft Committee’s task was to ensure consistent drafting was used throughout the process. Numerous informal working groups were held concurrently with the coordinators of these groups reporting the results of their work to the Committee of the Whole. Negotiations and drafting lasted late into the evenings and, in the final week, often all night.


\textsuperscript{60} Details on the PrepComs can be found in Cherif Bassiouni, ‘Observations Concerning the 1997-98 Preparatory Committee’s Work’ (1997) 25 Denver Journal of International Law and Policy 397.

Very few of the issues relating to the ICC were uncontroversial. The nature of the institution to be created through the Conference touched on a mass of issues layered together, from the obvious State sovereignty concerns and various criminal legal systems, to culturally relative views of matters such as the concept of punishment.\(^{62}\) As Philippe Kirsch, Chairman of the Committee of the Whole, has expressed ‘the conference was characterized by a mosaic of positions that transcended political and regional groupings.’\(^{63}\)

However, a number of ‘groupings’ can be identified, including the ‘like-minded group’ (LMG), which favored a robust and independent ICC. This group was created during the \textit{Ad Hoc} Committee and grew significantly at the Conference to over 60 States from all corners of the globe including a large number of countries from the European Union.\(^{64}\)

The other clear group consisted of the permanent members of the Security Council (SC) which, on the whole, pushed for a strong role for the SC in ICC matters, particularly relating to jurisdictional matters of the Court. States traditionally suspicious of the SC and members of the Non-Aligned Movement, in particular

\(^{62}\) For example, a number of countries advocating, unsuccessfully, for the death penalty were adamant that sentences involving life imprisonment were too cruel to contemplate.
\(^{63}\) Kirsch and Holmes, above n 61, 4.
\(^{64}\) The number of countries which are members of the ‘like-minded’ group is always in a state of flux, however it encompasses all corners of the globe. In June 1998 it numbered approximately 60 and included a large number of members of the European Union (excluding France) as well as nations such as Australia, Canada, Chile, Egypt, Finland, Malawi, New Zealand, Republic of Korea, Uruguay and Venezuela.
countries from the Asian region, wished for the role of the SC to be extremely limited and generally pressed the need for an ICC with restrictive powers.

The ‘mosaic of positions’ was most obvious during debates on Part 2 of the Draft Statute dealing with jurisdiction, admissibility and applicable law. This section contains the heart of the Court including the list of crimes, State consent requirements and the powers of the Prosecutor. Accordingly, States felt strongly about Part 2 and it was the most sensitive and complex area to negotiate. On the issue of the list of crimes, whilst the ILC Draft had suggested a range of international treaty-based crimes, there was early discussion that the ICC’s jurisdiction should be limited to the ‘core’ crimes of genocide, crimes against humanity and war crimes. However a large number of States, including Germany, advocated that the crime of aggression should be included, despite a lack of agreement on definition. Others, including the Caribbean States and Turkey, wished to see treaty crimes such as terrorism and regional drug trafficking remain in the Statute.

The definition of the ‘core’ crimes was a matter of heated dispute. In the PrepComs, suggestions had been made that the definition of genocide, found in the Genocide Convention\(^{65}\), was limited as it excluded the intent to destroy political or social groups. Early in the Conference it was agreed that the Genocide Convention definition should stay and that crimes against humanity should ‘catch’ crimes which would not fall under the strict definition of genocide. Dispute over whether crimes against humanity could be committed in times of peace as well as times of armed

conflict reflected the range of varied jurisprudence on this topic. Whilst the Nuremberg and Tokyo proceedings required a strict nexus between such crimes and crimes against the peace, the Yugoslav Tribunal does not demand concurrent prosecution of these two crimes and the Rwandan Tribunal cuts the nexus all together. The crimes to be listed under crimes against humanity, as well as whether the intent would be ‘widespread or systematic attacks’ or ‘widespread and systematic attacks’ were also matters of lengthy deliberations.

The crimes to be listed under the war crimes provision also demonstrated the diversity of State’s views. There was little contention about the inclusion of the ‘grave breach’ provision of the Geneva Conventions 66 nor were many concerns expressed relating to the serious violations of the laws and customs applicable in international armed conflict. The position of crimes committed during non-international armed conflict, other than those listed in common Article 3 of the Geneva Conventions, created great discord. The ‘like-minded group’ as well as a range of other States, argued passionately that the ICC must reflect the reality of massive violations occurring in a huge number of non-international armed conflicts currently being waged. However, a large number of countries were not comfortable with the thought of the Court having jurisdiction over internal disputes. The proposal that the Prosecutor should be able to initiate investigations on her/his own behalf was also hotly contended as the ILC draft

only contemplated States Parties or the Security Council being able to ‘trigger’ the Court.

Most highly controversial were matters relating to the jurisdiction of the ICC. Issues included whether a ratified State automatically accepted jurisdiction over the listed crimes and which States’ consent was required before a case could go before the Court. In relation to the former, the ILC draft outlined an intricate ‘opt in’ system where countries could ratify the Statute choosing which crimes to accept jurisdiction over. With reference to the latter issue, heated debate ensued on whether the consent of the State of the nationality of the accused, the territory where the crimes took place, the nationality of the victims or the State with custody of the accused, was required. Some States argued for none of the above, thus giving the ICC ‘universal’ jurisdiction. Other powerful countries insisted that the consent of the State of the accused was essential.

As the Conference drew near to the end, there was still little agreement on much of the substantial area, particularly that found in Part 2. With only two days remaining, and under apprehension that without consensus the negotiation process over the previous five years would unravel, the Bureau of the Conference advised that they would provide a ‘package’ text. The ‘package’ was developed by the Chairman and other members of the Bureau in consultation with various delegations, taking into account the various options canvassed over the previous five weeks of debate. The ‘package’ was eagerly awaited by all State delegates and non-State actors and became

67 Kirsch and Holmes, above n 61, 10.
available on the morning of the last day of the Conference. That evening a meeting of
the Committee of the Whole was called and India and the United States proposed
amendments to the ‘package’ that were not widely supported. The Conference then
moved to the Plenary where, due to concerns primarily relating to the State consent
requirements of the ‘package’, the United States called for a vote. 120 countries
voted in favor, 21 abstained and 7 voted against. The world had a Statute for an ICC
which had gained overwhelming support.

(d) Rome Statute

The Rome Statute is divided into 13 parts, consisting of 128 Articles fronted by a
preamble. Two major principles underlying the creation of the ICC are mentioned in
the preamble in addition to their articulation in specific Articles. The first is that it is
not a legal institution which aims to replace domestic courts. Several references are
made to the fact that the ICC is complementary to national criminal jurisdictions and
the preamble recalls ‘that it is the duty of every State to exercise its criminal
jurisdiction over those responsible for international crimes.’

The second is that the Rome Statute, as the preamble notes, has jurisdiction only over
the most serious crimes of concern to the international community as a whole. The
preamble recognises that ‘such grave crimes threaten the peace, security and well-
being of the world’.

68The thirteen parts are: 1) Establishment of the Court; 2) Jurisdiction, Admissibility and Applicable
Laws; 3) General Principles of Criminal Law; 4) Composition and Administration of the Court; 5)
Investigation and Prosecution; 6) The Trial; 7) Penalties; 8) Appeal and Revision; 9) International
The preamble reaffirms the purpose and principles of the Charter of the United Nations and mentions ‘States’ and ‘peoples’. No reference is given to individuals nor is the connection between peace and justice, deterrence, or the protection of victims mentioned. The ICC will enter into force on the first day of the month after the 60th ratification.\textsuperscript{69}

This section will not explain nor analyse the Statute. Relevant Articles will be dealt with throughout this thesis and the full Statute is easily available.\textsuperscript{70} However the thesis will briefly review Part 2 of the Statute, as it is the heart of the ICC, dealing with jurisdiction, admissibility and applicable law.

Article 5 of the Statute lists the crimes within the jurisdiction of the ICC including:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

As States could not reach consensus on the definition of aggression:

The Court shall exercise jurisdiction over [this crime] once a provision is adopted...defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.\textsuperscript{71}

\textsuperscript{69} As of January 2000 five States had ratified the Statute, San Marino; Senegal; Trinidad and Tobago; Italy and Fiji.

\textsuperscript{70} A copy of the Rome Statute can be found at <www.un.org/icc>.

\textsuperscript{71} Rome Statute, art 5(2).
The definition of genocide reflects that of the Genocide Convention (Article 6). The definition of crimes against humanity does not demand a nexus to armed conflict and requires ‘widespread or systematic attack directed at any civilian population’. The list of such crimes includes murder; extermination; forcible transfer of population; torture; persecution; enforced disappearance; apartheid and ‘other inhumane acts of a similar nature’ (Article 7(1)(a)-(k)). There is a specific and detailed list of crimes concerning sexual violence including rape, sexual slavery, and enforced pregnancy (Article 7(1)(g)). These crimes are defined in more detail within the section dealing with crimes against humanity (Article 7(2)).

The war crimes provision states that the ICC shall have jurisdiction in respect of ‘war crimes in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes’ thus not creating a strict threshold (Article 8(1)). Grave breaches of the Geneva Conventions are included (Article 8(2)(a)) as well as other serious violations of the laws and customs applicable in international armed conflict (Article 8(2)(b)). The provisions of Article 3 common to the four Geneva Conventions is listed (Article 8(2)(c)) as well as a range of crimes committed in non-international armed conflict, such as attacking civilians not taking part in hostilities (Article 8(2)(i)); attacking humanitarian workers (Article 8(2)(ii); sexual violence (Article 8(2)(vi) and actively using children under the age of 15 in hostilities (Article 8(2)(vii)).

Except in a situation of referral from the Security Council, in order for the ICC to exercise jurisdiction, either the State or territory in which the act occurs, or the State
of which the person being investigated is a national, must be a State Party or have accepted jurisdiction (Article 12). In such situations, the ICC will only get access to a case when a State with primary jurisdiction over the matter is 'unwilling or unable genuinely to carry out the investigation or prosecution' (Article 17). A State Party, the Security Council or the Prosecutor can initiate an investigation (Article 13). The applicable law is listed as not only the Statute, but also '[a]pplicable treaties and principles and rules of international law, including the established principles of international law of armed conflict.'

CONCLUSION

It is naive to assume that the development of the International Criminal Court will result in the complete eradication of breaches of international criminal law or revolutionise human behavior. On the other hand, such a court reflects the reality that crimes are not committed by abstract entities but rather by individuals and that it is thus essential to develop an international system that punishes individuals. The established systems relating to jurisdiction, admissibility and applicable law are complex and there are many unanswered questions relating to how this ambitious international legal institution will work. However, on the eve of the end of the most violent century in history, the development of the Statute for the ICC indicates that a vast number of States acknowledge the need for a permanent international legal institution to end impunity for those who commit atrocities.

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72 Rome Statute, art 21.
PART 2
CREATING THE
INTERNATIONAL CRIMINAL
COURT:
ROLE OF NGOS AND THE
INTERNATIONAL COMMITTEE
OF THE RED CROSS
CHAPTER 3
THE ROLE OF NGOS IN CREATING THE
INTERNATIONAL CRIMINAL COURT STATUTE

This Chapter demonstrates that NGOs played a significant role in the creation of the Statute for the International Criminal Court (ICC). The Coalition for an ICC (the Coalition) was developed early in the United Nations negotiation process to act as an umbrella for organisations wishing to see a just and effective ICC. The Coalition undertook a range of activities at the Preparatory Committees in New York including writing papers, holding meetings with State delegates, lobbying and global dissemination of the need for an ICC. These activities were continued with intensity at the Diplomatic Conference. This Chapter takes a sample of NGO writings and analyses the direct influence these papers had upon the drafting of the Statute. Due to the large numbers, skills and organisation of the Coalition it was able to keep a more comprehensive track of the complex negotiations at the Diplomatic Conference than most of the government delegations. NGOs also provided a crucial linkage with the media and added creativity, emotion and colour to debates. Issues such as the stark philosophical differences between various NGOs on certain topics, highlights the question of whether civil society should trade diversity of opinion for efficiency. This Chapter also warns of the dangers involved in trying to quantify the exact input from non-State actors in treaty making. However it acknowledges that the range of activities engaged in by the NGO community did greatly assist in making a Statute for an effective ICC.

1. NGOS AT THE PREPARATORY COMMITTEES FOR AN INTERNATIONAL CRIMINAL COURT

The NGO movement has no single inspiration or aspiration, neither a spiritual nor secular authority to define one belief for all within it, no pope and no central committee.1

Pursuant to Resolution 50/46,2 adopted on 11 December 1995, the UN General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court (ICC) (hereafter PrepCom).

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As previously discussed, this Committee was directed to review the major substantive and administrative issues arising from the Draft Statute and to draft texts with the view to preparing a widely accepted consolidated text. The PrepCom's task was to lay the groundwork for a Conference of Plenipotentiaries to finalise and adopt a convention on the establishment of an International Criminal Court. In 1995 the *Ad Hoc* Committee had framed some of the issues, however, most of the substantive work was undertaken in the PrepCom.

In accordance with its mandate, the PrepCom met six times at the United Nations in New York. The first meeting was convened in March-April 1996 and the final meeting was held in March-April 1998. Topics dealt with at the PrepComs included the definition and elements of the crimes; the penalties and organisations of the court; procedures; complementarity; the trigger mechanism; the relationship with the UN; final clauses and the issue of finances. In 1996, the PrepCom stated that it 'considers that it is realistic to regard the holding of a Diplomatic Conference of Plenipotentiaries in 1998 as feasible.' This target was realised with a five week Diplomatic Conference hosted by the Government of Italy in Rome in June-July 1998, where the Statute for the ICC was concluded.³

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Coalition for an International Criminal Court

The PrepComs were attended not only by a large number of State delegations but also a wide range of NGOs. The largest NGO grouping working towards the creation of an ICC was the Coalition for an International Criminal Court (the Coalition). This Coalition brought 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. Its key goal was to foster awareness and support among a wide range of civil society organisations: human rights, international law, judicial, humanitarian, religious, peace, women’s groups and others. To this end, the Coalition undertook the following activities:

- Convening the Coalition and its working groups concerned with such issues as gender, children, victims’ rights, religion, and peace;
- Creating and maintaining a World Wide Web page, international computer conferences and listserv mail lists to facilitate the exchange of NGO and expert documentation and information concerning the ad hoc International Criminal Tribunals and the ICC negotiations. The aim here was to foster discussion and debate about substantive issues arising from the negotiations for establishing a permanent International Criminal Court;
- Facilitating meetings between the Coalition and representatives of governments, UN officials and others involved in the ICC negotiations;
- Promoting education and awareness of the ICC proposals and negotiations at relevant public and professional conferences — including UN conferences, committee, commission and preparatory meetings;
• Producing a newsletter, media advisories, reviews and papers on developments in the course of negotiations.⁴

The Coalition has over 500 Participating Organisations which are diverse and include the American Bar Association, Amnesty International, B’nai International Community, Coordinating Board of Jewish Organizations, Drug Free Society, the European Law Students Association, the Evangelical Lutheran Church in America, Global Policy Forum, Human Rights Watch, International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, the Quaker UN Office, United Nations Association of USA, the World Federalist Movement and the Young Democratic Society to name a few. However, attendance at the PrepComs was usually limited to 30 to 50 organisations.

The history of the creation of the Coalition stems back to the re-emergence of the debate for an ICC at the UN. As discussed in Chapter 2, concerned with the high incidence of drug trafficking in Trinidad and Tobago and the lack of an international institution to deal with the issue, a Caribbean representative raised the concept of an ICC in the General Assembly (GA) in the early 1990s.⁵ Requested by the GA to prepare a draft Statute for an ICC, the International Law Commission (ILC) presented their finished product to the GA in November 1994.⁶

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⁴ Coalition for an International Criminal Court, About the Coalition 2-3. William Pace is the current Convenor of the Coalition and is also the executive director of the World Federalist Movement-Institute for Global Policy.  
⁵ See Chapter 2 for a discussion on the creation of the ICC.  
⁶ For a detailed discussion on the draft Statute see, eg, James Crawford ‘The ILC Adopts a Statute for an International Criminal Court’ (1995) 89 American Journal of International Law 405-16.
At the time the ILC presented the Draft Statute to the GA, only a few NGOs were present. Due to the fact that the issue had been on and off the agenda of the international community for almost 100 years and had not been discussed in any substantive way for more that 40 years, very few NGOs took the concept seriously. However, in 1994 William Pace from the World Federalist Movement met representatives from Amnesty International and discussed the actions that NGOs could undertake to enhance the debates surfacing on the ICC. Amnesty International produced a paper entitled ‘Establishing a Just and Effective International Criminal Court’ highlighting some of the issues of concern in relation to the proposed Court.

In February 1995 a meeting of interested NGOs was convened and there was agreement that they should intensely cooperate on the ICC and form a Coalition. It was deemed that a Coalition was needed due to the limited resources in the face of the overwhelming amount of work to be undertaken. Combining knowledge, networks, staff and economic resources was seen as the best method to impact upon the UN debates. Furthermore, the Coalition could potentially assist in avoiding repetition and duplication by allocating certain issues to different groups with specific expertises on topics such as victims, children, peace and women. However, eventually, many of the large NGOs preferred to take individual positions on all issues, despite their similar views in most instances. This preference was both ideological, due to the difficulties of the coordination of one major policy in such a Coalition, as well as practical as this was more useful for certain groups in relation to fundraising.

7 Amnesty International, Establishing a Just, Fair and Effective International Criminal Court (October
Large and powerful NGOs, such as Amnesty International, the International Commission of Jurists and Human Rights Watch were not perceived as appropriate organisations to coordinate the Coalition due to their potentially strong views on specific elements of the ICC and the robust internal relationships found in such groups. The World Federalist Movement (WFM), positioned in New York, with close access to the UN, was seen as small and ‘neutral’ enough to convene the Coalition. As an organisation it was also ‘trusted’ by a range of NGOs, which in other instances can become competitive with each other. WFM was not perceived as a ‘threat’ to any organisation. As a secretariat, it is able to send out information to broad networks, make available information on the internet, quickly gain direct access to material, and to generally make sure that a wide range of non-State actors started to develop views on the ICC.8

The Coalition was always envisaged as informal, and there has never been any attempt towards formalisation, such as legal incorporation. The procedure to become a participating organisation in the Coalition is simple — merely involving returning a form which advises that the organisation endorses in principle the creation of a just and effective International Criminal Court and wishes to be involved at some level with efforts to create an ICC. There are no memberships available for individuals and no membership fee. Members are rather encouraged to support the Coalition as they are able.9 In this sense the Coalition allows smaller NGOs to play a role and support the ICC, even to a limited extent, so that they can be part of the overall structure.

8 Interview with William Pace, Convenor NGO Coalition for an International Criminal Court (New York, USA, 25 November 1996).
Major decisions relating to the Coalition are undertaken by a steering committee consisting of members from Amnesty International, the European Law Students Association (ELSA), Federation International des Ligues des Droits de l'Homme, Human Rights Watch, the International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, the Women's Caucus for Gender Justice in the ICC and the World Federalist Movement. This steering committee continues to be expanded.

Due to the broad range of actors involved and the different NGOs functioning under the same banner the Coalition has been determined from its inception not to take a specific stand on any of the issues related to the ICC. The only position that the Coalition articulates is advocating the creation of a 'just and effective International Criminal Court.' This decision, at times, has proved to be controversial. Numerous discussions have been held on whether or not the Coalition should develop a small number of 'common positions', in particular the definition of 'just and effective.' It was argued by some members that without a clear understanding by the whole Coalition of its defined aims, the organisation may not be fulfilling its mandate of effective lobbying.

On the other hand, others advanced that the strength of the Coalition lies in the fact that it is perceived as non-political and able to incorporate a range of diverse views, under the umbrella of advocating for the Court. In this sense the Coalition is an administrative body, providing a platform for information rather than policy. Thus, as

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9 PrepCom Six Special Edition, The International Criminal Court Monitor (New York, USA), April
a whole, the organisation is deemed neutral which in turn provides increased access to discussions on the ICC at all levels. Furthermore, it was suggested that in some instances the creation of a common position within a coalition can result in the development of the lowest common denominator, rather than a cohesive and useful policy.\textsuperscript{10} However this proposition was contested. With numerous actors involved, many with specific agendas in relation to the Court,\textsuperscript{11} it would be a complex and potentially restrictive process for participating organisations to agree upon certain positions often not relevant to their mandate.

This tension between formalising an organisation and remaining informal, reflects the broader relationship between NGOs and the UN system as discussed previously. The push towards streamlining the process and encouraging stronger coordination of substance would no doubt result in greater efficiency, but can be at the cost of participation. During every PrepCom the Coalition continued to remain informal in structure and did not develop common positions, serving rather to raise awareness of the positions of its members.

(ii) Activities undertaken by the Coalition at the PrepComs

The Coalition's members played an extremely active role during every PrepCom held in New York. It is important to note that the CICC was the main source of information on the ICC for governments, NGOs and the media alike.\textsuperscript{12} On the whole,

\textsuperscript{10} Discussions held at a full day meeting of the NGO Coalition for an International Criminal Court (UN Plaza, New York, USA, 10 July 1997).
\textsuperscript{11} For example: Caucus on Children's Rights in the ICC; Women's Caucus for Gender Justice; Redress.
\textsuperscript{12} Discussion with William Pace, Convenor NGO Coalition for an International Criminal Court (email, Melbourne, Australia, 13 June 1999).
activities were focused on three major areas: (1) the preparation and delivery of papers and writings on the International Criminal Court; (2) meetings and discussions with government delegations; and (3) lobbying and policy development aiming for dissemination to assist domestic NGOs to put pressure upon their respective governments.

During the *Ad Hoc* Committees and the first PrepCom, the Coalition did not have access to a room in the United Nations Building and hence had to conduct all activities in areas such as the Delegates’ Lounge, UN public areas and the Church Centre of the UN. On the one hand there were disadvantages in relation to issues of privacy. However, some benefits were discovered with the use of public spaces. In particular, discussions were transparent and it became obvious that the Coalition was able to conduct meetings with eminent jurists, powerful State representatives and senior members of the UN structure. This assisted the Coalition to develop both exposure and credibility. The concept of the different benefits gained with ‘public’ rather than ‘private’ space continued to be used as a tool throughout the whole negotiating process. Even once the Coalition obtain its own room, certain meetings continued to be held in coffee shops and UN public areas.

In August 1996 during the second PrepCom, the Coalition was allocated a room within the UN Building in which to hold meetings, distribute documentation and undertake other activities. Meetings of the Coalition were held every morning before the PrepCom commenced and also at the end of the day’s proceedings. At these

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13 Interview William Pace, above n 8.
meetings papers from previous sessions and summaries of discussions were provided to each participating organisation present, strategies for the day were developed and on some occasions meetings with State representatives were held. There were also evening meetings scheduled for drafting or discussions. The administrative tasks of copying papers (the Coalition was provided with only one copy of each document from the UN Secretariat), allocating notetaking roles, arranging times for discussions with delegates and organising passes for members to attend the UN debates, was considerable. Individuals were able to attend the PrepCom discussions if they were members of an NGO with accredited status at the UN.

Considering the potential for political tensions within the Coalition, the coordination of activities proceeded rather smoothly. In some instances there were concerns raised when certain participating organisations were perceived as not following agreements made on the subject matter to be raised with government delegations. However, on the whole, goodwill and cooperation prevailed. The informal structure allowed all members to participate in discussions on policy strategy, including, for example, the allocation of responsibilities to discuss designated topics with specific country delegations. In relation to geographic representation, the extremely limited number of NGOs from the Asian region was disappointing.\textsuperscript{14} The African continent provided numerous representatives from various NGOs, with the economic assistance of countries such as The Netherlands and other northern European countries, the European Union, Ford and MacArthur Foundations. This resulted in valuable

\textsuperscript{14} At the August 1996 PrepCom the Lawyers Committee for Human Rights assisted a member from the Philippine NGO, Alterlaw to attend the proceedings. However, throughout the 3 years of discussion no paper was made available from any NGO of the Asian region.
regional contributions.\textsuperscript{15} The lack of strong Asian NGO participation was the result of a number of factors. These include limited funds available for international travel, the difficulties experienced by a number of Asian NGOs in creating a voice for civil society within their own countries and the low priority many Asian Governments placed on the creation of an ICC, stifling community debate on the topic. Whilst the Australian Government had made significant efforts to involve regional government delegates on the ICC, it was a great pity NGOs within Australia did not undertake any programs to assist in rectifying the situation of limited voices from the region.

It is impossible to ensure that the non-State actors input into UN treaty negotiations are globally ‘representative’. Even if economic inequalities relating to resources to attend meetings where taken out of the equation, there is no guarantee that there would be NGOs in every geographical region skilled or interested in the topic. Rather it is important to note the limitations in claims of ‘representation’.

(a) \textit{NGOs' Position Papers}

The numerous analytical writings on the ICC authored by members of the Coalition played an extremely significant role in the PrepCom debates. Some papers were personally handed to government delegates or they were made available on a table next to the entrance of the meeting room. Topics ranged from technical legal and jurisdictional matters; the rights of suspects; the needs of victims and witnesses; the right to a fair trial and the cooperation between the ICC, national jurisdictions and the Security Council. Whilst it is unlikely that every government delegate read every

\textsuperscript{15} See, eg, 'The Cooperation Between the ICC and National Jurisdiction' (Working Paper, The African
NGO position paper, references were regularly made to many of the writings during the debates. In some instances, State representatives quoted directly from NGO papers adopting the ideas as their own position and in other cases they referred the PrepCom to NGO documents. The papers were of particular use to State delegates from countries with limited resources. The papers often provided ideas and detailed research on the specific topics under discussion with NGOs responding to requests from States for information.\(^\text{16}\)

In their writings the NGOs often ‘pushed the boundaries’ by arguing for matters that \textit{prima facie} had not been agreed upon, nor initially considered, by States. This is an extremely important role for civil society to undertake in the course of international treaty negotiations — attempting to stretch parameters on matters that may have initially appeared to be unfeasible. Initially, for example, even supportive States wanted to limited the ICC to the suggestions made in the ILC Draft Statute, which included numerous limitations such as no independent prosecutor and ‘opt-in’ clause for all crimes excluding genocide. The NGOs were able to channel the negotiations away from this minimalist view of the ICC and suggest new concepts. This process allowed progressive States to consider the merit of ideas unlikely to have been included in their Governments’ instructions and also enabled those States not in favour of a strong Court to review the range of options in a new context. There is no doubt that NGO position papers, as well as lobbying, played a major part in the

\(^{16}\) Interview with Richard Dicker, Counsel for Human Rights Watch (New York, USA, 24 October 1996). Human Rights Watch was thanked by a number of State delegates for providing useful information.
drafting of numerous articles. The next section will examine the direct impact of NGOs writings on a number of specific topics.

_Trigger Mechanisms_

The 'trigger mechanisms' involve acceptance of the Court's jurisdiction, State consent requirements and the method by which cases are brought before the ICC. In relation to the latter point, the original ILC Draft Statute only envisaged the Prosecutor initiating investigations and proceedings under two circumstances. The first of these enabled States who were a party to the Statute to lodge a complaint with the prosecutor under Article 25(2) if they had accepted the Court's jurisdiction over the crime in question. The second method provided for was Article 23(1) which allowed the Security Council, acting under Chapter VII of the Charter of the United Nations, to refer matters to the ICC. No mention was made of the Prosecutor having the capacity to 'trigger' cases either himself or herself. However, the final Statute includes a third option which enables the Prosecutor to initiate investigations on his or her own accord.¹⁷

NGOs significantly contributed to this third provision, sometimes entitled the 'independence of the prosecutor.' A broad range of papers and documents were

¹⁷ Statute of the ICC, art 13 provides
   The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provision of this Statute if:
   (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
   (b) A situation in which one or more such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
   (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
submitted on this topic. The proposed exclusive instigation powers of States Parties and the Security Council was criticised by many NGOs who found the complaint procedure 'to be unnecessarily narrow.\textsuperscript{18} Amnesty International wrote in this regard:

Amnesty International has consistently urged that an independent prosecutor have the power to initiate investigations and prosecutions on his or her own initiative, without having to wait for a political body, such as the Security Council or a State party.\textsuperscript{19}

Similarly, the Lawyers Committee for Human Rights urged that the Prosecutor be allowed to trigger the jurisdiction of the Court of his or her own accord, that is without being moved by a formal complaint from a State Party or the Security Council. This was considered necessary to strengthen the effectiveness of the Court in determining and punishing serious crimes of concern to the international community as a whole.\textsuperscript{20}

A large number of NGOs stressed that the independent Prosecutor and broader trigger mechanisms were critical to the credibility of the ICC. As the European Law Students' Association expressed:

[T]he International Criminal Court should be completely independent of political pressure, to enable it to establish a name for itself as a legal institution.\textsuperscript{21}

\textsuperscript{18} 'Commentary for the Preparatory Committee on the Establishment of an International Criminal Court' (Paper produced by Human Rights Watch, August 1996) 2.


Some NGOs argued that the drawbacks of the limited initiation of prosecutorial investigations included the potential use of the ICC by States for political purposes. The likelihood of States not bringing complaints against nationals of other States due to the fact that this could be perceived as politically hostile or damaging to their foreign relations was raised. The extremely low incidence of use by States of complaints procedures against other States in human rights treaties, was cited as an example.\textsuperscript{22} The difficulties of a case being investigated when the crimes occur within one State, thus the territorial and national State being one and the same, was pointed out by the International Commission of Jurists:

Without a broader complaint procedure, it is difficult to envision how the Court will be empowered to try cases of alleged crimes under international law (excluding genocide) that are committed within a single State. Indeed, it is situations such as these that warrant the establishment of an International Criminal Court in the first instance\textsuperscript{23}

Most NGOs also advocated that the Statute ought not only allow the Prosecutor the independence to instigate investigations on his or her own accord, but also that information be taken from an extremely broad range of sources. In a paper entitled \textit{The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor} the Lawyers Committee for Human Rights wrote:

The Lawyers Committee supports the right of states parties and the Security Council to trigger the court's jurisdiction. We believe, however, that these two mechanisms need to be supplemented by expanding the discretionary power of the prosecutor to initiate proceedings of his or her own accord. Specifically, the prosecutor should have the authority to initiate investigations \textit{ex officio}, or on the basis of information obtained form various sources,

\textsuperscript{22} No States have used the state complaint procedures in Article 41 of the International Covenant on Civil and Political Rights, and only a few states have used such procedures under Article 24 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See, eg, Amnesty International, above n 7, 28.

including governments, United Nations organs, inter-Governmental organizations and non-government organizations (NGOs).  

On the same issue Human Rights Watch advised in a commentary:

[We] believe that in order to establish an independent and effective Court it is critical that the Prosecutor be empowered to initiate investigations ex officio on the basis of information obtained from any source. The contribution of information from victims is of particular importance and would be especially valuable in bringing perpetrators to justice.  

In relation to fears raised by some delegates that this would result in the ICC being overloaded with trivial complaints, NGOs raised the precedent from the International Criminal Tribunal for the former Yugoslavia. Article 18 of that Statute provides that:

the Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, inter-Governmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

The Statute of the ICC reflects the arguments advanced by many NGOs and governments, with the Prosecutor being granted the right to seek additional information from States, organs of the United Nations, inter-Governmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.  

Finally, a number of NGOs advocated that individuals should be able to file complaints directly to the ICC. In that event, survivors of crimes, their relatives or

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26 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993); 32 ILM 1203 ('Statute of the ICTY').
NGOs on their behalf would be able to have direct access to the Court. The fears expressed by States in the debates that such a procedure would lead to the Court being inundated with complaints were dealt with by NGOs using examples of individual complaint mechanisms found in some human rights treaties.\(^{28}\) These treaties impose restrictions on individual complainants and require them to be made by persons who are subject to the jurisdiction of a State Party to the treaties and after having exhausted all available domestic remedies. One suggestion put forward in debates, and agreed upon by the Lawyers Committee for Human Rights was for the creation of a Special Commission to be set up to review the admissibility of individual complaints before any decision on action is taken.\(^{29}\)

This proposal is an example of NGOs ‘pushing the boundaries.’ It was clearly understood by the majority of the Coalition that it was unlikely for States to agree to individuals having the capacity to initiate proceedings. However, such a ‘radical’ suggestion made the prospect of an independent Prosecutor appear more acceptable and less threatening than that of individual citizens ‘triggering’ the Court. An independent Prosecutor was thus seen as a less extreme option. It would be dangerous to overstate the impact of NGO writings on the ‘trigger mechanisms’, especially considering the fact that the PrepComs were forums dealing exclusively with decisions made by States. Yet the momentum for the final version of Articles 13 and

\(^{27}\) Statute of the ICC, art 15. For a further discussion on this topic see Chapter 5 of this paper.

\(^{28}\) For example, the NGOs relied upon the Convention on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, art 22 (entered into force 26 June 1987) (‘Torture Convention’); the Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 383 (entered into force 23 March 1976) and the proposed Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

\(^{29}\) See, eg, Lawyers Committee for Human Rights, ‘Establishing an International Criminal Court’,

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15 was greatly enriched by the pressure, ideas, research and analytical writings of the Coalition members.

Whilst a majority of the Coalition papers on legal issues were the product of powerful, internationally acclaimed NGOs, this was not always the case. Position papers on a range of topics were made available to delegates from individuals\(^\text{30}\), law students’ groups\(^\text{31}\) and new NGOs established specifically to contribute to the debates surrounding the creation of the ICC. The Women’s Caucus for Gender Justice in the International Criminal Court (Women’s Caucus) is an example of a specific focus member of the Coalition. Created in February 1997 with the assistance of the Coalition, the Women’s Caucus aimed to advocate the incorporation of a gender perspective to the proposed International Criminal Court. The primary goals of the Women’s Caucus include:

* ensuring the participation of women’s human rights advocates from all regions in developing positions that should be incorporated into the ICC treaty;

* building a political force which will influence governments negotiating the ICC through advocacy with foreign ministries at home;

* building a delegation of women to participate in developing and lobbying the positions of the Caucus at the UN meetings;

* using the occasion of the negotiation for popular education in women’s human rights and strategies, including the ICC, for holding perpetrators accountable.\(^\text{32}\)

above n 20, 20.

\(^{30}\) See, eg, B Ferencz Crimes to be Tried by an International Criminal Court (1996).

Among their various activities the Women’s Caucus was responsible for a number of influential written recommendations and commentaries. In particular the Women’s Caucus played an extremely significant role in pushing for the inclusion of sexual violence within the ICC’s jurisdiction as both a crime against humanity and a war crime during international and internal armed conflict. With careful coordination it created a Legal Text Drafting and Vetting Group, identifying relevant areas of the Statute and allocating work to various legal experts on gender issues from around the world. Utilising a strong international women’s legal network and information technology, such as faxes and emails, the Women’s Caucus was able to develop comprehensive and articulate papers to impress upon delegates that a gender perspective in the ICC was essential.

**Witness Protection**

During the PrepCom of August 1997 one of the areas of concern to the Women’s Caucus and other NGOs was the provision of appropriate and effective witness protection procedures. The ILC’s Draft Statute had made limited reference to this issue. Article 43 dealing with protection of the accused, victims and witnesses stated that:

> The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Concern was expressed by the Women’s Caucus as to the numerous instances in the Draft Statute where the accused was included in the same category as victims and

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witnesses. In a document making recommendations in relation to this area the 

Women’s Caucus wrote:

It is essential to distinguish between the degree and type of protection required 
by the accused and that which should be accorded to victim and witnesses. In 
this context witnesses refers to individuals giving evidence for both the 
prosecution and the defence. In some circumstances the accused may lose 
certain rights (such as privacy) which are particularly important to witnesses 
and victims. A lack of distinction between these two groups, the accused on 
one side and victims/witnesses on the other, may be legally confusing or 
incorrect.33

The document then continued:

It must also be recognized that certain rights given to witnesses and victims 
encourage individuals to give evidence and report offences. Unlike the 
situation of the accused, the appearance of the witnesses before the court and 
the reporting of offences by victims is likely to be discretionary and depends 
on their willingness to participate. Ensuring that witnesses are available to 
testify at trials is essential to the integrity of an international criminal 
proceeding. Providing suitable environments and conditions for victims and 
witnesses to provide investigatory bodies with evidence will provide 
momentum for prosecution. This is of particular importance in cases of sexual 
and gender violence where the protection of identity and privacy, and the 
avoidance of intimidation, retraumatisation, and retaliation against witnesses 
and family members must be an inextricable part of the Court’s assessment of 
the rights of the accused and the guarantee of a fair and impartial trial.34

A number of specific suggestions made by the Women’s Caucus in relation to the 
wording of the provision dealing with protective measures were not adopted.35 

However, the final text of the Statute differs greatly from that recommended by the 
ILC and incorporates many of the concerns expressed by the Women’s Caucus and 
other NGOs writing on this topic. Article 68 of the Statute of the ICC deals with

33 ‘Recommended Amendment to Article 27’ (Paper produced by Women’s Caucus for Gender Justice 
in the International Criminal Court, August 1997).
34 Ibid.
35 See, eg, ‘Recommendations and Commentary For August 1997 PrepCom On The Establishing Of An 
International Criminal Court - Part II: Procedural Matters’ (Paper produced by Women’s Caucus for 
Gender Justice in the International Criminal Court, August 1997) 3.
protection of victims and witnesses and their participation in the proceedings and states that:

(1) The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 2, paragraph 3, health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

This evolution and ‘fleshing out’ of articles dealing with the protection and right of victims and witnesses was the result of the efforts of numerous Coalition members and many delegates committed to this issue. The writings of the Women’s Caucus on this and other topics contributed greatly to the discussions and variety of options States had to eventually consider. With the active work undertaken by the Women’s Caucus the issue of gender within the ICC could not be ignored by delegates attending the PrepComs.

Financing the ICC

NGOs also produced papers dealing with the administrative aspects involved in creating the ICC. A paper written by the World Federalist Movement entitled ‘Prospects for the Financing of an International Criminal Court’ proved to be of great assistance and was raised by a number of government delegates during the PrepCom as a useful document. Among other things this document summarised the

negotiations on ICC finances to date, highlighted the various State positions on matters of finance, set out the position of NGOs on the issue and examined precedents of funding other international bodies such as the ad hoc Tribunals and the International Court of Justice. The paper stressed the importance of adequate and non-politicised funding and concluded that the Court should be a freestanding body with its own system of assessments based on a tiered model allowing fair distribution amongst all States to the United Nations. Furthermore, it was suggested that a voluntary International Criminal Justice fund be developed to be administered by the registrar to assist poor defendants, States Parties to the Statute and aid in victim compensation. States, individuals and private groups were considered eligible to contribute to the fund. The fund would also be used as a deterrent in that, 'the assets of convicted international criminals should also go into such a fund.'

The ILC Draft advocated two possibilities for financing the Court, one being directly by States Parties and the other being economic support from the United Nations. States Parties’ views on the topic ranged in the PrepCom debates from agreement with the ILC’s suggestions to statements indicating that the consideration of the budget was premature. The idea mooted by the United States, that States who initiate proceedings cover the costs, was hotly debated, especially by a number of developing countries, arguing that this would deter nations without ample budgets from becoming involved in the Court.

The matter of financing the ICC has not been fully resolved in the Statute of the ICC.

Article 113 states

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of State Parties, including its Bureau and subsidiary bodies, shall be governed by the statute and the Financial Regulations and Rules adopted by the Assembly of State Parties.

Article 115 stipulates that the funds of the Court shall be provided by assessed contributions from State Parties and monies provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. Article 116 of the Statute of the ICC allows the court to:

[R]ecipe and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporation and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

The Rules to be adopted by State Parties will further clarify financial matters for the ICC. Creative suggestions from NGOs, such as the voluntary economic involvement of Non-State Actors including individuals and corporations, have had a direct impact upon discussions on this topic.

The writing and distribution of NGO position papers was an extremely valuable task for members of the Coalition to have undertaken. The informal structure of the Coalition proved to be both its strength and weakness in this area and was a classic example of participatory democracy. The structure enabled any member of the Coalition to write a paper and provide government delegates with a copy, as long as it was credited to the specific participating organisation. The Coalition had no vetting process, no committee to review the quality, or lack-there-of, of documents. Rather,
the Coalition provided administrative support such as photocopying and members assisted each other by discussing ideas and previewing positions. This allowed the plethora of voices of civil society interested in the ICC to contribute to this important debate upon a vast range of topics. Hundreds of papers were produced and this section previewed only a very small selection.

On the negative side, delegates had no guarantee of the quality in either the substance or the form of documents produced under the umbrella of the Coalition. Like some of the government papers produced the usefulness of documents written by NGOs did vary according to the individual author’s or organisation’s expertise and experience. NGOs such as Amnesty International were able to provide fulsome and detailed research on a vast range of matters relating to the ICC. Such papers added greatly to the educational and research consultative contributions from NGOs. Other NGOs, without the technical skills and resources, focused upon limited and specific issues. On some matters there was no unity in the views expressed by members of the Coalition, for example, whether or not the crime of aggression should be included within the Court’s jurisdiction. However, delegates were under no obligation to read NGO papers and soon made decisions about the use of availing themselves of various NGOs’ positions. Furthermore there is a strong degree of merit in civil society being able to express a range of sometimes contrary views. Just as there are differences of opinions between, and sometimes within, State delegations so too should NGOs have the right to reflect intellectual freedom at international negotiations.
(b) **NGO Meetings with Delegates**

During the PrepComs the Coalition organised a large number of meetings between NGOs and delegates. These ranged from formal meetings with the whole of the Coalition, to smaller discussions and one-on-one talks. Each format differed, depending on the purpose of the meeting and was carefully chosen with this in mind. In most cases the reason for meetings was to allow NGOs to listen to States express their positions on the ICC and thus gain a better understanding of States’ concerns. This provided opportunities for Coalition members to raise questions and debate matters with State representatives. It was also discernible from these meetings that a number of such cases were followed up by bilateral meetings and further networking. At all levels of meetings, NGOs were able to ask State representatives if there was any assistance required in the area of research or the provision of information. The timing of such meetings, either before the PrepCom or during lunch breaks or at the end of the day, was important as often the position of a country on an upcoming topic of debate related to potential lobbying or the creation of position papers.³⁸

The purpose of other meetings was to enable members of the Coalition to make inquiries from selected States as to the reason why they had taken certain attitudes towards the creation of an ICC. In the course of these meetings robust debate was embarked upon, in particular with governments such as the United States who have a strong domestic understanding of the role of civil society. It is important to

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³⁸ For example, after discussions with certain State delegates in relation to amnesty laws and admissibility under Article 35, and being aware that the matter would be discussed during the next day, Human Rights Watch produced an informal paper dealing with the topic, with headings such as ‘Thoughts on why delegates should support the Court’s ability to exercise jurisdiction in the face of amnesty laws.’ ‘Note on Amnesty Laws and Admissibility Under Article 35’ (Paper produced by Human Rights Watch, 1997).
acknowledge that not all nations are positive about the participation of NGOs in international law, in particular the development of international law at the UN. States such as China, who at times have expressed the need to restrict political and civil rights in order to advance the economic and cultural foundations of their nation, have a limited history of dealing with pressures from NGOs. However the Coalition did meet with China several times during the PrepComs. Even countries which take a liberal view on the development of an active civil society, are at times wary of NGOs. On the other hand, some countries believe it is important to establish a dialogue with civil society and expressed disappointment if they were not invited to address the Coalition during PrepComs. The Coalition was aware of these considerations and organised meetings accordingly.

Due to careful consideration of these issues the Coalition was seen as a useful and safe vehicle through which NGOs and governments could interact. For example, when meeting with a country which did not have a history of active domestic NGO participation, it was necessary to carefully plan a course so as to allow interaction without intimidating or threatening delegates. In this sort of situation, informal and small meetings were more appropriate. The type of NGO representatives to be included in such meetings was also important. For some countries, discussions were not as fruitful if members from international groups involved in advocacy such as Amnesty International were present rather than local, culturally relevant NGOs. The limited involvement at the PrepCom of members of civil society from the Asian Region to some degree restricted the capacity for the Coalition to hold detailed discussions with such countries.
One of the most successful meetings held at each PrepCom was a reception hosted by the Coalition. A surprisingly large number of State representatives attended each of these occasions and the mood was relaxed and friendly. With ample food, drink, musical entertainment and limited speeches the reception provided a unique opportunity for informal discussions between Coalition members and delegates. A break from the heavy schedule of negotiations and meetings also fostered an atmosphere of 'common purpose' and friendship among a group of people interested in and informed on the ICC.

The range of meetings held by the Coalition allowed for an exchange of ideas, information and the development of important relationships between NGOs and governments. It is a clear example of NGOs building informal networks. Attention and careful planning of meetings to suit various goals and to deal sensitively with the delegates' 'comfort zones' resulted in a comprehensive dialogue between government representatives and Coalition members.

(c) Lobbying and Dissemination

Every activity of the Coalition during the PrepComs involved an element of lobbying, in the sense that it involved education, and reinforcement of the progressive majority. The conditions required to effectively persuade and influence government decisions are complex, particularly at the level of international multilateral treaty negotiations. As mentioned previously, different States have different responses and understandings of the role civil society plays at UN debates. In some instances, the most effective lobbying for certain States was the compilation of academic papers with detailed research on the relevant legal issues. Other representatives preferred one to one
discussions with Coalition members and to develop personal relationships based on trust and mutual respect. Regardless of the strategy employed, the need for NGOs to develop credibility and to be deemed independent proved essential. Throughout the PrepComs, the Coalition made every effort to focus on the specific task ahead and to treat each country on an equal footing.

Early in the process, at the stage of the Ad Hoc Committees, a number of NGO representatives played an active role in encouraging those countries positive to the creation of a strong ICC, to join forces and work together. The emergence of the ‘like-minded group’ (LMG) was an essential element to the final creation of the ICC Statute and this group of countries played an extremely strategic role in the negotiations. The LMG were deemed by the Coalition as a crucial grouping. These States created a strong lead by setting the parameters of debates and diverted sources of opposition in all levels of negotiations.\(^{39}\) Inevitably the Coalition forged a more intimate relationship with the ‘like-minded’ countries than with some of the other States. However, at all times NGOs were aware of the dangers of appearing too close to this group, thereby affecting the credibility of the ‘like-minded’ countries which could not be projected as ‘puppets’ of civil society. A certain distance from the ‘like-minded’ group was essential for the Coalition and the LMG to maintain their independence and integrity.

\(^{39}\) The number of countries who are members of the ‘like-minded’ group is always in a state of flux. The group is, however, representative of the international community. In June 1998 it numbered approximately 60 and included a large number of members of the European Union (excluding France) as well as nations such as Australia, Canada, Chile, Egypt, Finland, Malawi, New Zealand, Republic of Korea, Senegal, Uruguay and Venezuela. Many of the African States played a crucial role in this grouping.
Thus, the Coalition found that it was important not be involved in many of the LMG meetings. This was due to the fact that in some circumstances States spoke more openly without members of civil society present as there was no sense of accountability to, or over-encouragement of, NGOs. The tension between being close enough to be able to encourage and influence State representatives and not becoming too close to delegates and the formal decision making powers required careful monitoring. As discussed in Chapter 1 this balance is always a challenge for active groups within civil society.

An extremely substantial role played by members of the Coalition at the PrepComs in relation to lobbying was the ability to link debates occurring in New York back to domestic NGOs. Whilst dealing directly with delegates at the PrepCom was a major focus of the Coalition, it was acknowledged that State representatives received their instructions from their respective capitals. The Diplomatic Conference was attended by high level representation from the government, usually from the Minister of Foreign Affairs, Law and Justice and other portfolios, sensitive to the need to maintain public support to avoid electoral backlash. It was decided that politicians needed to feel that the public was interested in the Court and that there would be scrutiny of their actions and a 'political cost' if they were not supportive. Countries advocating a strong ICC required encouragement to continue this stance with popular support from the general community. On the other hand, those countries playing a negative role, especially if their relationship with civil society allowed it, needed to be questioned by their citizens as to why the government was not committed to the creation of such a legal institution. Even countries not supportive of the ICC were at times 'mixed' on a range of elements with internal tensions arising at times between
Ministerial Departments such as Justice and Defence. Thus it was important for the Coalition to identify progressive Ministers within countries to specifically target.

Furthermore, it was recognised that, once the Statute of the ICC was finalised, citizens and ‘grassroots’ institutions would be necessary to push for ratification and domestic implementation. It was deemed crucial to disseminate information about the ICC to a broad range of civil society organisations throughout the world.

To this end, a number of workshops were held by the Coalition involving ‘brainstorming’ sessions and the development of national and regional dissemination and advocacy strategies. Groups such as human rights and legal oriented NGOs, academics, Bar Associations and Law Societies, Church groups and Women’s Rights organisations were identified as sectors of civil society which would potentially be able to assist in promoting public awareness of the ICC. Activities such as distributing information, responding to inquiries, hosting seminars, debates, conferences, letter writing campaigns and the creation of educational newsletters were suggested.\(^{40}\)

It was generally understood that informing the public about the importance of an ICC would not be an easy task as unlike other international issues, such as anti-personnel landmines, the matters involved in creating the Court are relatively complex. It was advisable that, for the general public, a few salient points should be stressed rather

\(^{40}\) Examples of initiatives in Australia include: the Australian Red Cross, *ICC-UpDate Newsletter*, Amnesty International’s legal letter writing campaign in April 1998; *The International Committee of Red Cross and Australian Red Cross International Criminal Court Seminar*, Australian National
than the full range of legal issues. For example, the Lawyers Committee for Human Rights created a simple ‘Statement of Support’ for individuals to complete and send to governments stating in effect that:

I support the establishment of a permanent International Criminal Court. I recommend -

• that the Court’s prosecutor be independent and be able to initiate investigations on his/her own accord;
• that the Court’s jurisdiction initially focus on genocide, war crimes and crimes against humanity;
• that the Court have automatic jurisdiction over the above crimes when a national judicial system is unavailable or inadequate;
• and that the Court operate according to the highest international standards of justice, ensuring all due process and fair trial guarantees.

Earthaction\textsuperscript{41} encouraged citizens in the United States to write to President Bill Clinton urging the US Government to support an ICC which would:

• Have jurisdiction to try individuals for the most serious international crimes: genocide, war crimes, crimes against humanity and aggression.
• Be a genuinely independent body, with its prosecutor able to investigate all cases free from political pressure.
• Allow cases to be brought by governments, individuals and non-governmental organisations — as well as the Court’s prosecutor.

In addition to detailed letter writing campaigns for legal networks, Amnesty International created a range of postcards with effective photographs on the front and simple messages about the ICC on the reverse addressed to politicians. Representatives from NGOs such as the Parliamentarians for Global Action\textsuperscript{42} advised that they were briefing politicians on the topic of the ICC and coordinating domestic educational activities.

\textsuperscript{41} Earthaction is a global network for the environment, peace and social justice.

\textsuperscript{42} Parliamentarians for Global Actions is an organization consisting of over 1,200 politicians across Europe.
The media was recognised as playing an important role in disseminating information about the ICC. For over three years the Coalition held briefings for the UN media paving the way for the often complex debates on the ICC. Media workshops were coordinated by the Coalition with discussions on how to build a press strategy, write press releases, develop ‘press lines’ and maintain contact with the media. Members of the Coalition were advised to encourage eminent academics and journalists to write articles in newspapers or magazines and to try to identify events to gain media coverage on the topic. The fact that journalists were in the position to ask politicians ‘difficult questions’ in relation to policies on the ICC required NGOs to fully brief members of the media on the diverse range of issues involved. NGOs were requested to create a media database to inform the Coalition of the press coverage the ICC received in their country. However discussions were also held on the dangers of inserting the ICC into the media during national election campaigns in countries such as the USA and the UK.

In relation to international events the Coalition also created a list of advocacy opportunities to raise awareness of the ICC at other forums such as the Vienna Conferences on Women, during successive openings of the UN General Assembly and the General Assembly’s Sixth Committee debates. Matters such as the need for adequate funding to be allocated to the Diplomatic Conference and NGO access to debates were deemed to be a high lobbying priority.

Not all Coalition members were keen to push for popular support for the ICC within their own countries. A number of representatives from African NGOs claimed that
the civil society within their States had other pressing needs and priorities to raise
with the government and acknowledged that a pressing lack of resources hampered
the creation of public awareness about the Court. It was suggested that information
and resources be shared between countries and that international organisations, such
as Amnesty International, with sections in these countries, provide culturally relevant
documents. Representatives from Latin American NGOs cautioned about the dangers
of ‘grassroots’ support in their countries for the Court alienating the government. In
their view, if the ICC was portrayed purely in a human rights context rather than as an
international judicial instrument, States may feel compelled to take a very
conservative approach. This was deemed particularly pertinent in countries where
there are weak democratic structures and limited opportunities for ‘open’ social
debate. The Coalition acknowledged the diversity of its members and variety of
political environments the NGOs work in and advised that discretion should be used
when implementing lobbying strategies.

A valuable task that members of the Coalition at the UN debates were able to
undertake was in regard to ‘cross-referencing’ delegates’ positions with NGOs from
the representatives’ country. For example, when the French delegation redrafted and
presented to the August 1996 PrepCom a completely new Statute with a number of
restrictive proposals, the Coalition immediately contacted French NGOs who started
questioning the policy makers in Paris. A comparison was able to be made between
what governments were communicating to their own people and the statements they
were delivering at the PrepCom. This is proved to be a powerful tool to create
democratic transparency in international negotiation and is greatly assisted by the
development of technology such as the Internet and electronic mail.
The broad range of activities performed by Coalition members at the UN debates in New York and then dissemination of the same to all corners of the globe was seen as a ‘driving force’ leading to the early convening of the Diplomatic Conference. The interweaving of personal relationships, technical competence, emotion, noise and persistence ensured that a variety of voices joined the discussions in the push to create an ICC.

2. **NGOS AT THE DIPLOMATIC CONFERENCE FOR AN ICC**

By resolution 160 of 15 December 1997, the General Assembly requested the UN Secretary-General to invite non-Government organisations, accredited by the Preparatory Committee (with due regard to the provisions of part VII of the Economic and Social Council Resolution 31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference), to participate in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (hereinafter the Conference). Participation in the Conference was confined to:

> NGOs having the capacity to attend meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receive copies of official documents, make available their materials to delegates and address, through a limited number of their representatives, its opening and/or closing sessions.\(^3\)

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All activities had to be performed in accordance with the Rules of Procedure adopted by the Conference. This was the first formal resolution dealing directly with NGOs. Previous NGO participation in the ICC debates was an example of the informal relationship between such organisations and the UN.

(i) **NGO attendance at the Conference**

The Secretariat of the Conference, with the assistance of the NGO Coalition, compiled a list of non-Governmental organisations to be invited to participate in the Conference. The list consisted of over 250 NGOs from all over the world including groups such as: the Arab Organization of Human Rights (Egypt); The Asian Human Rights Commission (Hong Kong); The Australian Lawyers for Human Rights (Australia); Bar Human Rights Committee of England and Wales (UK); The Catholic Commission of Peace and Justice (Zambia); The European Peace Movement (Germany); Physicians for Human Rights (USA) and Regional Union of Young Lawyers (Russia). With only 200 seats made available for NGOs at the Conference, organisations were only able to send a few representatives, and in some cases one individual represented a number of organisations.

All those involved in the Conference, both delegates and NGOs, knew that the five weeks allocated was an extremely short period of time to create a consolidated and widely acceptable text for an ICC. The PrepComs had resulted in the creation of a 175 page Draft Statute with very few of the 116 articles actually agreed upon by all.

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45 The full list of organisations can be found in Appendix 1.
participating States. All activities undertaken by the Coalition during the PrepComs, including writing position papers, holding meetings and lobbying were pursued with even more vigour during the Conference.

Although the three years of discussions preceding the Diplomatic Conference yielded fruitful relationships between the NGOs and government representatives, the Rome Conference was a different matter. Some governments that had not participated at all during the PrepComs sent delegations to Rome. Other governments sent different, often more senior, delegates to Rome because of the auspicious nature of the Conference. Added to this, the vast increase in the number of NGOs participating at the Conference resulted in the need for forging relationships in a more intense period of time. On the other hand, a number of individuals previously members of the NGO Coalition during PrepComs, attended the Conference with government representatives as part of a State’s delegation. In such situations there was ample potential for ‘cross-over’ discussion between NGOs and delegations and for many of the issues sought by NGOs to be raised at formal meetings through these representatives.

Unlike the position during the PrepComs, the Coalition produced a paper entitled ‘Basic Principles for an Independent, Effective and Fair International Criminal Court.’ The paper advocated

The following principles are considered fundamental by the undersigned organizations, which are members of the Coalition Steering Committee. Their listing is in no way intended to limit espousal or advocacy of other specific principles as determined by the mandate of each member organization.\(^{45}\)

\(^{45}\) ‘Basic Principles for an Independent, Effective and Fair International Criminal Court’ (Paper
The principles included issues such as wide subject matter within the jurisdiction of the ICC, independence of the Prosecutor, relationship with the Security Council and funding. The principles indicated a policy shift within the Coalition due to the seriousness and intensity of the Conference.

(ii) **NGO activities**

In furtherance of the work undertaken during the PrepComs and to provide assistance during the Conference, a number of NGOs prepared specific papers, kits, and booklets either stating their position on important areas of negotiations or summarising discussions to date. In many cases this information was made available to State representatives before or in the first week of the Conference. An example of this was the handbook created by the European Law Students’ Association on the Draft Statute for the ICC. The handbook covered topics such as the historical background of international criminal jurisdiction; definition of crimes; exercise of jurisdictions and admissibility; general principles of criminal law and penalties.47 In a section dealing with cooperation between the ICC and national jurisdictions, the handbook highlighted the major issues of concern, reviewed the relationship between the *ad hoc* International Criminal Tribunals and States and examined the 1994 ILC Draft Statute in reference to this topic. It then summarised the discussion to date at the *Ad Hoc* Committee and PrepComs and presented the options before the Conference. An analysis of specific suggestions from States such as the proposals from the UK and

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USA dealing with national security interests vis-à-vis the obligation to cooperate with the ICC was also undertaken.  

Other NGOs wrote letters to government representatives attending the Conference outlining key issues. For instance, Richard Dicker, Associate Counsel for Human Rights Watch (HRW), wrote to the Australian delegates as follows:

As you prepare your government’s positions for the Diplomatic Conference in Rome establishing an International Criminal Court, I am writing to share Human Rights Watch’s views with some of the longtime members of the Like-Minded Group (LMG) with whom we have worked closely over the last three years... We know that the opponents of an effective Court, though outnumbered, will bring to bear intense pressure on your governments and yourselves. We have seen examples of that pressure in the Pentagon’s effort to enlist military support for Washington’s positions, France’s attempt to mobilize the Francophonie as the protector of ‘civil law’, the bid to introduce unprecedented and burdensome decision-making procedure for the Diplomatic Conference, and most recently the effort by a few hardcore obstructionist states to magnify their minority views through the Non Aligned Movement. We can expect more before July 17. We see these efforts as desperate attempts to prevent the establishment of an effective and independent Court. Now is the time to move forward smartly, not to recoil in intimidation.

The letter set out five essential elements that HRW believed would form the ‘bottom line’ of an effective ICC. These elements included that the jurisdictional regime must exclude any form of state consent; that the prosecutor must be empowered to begin investigations in his or her own right; that there ought to be limited political interference by the Security Council; that the principle of complementarity must be given effect by not placing physical and testimonial evidence at risk; and the exercise of jurisdiction over war crimes whether committed in internal or international armed

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48 Ibid, 127.
49 Letter from Richard Dicker, Associate Counsel Human Rights Watch to Cate Steains, Foreign Affairs and Trade, Canberra, Australia, 30 April 1998.
conflict. The letter concluded by urging the like minded group to present a strong and united front in Rome to ensure that the Court ‘becomes an effective and independent tool against genocide, war crimes and crimes against humanity.\(^5\)

The Coalition compiled a comprehensive media kit with an overview of the ICC, a history of events leading up to the Conference, an outline of the Draft Statute, and a summary of support for and challenges to the ICC. The kit also included a list of ICC experts and a bibliography. The list of NGO papers on the Court is impressive in range and size. In a covering letter to journalists, William Pace wrote:

> The path we are on may lead to the creation of the last major international institution established in the 20th Century... and one of the most important in all history. I encourage you to review materials enclosed, follow the progress made on the ICC, and cover this historic story — both during the Rome Conference and beyond.\(^6\)

During the Conference, an extremely useful task performed by members of the Coalition was to conduct a ‘virtual vote’, involving the cataloguing of countries’ positions on certain articles. Due to the importance and complexity of the negotiations it was unsure, up until the last minute of the Conference, as to whether or not the final Statute would be created through a process of States voting on each article. In order to keep a ‘running tab’ on topics, representatives of the NGOs took detailed notes during debates and were then able to succinctly present this information to all participants at the Conference the next day. Published in the International

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\(^5\) Ibid.

\(^6\) Ibid.

Criminal Court Monitor and the daily newspaper entitled 'Terra Viva' it was not unusual for this to be the first document consulted by delegates each morning.

Due to the huge number of active and organised individuals present as part of the Coalition at the Conference, the NGO community was able to keep a far more comprehensive track of the debates than any of the government delegations. Whilst some delegations were large, (the US, for example, had over 40 individuals present), the majority of State representatives from each country was limited to under half a dozen and many countries only had one or two people to represent them. To achieve a result at the Conference it was necessary for numerous debates to be held simultaneously during the day and very often late into the night. Even large delegations became worn out. The Coalition, with its hundreds of members, was able to keep track of all negotiations it was privy to. This was done by shifts of members of the Coalition sitting in on the debates as well as a telecast of all proceedings live onto television monitors to the NGO room. Due to the extent of NGO representation, it was not possible for all Coalition members to gain direct access to all discussions so the broadcast played an essential role in keeping everyone informed.

As well as the regular writing up of the proceedings, the Coalition was organised into 12 teams one on each major part of the Statute. These teams analysed the current developments on the various topics and drafted suggested changes to the texts accordingly. The quality of this work was high with individuals such as Christopher Hall, the representative from Amnesty International, displaying outstanding academic knowledge on the issues at stake. Sharing all information at morning, evening and
lunchtime sessions in the NGO room, the Coalition demonstrated the power, skills, knowledge and coordination of an extremely professional organisation.

_The Final Week_

In the last week of the Conference a number of NGOs reached a point where they were concerned at the direction the negotiations were taking. In a letter sent by Amnesty International to all delegates, these fears were expressed as follows:

Amnesty International is deeply concerned that government delegates at the diplomatic conference to establish a permanent international criminal court which would have power to try persons accused of the worst crimes in the world — genocide, other crimes against humanity and war crimes — are making compromises which would fatally weaken the court... Delegates are now considering a discussion paper (UN Doc. A/CONF.183/C.1/L.53) prepared by the chair of the committee of the whole which proposed a number of possible compromises on definitions of crimes under international law, the scope of the court’s jurisdiction (power to try cases) and trigger mechanism (how to permit the prosecutor to begin investigations). Many of these compromises could lead to a weak court, which could be blocked at every step of the way to justice by states or the Security Council.\(^5^3\)

The paper dealt with each of these issues in technical legal detail, demonstrating the potential dangers in each of the compromises.

Other NGOs made similar strong statements, with the Women’s Caucus stating that the ‘Women’s Caucus is gravely concerned that justice is being hijacked. Fundamental norms and preconditions to international justice have already been compromised.’\(^5^4\)

\(^5^3\) ‘Amnesty International is Concerned that Diplomats are Adopting Lowest Common Denominators in Efforts to Adopt a Statute for a Permanent International Criminal Court’ (Amnesty International Position Paper, Rome, 1998).
Listing gender justice, an independent prosecutor, jurisdiction over all armed conflict, automatic jurisdiction and a no state consent regime, the Women's Caucus cautioned that 'if these minimal criteria are not present in the final Statute, the Women's Caucus will not support the resulting weak court and will consider actively lobbying their governments against ratification.' At the time of the Conference the Women's Caucus had affiliations with over 300 other international organisations.

More intense NGO papers appeared in the last few days of the Conference. On the topic of whether the ICC should have jurisdiction over internal as well as international armed conflict, Medecins Sans Frontieres (MSF) began to produce extremely graphic photographs of tortured children with captions reading 'children as victims of armed internal conflict — do they deserve justice?' The Children's Caucus wrote:

On behalf of Children victims of war crimes, genocide and crimes against humanity, we appeal in these final hours of the Conference to all Governments to stand firm on those principles that will make the Court effective. Remember:
- the 300,000 children under the age of 18, serving in government forces or armed rebel groups, in 33 current and recent international and internal armed conflict,
- the thousands of girls raped,
- 2 million children killed,
- 4 million children disabled in the last 10 years as targets in armed conflicts.

55 Ibid.
56 See Appendix 2.
As well as these emotional pleas on the topic, international organisations such as the International Committee of the Red Cross, wrote technical analysis on the necessity of including internal armed conflict within the ICC’s jurisdiction.\textsuperscript{57}

\textit{Tensions within the NGO community}

One of the biggest differences between the work of NGOs during the PrepComs and the Conference, which was highlighted in the last week of the Rome negotiations, was in the variance of views presented by participating NGOs. Coalition members had not agreed on every topic at the PrepComs and due to the informal structure of the Coalition, members could express their own views. However, at the Conference there were a number of NGOs present that were not members of the Coalition and had strong contrary views on issues. Topics such as whether or not the ICC should have the death penalty as a punishment resulted in papers being produced by NGOs on both sides of the debate.

A clear example of this tension could be seen on the topic of gender and the ICC. All issues dealing with gender became extremely controversial, including whether or not forced pregnancy should be included within the jurisdiction of the Court. A number of States, including the Vatican and an NGO calling itself the REAL Women of Canada\textsuperscript{58} (REAL Women) expressed concern that including the crime of forced pregnancy may impact upon domestic laws relating to abortion. This view was vehemently opposed by other States and Coalition members such as the Women’s Caucus. At the heart of this contention was the definition of ‘gender.’ On this topic

\textsuperscript{57} For a review of work undertaken by the ICRC see Chapter 4.
\textsuperscript{58} This NGO was not a member of the Coalition.
REAL Women wrote papers directly expressing their concern with policies advocated by the Women’s Caucus:

Groups advocating ‘gender justice’ have argued recently that ‘a small minority of delegations’ are ‘systematically attacking...the essential components of justice for women’. Before one can assess the validity of that accusation, however, one must know exactly what is meant by ‘gender justice’ and ‘the essential components of justice for women’.59

The paper reviewed the various definitions of ‘gender justice’ from equal treatment before the law to a more expanded definition. It advocated that the Beijing Platform was not a ‘consensus’ document, in particular, in relation to abortion. The paper warned of moving the definition of ‘gender’ from the male and female sexes to a broader interpretation stating that the dangers with this move included the ICC having a potential impact upon the law pertaining to sexual orientation and abortion. The paper reminded readers that French and Arabic texts do not use the word gender and rather refer to ‘the two sexes.’ The paper concluded:

One might ask what fuels the continual quest for ‘gender justice’. No one opposes equal treatment of women and men before the law. If ‘gender justice’ means more than this, the concept dramatically expands the role of the International Criminal Court, changing the Court from a Court aimed at the ‘most serious crimes’ of ‘international concern’, into a potent judicial engine for social engineering.60

The Women’s Caucus had written a position paper highlighting the use of the term ‘gender’ and ‘gender-based violence’ within the Vienna Declaration and Programme of Action; the Declaration on the Elimination of Violence against Women adopted 23/2/94; the Beijing Platform for Action adopted 15/9/95 and a number of UN General Assembly Resolutions. The paper concluded with a quote from the Report of

the Secretary General on Integrating the Human Rights of Women Throughout the
United Nations System.\textsuperscript{61}

As sex refers to biologically determined differences between men and women
that are universal, so gender refers to the social difference between men and
women that are learned, changeable over time and have wide variations both
within and between cultures. Gender is a socio-economic variable in the
analysis of roles, responsibilities, constraints, opportunities and needs of men
and women in any context. The use of the term ‘gender’ as an analytical tool
focuses not on women as an isolated group, but on the roles and needs of men
and women. Given that women are usually in a disadvantaged position as
compared to men of the same socio-economic level, promotion of gender
equality usually means giving explicit attention to women’s needs, interests
and perspectives.\textsuperscript{62}

The final Statute of the ICC has a limited definition of ‘gender.’ Article 7 of the
Statute of the ICC addressing crimes against humanity deals with this term stating:

For the purpose of this statute it is understood that the term ‘gender’ refers to
the two sexes, male and female, within the context of society. The term
‘gender’ does not indicate any meaning different from the above.\textsuperscript{63}

Forced pregnancy was finally agreed to be included in the Statute, both as a crime
against humanity in Article 7(1)(g) and as a war crime in Article 8(B)(xxii) dealing
with international armed conflict and Article 8(C)(vi) in non-international armed
conflict. However the compromise for including this crime involved a high threshold
for intent to be articulated in the section dealing with the elements of ‘forced
pregnancy’. The Statute states that:

‘Forced pregnancy’ means the unlawful confinement of a woman forcibly
made pregnant, with the intent of affecting the ethnic composition of any
population or carrying out other grave violations of international law. This

\textsuperscript{60}Ibid.
\textsuperscript{61} Report of the Secretary General on Integrating the Human Rights of Women Throughout the United
\textsuperscript{62} ‘The International Community has Repeatedly Reaffirmed the Need to Eliminate Gender Violence’
(Position Paper, Women’s Caucus for Gender Justice in the International Criminal Court, 1998)
\textsuperscript{63} Statute of the ICC, art 7(3).
definition shall not in any way be interpreted as affecting national law relating to pregnancy.  

An analysis of the debates between NGOs at the Conference on issues relating to gender highlights some interesting considerations in relation to the role of civil society at international negotiations. The tension between informality or a structured approach to the position and internal workings of NGOs is sharply emphasised when philosophical differences arise within such groups. Without a centralised body regulating policy in a democratic sense, who has the right to speak on behalf of who? This is a practical example of the theoretical issue raised in this thesis previously, namely that of ‘popular sovereignty’. In some cases it is those with the most resources, despite being narrowly focused and representing a minority, who are able to make the most impact. On the other hand, questions could be asked in relation to what is a ‘minority’ in such a context. Most NGOs tend to be progressive and thus conservative NGOs appear as a ‘minority’ in circumstances such as the ICC Conference. In reality a large number of the world’s population may support ‘unpopular’ views, such as those articulated by the REAL Women’s Caucus.

The underlying issue needing consideration is that if NGOs are tasked with being the ‘other’ voice to that of States, does internal fragmentation of views strengthen this position or weaken civil society’s credibility? Diversity is essential. There are dangers involved in specific issues becoming a central focus of resources and time of civil society during debates on a topic dealing with a range of important issues. In the

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65 See Chapter 1 for discussion on this topic.
situation discussed above, the question must be asked as to whether the final week of the Conference was the time and place to embark upon important debates in relation to the definition of gender. This is particularly so considering the three previous years of discussions at the PrepComs during which this concept had not been deemed particularly controversial.

Within the Coalition, despite there being a focus upon the heterogeneity of members’ views, loose guidelines had been established involving etiquette and protocol when dealing with delegates. Acknowledging that each NGO representative had a different mandate to push at the Conference, coordination was undertaken of topics to be raised with State representatives during meetings. For example, some meetings focused upon the rights of the accused, others upon gender justice or the ‘trigger’ mechanism.

In the last weeks of the Conference it was perceived by some members of the Coalition that NGOs not party to this organisation were not ‘playing fair’ by using tactics such as bullying delegates.

With the increasing availability of information as a result of the ‘technology revolution’ it is likely that international negotiations in the future will only attract more and more NGOs with a medley of diverse views. Perhaps an informal code of conduct, similar to that developed to assist coordination of humanitarian actors in the field,66 should be developed for NGO participation at UN Conferences. The Red Cross, Red Crescent Movement and NGO Code of Conduct sets out broad principles

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66 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief, ICRC, (1994). See also, The Sphere Project,
and minimum standards of behavior and respect for other organisations. Whilst any such document could not be binding due to the inherent nature of civil society (as only those NGOs who agreed with the concepts would sign), it could become a pre-condition for NGO accreditation with the UN or be used to determine eligibility for public funding for aid organisations.

On the other hand there are dangers in this type of regulation being placed upon civil society. As raised on numerous occasions in this paper, the most precious resource NGOs supply to discussions at an international level is the variance of views. The freedom that accompanies informality may provide benefits far greater than that correlating structure. The price of true democratic involvement of NGOs at the Conference may have been the lack of a united front on issues, different styles of lobbying and energies spent on internal, and at times bitter, debates.

*NGO events*

NGOs were not only involved in serious activities at the Conference. They were also the instigators of creative and innovative events in Rome including concerts, performances, viewing of the Soccer World Cup, lie-ins and candle light vigils. All across the city of Rome huge, colorful posters stated the importance of the negotiations and everywhere people were wearing T-shirts with printed messages relating to the ICC on the front. The Coalition reception drew a large number of Conference participants as usual. Held on a balcony with a magnificent view of the ancient city of Rome, in the balmy evening air there was a strong feeling of

expectancy and excitement. In the last few days of the Conference a large number of Coalition members commenced a hunger strike urging delegates to consider the importance of their work. Other groups held around the clock speeches in front of the building housing the debates. NGOs also contributed emotion to the discussions and in the final hours their roars and cheers at the agreement of the text of the Statute, echoed throughout the plenary building. As exhausted delegates left the negotiations in the small hours of the final day they were greeted by a huge banner, surrounded by candles, in which the word YES was written using hand prints. It was an emotional end to the negotiations.

CONCLUSION

It is impossible to quantify the level of achievement NGOs reached at the Conference. Measuring the success of civil society in the creation of international legal norms is not easy. Like all organisations which play an informal part in policy formulation, it is complex to extract the exact value of input from one group due to the range of contributions from various forces and actors. As one commentator suggests:

This makes measuring 'strategic' accountability in its most fundamental sense almost impossible — no organisation can be held accountable for the impact of forces which are beyond its control67.

However, despite the difficulties of quantifying precise contributions there are some conclusions that must be drawn from the experience. Civil society made it possible for the aspiration for a permanent international criminal court to flourish. NGOs nurtured delegates and States supportive of the concept and created many favorable

67 Michael Edwards and David Hulme, 'NGO Performance and Accountability: Introduction and Overview' in M Edwards and D Hulme (eds), NGOs - Performance and Accountability-Beyond the
domestic environments for mobilising public opinion on the need for an ICC. In some instances members of NGOs joined State delegations thus providing formal avenues for involvement in debates.

If an analysis is undertaken of topics discussed in detail at the Conference and those not deeply considered, some correlation can be made with the presence of NGOs. The provision dealing with illegal weapons in the ICC Statute, for example, is extremely weak with a limited list of prohibited weapons and no such provision for non-international armed conflict.68 Despite the huge effort undertaken by civil society in advancing the ‘Ottawa Treaty’ as previously discussed, there were no NGOs present at the Conference advocating for the inclusion of anti-personnel landmines as a prohibited weapon. Whilst there were a few proposals involving landmines there was no push from civil society on this topic – no papers written or specific lobbying undertaken. Landmines and the need for regulation of weapons in internal armed conflict were not raised in debates to any great extent and subsequently the lack of these two elements in the Statute is unfortunate but not surprising. It is hoped that the exclusion of landmines may be focused upon in the future pursuant to Article 8(b) (xx).69

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68 Article 8(b)(xviii) and (xix) only specifically mentions asphyxiating, poisonous or other gases, analogous liquids, materials or devices as well as bullets which expand or flatten easily in the human body.

69 Article 8(xx) states:

Employing the weapons, projectiles and material and method of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons are the subject of a comprehensive prohibition and are included in an annex to this statute, by an amendment in accordance with the relevant provision set forth in articles 110 and 111.
There is no guarantee that a strong presence of anti-landmine campaigners would have changed the Statute, but it would have ensured that States could not ignore the subject, as was the case. On the other hand, the ample voices from civil society relating to matters such as gender issues forced delegates to debate this topic at length. During the whole process of creating the ICC Statute NGOs not only proposed a range of positive and progressive options, channelling policy-making away from the lowest common denominator, they also prevented a number of restrictive proposals from being allowed to be ‘slipped in’.

Attending in large numbers at PrepComs and the Conference, using information technology and the help of the media to amplify their concerns, NGOs created a debate within and across State borders on whether the international community was serious about putting an end to impunity and creating an effective ICC. Through quiet and loud diplomacy, emotion and highly technical analysis, influencing individuals and ‘shaming’ governments, NGOs ensured that the global dialogue on developing an effective ICC was not the exclusive domain of States.
CHAPTER 4

THE ROLE PLAYED BY THE ICRC DURING THE CREATION OF THE INTERNATIONAL CRIMINAL COURT

The Chapter investigates the role played by the International Committee of the Red Cross (ICRC), not an NGO but a non-State actor, during the PrepComs and the Diplomatic Conference for an ICC. It demonstrates a different mode of action than that used by NGOs. The ICRC has a long history in dealing with attempts to regulate behaviour during armed conflict and as such has a respected place in international law. The origin and development of the ICRC is discussed in this Chapter as well as its status in international law. Specific briefing papers provided by the ICRC are examined on topics such as jurisdictional issues of the ICC, the independence of the Prosecutor and the definition of war crimes. Statements made by members of the ICRC delegation at the Conference are also considered. The highly technical role played by the ICRC complemented the activities of NGOs and other non-State actors in ensuring the development of an effective ICC.

1. THE ICRC AND THE INTERNATIONAL CRIMINAL COURT

As armed conflicts continue to occur, unfortunately so does the commission of atrocities. Rules exist to govern the conduct of war and to protect the victims of conflicts, yet they continue to be widely violated. States already have the obligation to prosecute suspected perpetrators of such crimes, but most of them are unfortunately never so prosecuted. It is imperative to put an end to this cycle of impunity: establishing an effective international criminal court would contribute to reaching this goal.¹

The International Committee of the Red Cross (ICRC) has been working in regions of armed conflict for over 136 years. Founded in 1863 by a Swiss businessman horrified at the plight of wounded soldiers during a battle in Solferino², the ICRC initially

¹ ‘Establishing an International Criminal Court, Towards the end of Impunity’ (Briefing and position paper of the International Committee of the Red Cross, February 1998) 1.
² Henri Dunant, Un Souvenir de Solferino (1862). All references in the present work are to the translation A Memory of Solferino (1986), the original of which was published by the American National Red Cross in 1939.
proposed that army medical services should be deemed neutral and given a distinctive emblem to enable them to function on the battlefield. It also suggested the creation of relief societies to act as auxiliaries to army medical services in times of war.³ These proposals were implemented, the former with 16 States drafting and signing the first Geneva Convention⁴ and the latter with the creation of Red Cross and Red Crescent National Societies. Today there are over 175 National Societies worldwide. National Societies combined with the ICRC and the International Federation of Red Cross and Red Crescent Societies (the Federation) make up the International Red Cross and Red Crescent Movement (the Movement).⁵ Whilst independent from governmental control, the highest decision making body of the Movement includes representatives from States Parties to the Geneva Conventions.⁶

The ICRC does not consider itself an NGO. In some senses it is a private Swiss association but its activities are international rather than national in character and often reflect the role of an inter-Governmental organisation.⁷ The ICRC performs tasks pursuant to the Geneva Conventions and Additional Protocol I, enters into legal relationships with States and its delegates are granted diplomatic privileges and

³ Ibid.
⁴ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, opened for signature 22 August 1864, 55 BSFp 43; (1907) 1 American Journal of International Law (Supp) 90 (entered into force 22 June 1865).
⁵ The Federation of the Red Cross and Red Crescent Societies was founded in 1919. Each of these three elements have distinct roles and structures. For further details see André Durand, History of the International Committee of the Red Cross — from Sarajevo to Hiroshima (1984)
⁷ See, eg, Yves Beigbeder, The Role and Status of International Humanitarian Volunteers and
immunities. Thus it is generally accepted that the ICRC possesses some form of international legal personality. Since 1990 the ICRC has had observer status at the United Nations General Assembly and consultative status (category II) with the Economic and Social Council of the United Nations since 1946.

The ICRC only acts in countries with the consent of the relevant government, and, like the rest of the Movement, ICRC activities are strictly undertaken within seven fundamental principles. Unlike other non-State actors, the ICRC has a legal right to remind parties to an armed conflict of their obligations under international humanitarian law (IHL) as well as the right of initiative in taking any action it considers appropriate to help victims of armed conflict. This results in the ICRC having the capacity to gain access to places and situations which other organisations and NGOs are barred from. The seven fundamental principles limit the capacity of the ICRC to speak out in public about the instances of abuse that members of the Movement witness. Rather, such information is directly relayed to governments or those in power. The principle of neutrality can be seen to take precedence over the role the ICRC gives to advocacy, both for ideological and pragmatic reasons. Neutrality is deemed by the ICRC to be an important principle in maintaining integrity as well as an essential operating tool when requesting access to prisoners and other detained individuals during times of conflict and peace.

9 Hans Haug, Humanity for All: The International Red Cross and Red Crescent Movement (1993) 504.
10 The seven fundamental principles of the Red Cross and Red Crescent Movement are humanity; impartiality; neutrality; independence; voluntary service; unity and universality. These principles were proclaimed at the 20th International Conference of the Red Cross in Vienna in 1965.
11 Yves Sandoz, The International Committee of the Red Cross as Guardian of International
This is a controversial trade-off with some commentators interpreting the ICRC’s silence as moving towards complicity. Irrespective of the theoretical debate surrounding the work of the ICRC, the fact remains that it continues to be the largest operating international organisation during times of armed conflict. Hence, the ICRC is in a strong position to understand the need for an ICC.

The history of the ICRC is linked with the development of international humanitarian law (IHL), which is:

international treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts, whether of an international or non-international nature; for humanitarian reasons those rules restrict the right of the parties to a conflict to use the method or means of warfare of their choice, and protect persons and property affected or liable to be affected by the conflict.\(^\text{13}\)

Since the creation of the Geneva Conventions the ICRC has played a leading role in the development of IHL including, the Additional Protocols of 1977\(^\text{14}\) and recent treaties such as the Ottawa Convention on Anti-Personnel Mines\(^\text{15}\) and the Additional Protocol IV to the 1980 Weapons Convention on Blinding Laser Weapons.\(^\text{16}\)

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\(^{12}\) Much has been written on this topic, in particular the role the ICRC played during the atrocities committed in World War II. For a detailed account on the issues involved in agencies seeking the principle of neutrality see, eg. A Slim Hugo, ‘Relief Agencies and Moral Standing in War: Principles of Humanity, Neutrality, Impartiality and Solidarity’ (1997) 7 Development in Practice 342-52.


\(^{14}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3; 16 ILM 1391 (entered into force 7 December 1978) (‘Additional Protocol I’). As at 28 October 1998, there were 152 States Parties; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609; 16 ILM 1442 (entered into force on 7 December 1978) (‘Additional Protocol II’). As at 22 October 1998, there were 144 States Parties.

\(^{15}\) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, opened for signature 18 September 1997, 36 ILM 1507 (entered into force 1 March 1999) (‘The Ottawa Convention’). As at 22 October 1998, there were 47 States Parties.

\(^{16}\) Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain
The ICRC is also deemed by the international community to be ‘guardian’ of the Geneva Conventions and their Additional Protocols and has a ‘unique influence over the content, application and development of international humanitarian law.’ As Yves Sandoz, ICRC Director of International Law and Communications writes:

The ICRC has always had a close and special relationship with international humanitarian law...it has worked on battlefields, and has always sought to adapt its action to the latest developments in warfare. It has then reported on the problems encountered, and on that basis has made practical proposals for the improvement of international humanitarian law. In short, it has made a very direct contribution to the process of codification, during which its proposals were examined, and which has led to regular revision and extension of international humanitarian law, notably in 1906, 1929, 1949 and 1977.

The ICRC, in conjunction with the National Societies, also works in a domestic context strengthening IHL within national laws. This role was articulated in the ICRC statement given to the UN General Assembly in October 1997:

As part of its mandate to promote respect for international humanitarian law and to enhance its implementation, the ICRC is providing technical assistance to States in passing laws necessary for the investigation and prosecution of suspected war criminals, as required by the Geneva Conventions. The ICRC's Advisory Service on International Humanitarian Law organized, a few weeks ago, a meeting of experts to discuss the problems of penal repression at the national level. A similar meeting of experts from common-law States will be held in 1998. The aim of these meetings is to draw up guidelines concerning legislation for the repression of violations of humanitarian law and to make them available to States.


18 Yves Sandoz, above n 11, 4

This history of the ICRC, as well as the type of work it undertakes, explains its active participation in the work towards the International Criminal Court both at the PrepComs in New York and the Diplomatic Conference in Rome. Furthermore, the ICRC has been an advocate for an ICC for many years and has on a number of occasions emphasised the need to create such an institution. Indeed over a century ago Gustave Moynier, one of the founders of the ICRC as well as one of its Presidents, made the first serious proposal for a permanent international institution dealing with war crimes. In a Draft Convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Conventions, dated 1872, Moynier set out in ten short articles his vision for a tribunal to enforce and strengthen IHL.20 This vision took over one hundred and twenty five years to realise.

The ICRC undertook a range of roles both at the PrepComs and the Conference in relation to the creation of the ICC. In particular it wrote briefing papers of a legal and technical nature. Neither at the PrepComs nor the Conference did the ICRC lobby openly, but rather undertook private discussions with delegates. The ICRC did not utilise public support nor emotional language or images. Whilst National Societies around the world were encouraged to sensitively raise the issue with their governments and disseminate information on the topic to the general public, with the fundamental principles and mandate of the Movement, the ICRC undertook limited public advocacy on behalf of the ICC.

2. THE ICRC AND THE PREPCOMS

The ICRC Briefing and Position paper of February 1998\textsuperscript{21} outlined the elements the ICRC considered necessary for the proposed ICC to possess for it to be effective. These included:

\textit{(a)} \textit{The ICC Ought To Have Jurisdiction Over Both International And Non-International Armed Conflicts}

The ICRC asserted that the vast majority of conflicts waged today are internal and thus for the ICC to be relevant it must have jurisdiction over internal armed conflicts as well as those waged internationally. Grave Breaches of the Geneva Conventions are relevant only to acts committed during international armed conflict. The paper stated that it would be essential for the ICC to have jurisdiction not only over Grave Breaches but also over all serious violations of international humanitarian law. The ICRC argued that this should include the most serious violations of Additional Protocols I and II since most States are Parties to these treaties and numerous provisions of the Additional Protocols have developed into customary international law. The ICRC echoed the statement made by the International Criminal Tribunals for the former Yugoslavia to the effect that, 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.'\textsuperscript{22}

\textit{International Review of the Red Cross 57.}
\textsuperscript{21} ICRC Briefing and Position paper, above n 1.
\textsuperscript{22} \textit{Prosecutor v Dusko Tadic (Jurisdiction) (Decision of the Appeals Chamber, 2 October 1995) 105}
(b) The ICC Ought To Have Jurisdiction Over War Crimes Whether They Are Committed As Single Acts Or On A Large-Scale

The ICRC contended that this proposition reflects the existing law. Any attempt to include a required threshold for war crimes (such as the need to prove the act was committed as part of a plan or policy, or on a large scale) would deviate from well established legal norms and weaken existing law. Unlike crimes against humanity or genocide, each individual act which is a serious violation of humanitarian law is an international crime. The ICRC maintained that in this context it is important to take into account the fact that the proposed Court will act as a complement to national criminal courts with States continuing to have the primary duty to prosecute. Thus, in the view of the ICRC, the ICC would have to exercise its jurisdiction only when national trial procedures might not be available or prove to be ineffective. It was argued that adding a new element to the definition of war crimes, such as a threshold requirement, would unnecessarily narrow the scope of the International Criminal Court and could contribute to the confusion between crimes against humanity and war crimes both in international and domestic trials. In this regard the ICRC stated:

[The ICRC] would like to emphasize that the commission per se of war crimes has already been recognized as unacceptable and has motivated the creation of international tribunals, namely those of Nuremberg, Tokyo, the former Yugoslavia and Rwanda, without requiring a further qualification such as their commission as part of a widespread and systematic manner. We therefore regard as superfluous and erroneous to add any further requirement to the list of war crimes, which, moreover, risks blurring the very notion of such crimes.24

ILR 419.

21Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1, 25. Option 1 states:
   The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

The ICC Ought To Have Inherent Jurisdiction Over The Core Crimes Of Genocide, Crimes Against Humanity And War Crimes

The ICRC advocated that as soon as a State becomes party to the Statute of the ICC and in the event of national trial procedures neither being available or effective, the Court ought to possess automatic jurisdiction. There were a number of proposals in relation to a State consent regime. Such a regime would have required the obtaining of consent of the custodial (the State that has custody of the suspect), and territorial (the State on the territory of which the act occurred) or other States, before the Court could exercise its jurisdiction. Under the existing principles of universal jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other State. As the ICRC statement before the Preparatory Committee indicated:

The ICRC would like to recall that under the Geneva Conventions of 1949, 188 States have accepted to be bound by the duty to prosecute or to extradite persons alleged to have committed, or to have ordered the commission of, grave breaches. States have also accepted to undertake all necessary steps to enact legislation necessary to provide effective penal sanctions for the perpetrators and suppress all acts contrary to the Conventions. Hence, the duty to prosecute exists, regardless of the State on whose territory they are committed or of the nationality of the accused.\textsuperscript{25}

This principle reaffirms the fundamental rule that war criminals and those breaching international criminal law are not immune from prosecution, wherever they have committed their crimes and whatever their nationality. The ICRC argued that the introduction of a State consent regime would not only make the Court ineffective,

\textsuperscript{25} Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, New York, August 1997.
more seriously, it would create the impression that States can lawfully protect alleged war criminals from prosecution.

(d) The ICC Ought To Have An Independent Prosecutor

The ICRC submitted that the Prosecutor should not have to wait for a referral of a situation from the Security Council or State Parties to the Statute of the ICC. Instead, the ICRC canvassed the proposition that the ICC should have a Prosecutor who is empowered to initiate investigations and institute proceedings *ex officio* on his or her own initiative. This would assist in ensuring the respect for the basic principles of law that a court must be impartial and independent. The ICRC also observed that this would also help stop prosecutions being subordinated to the Security Council, which could prevent or delay prosecutions when it is dealing with a situation under Chapter VII of the UN Charter.

(e) Definition Of War Crimes

As well as these broad elements, the ICRC submitted a number of detailed papers and commentaries to assist deliberations at the PrepComs in relation to the definition of the war crimes provision. In a statement given by the ICRC in December 1997, a review of the PrepCom informal working paper on war crimes was undertaken.\(^{26}\) The ICRC expressed concern at the absence of certain crimes committed in international armed conflict in particular a number of crimes found in Additional Protocol I. Delegates were reminded that Additional Protocol I had been signed by 148 States

\(^{26}\) Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, New York, December 1997.
and that many of the provisions it contains reflect customary international law. Furthermore these provisions have been enacted in the national legislation of States Parties, and the wording has been widely accepted. The ICRC thus stated:

Accordingly, for purposes of coherence, and also to reflect existing law in the Statute of the Court, it would be preferable to use the list and wording found in Protocol I.27

The ICRC acknowledged that some difficulties could occur for those States not yet a party to Additional Protocol I and offered to cooperate with States in reaching agreement on this complex issue. The ICRC stressed that two important crimes were missing from the definition to date and proposed through discussions:

- the launching of an attack against works or installations containing dangerous forces which are excessive in relation to the concrete and direct military advantage anticipated; and
- the unjustifiable delay in the repatriation of prisoners of war or civilians.

In relation to other specific crimes contained in the informal working paper on war crimes the ICRC made a number of comments including:

On the use of specific weapons, the ICRC considers essential that a generic clause be provided, clearly stating the long-standing rule regarding the prohibition of using means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate. A generic clause would also allow to take into account new weapons which may be developed and eventually prohibited. Emphasis should also be made on the use of the expression of a nature to cause and not calculated to cause which reflects an incorrect translation made in 1907 of the text of the Hague Regulations.28

27 Ibid, 1.
28 Commentary: Definition of War Crimes’ (Briefing Paper of the ICRC, Dec.1997) 29
In regard to the section of the working paper dealing with non-international armed conflict, the ICRC stressed that it is of fundamental importance that the ICC be given jurisdiction over crimes committed during internal armed conflict to reflect the realities of modern warfare.\textsuperscript{29} In particular, it was argued that the ICC should have jurisdiction over violations of common Article 3 and the core of Additional Protocol II.

These crimes, the ICRC argued, reflect crimes of serious concern to the international community. This Statute is affirmed in the subject matter jurisdiction of the International Criminal Tribunal for Rwanda (ICTR).\textsuperscript{30} The ICRC argued that common Article 3 reflects a customary norm\textsuperscript{31} and was a minimum yardstick applicable to international and non-international armed conflicts. Although common Article 3, Additional Protocol II or the Hague Regulations of 1907\textsuperscript{32} do not contain any grave breach provisions, it is understood that breaches of these provisions can nevertheless constitute war crimes.

\textsuperscript{29} Since the creation of the ICRC working papers there have been jurisprudential developments in the area of the relationship between internal and international armed conflict at the ICTY. Whilst these judgments are important they are not relevant to an analysis of the ICRC’s lobbying strategies at the PrepComs.

\textsuperscript{30} Statute of the International Tribunal for the Prosecution of Persons responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, SC Res 955, 49 UN SCOR (3453\textsuperscript{\textasciitilde} mtg), UN Doc S/RES/955 (1994); 33 ILM 1598 (Statute of the ICTR).

\textsuperscript{31} Previously affirmed in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Rep 14,92.

\textsuperscript{32} Convention Concerning The Laws and Customs of War on Land, 18 October 1907, 205 CTS 277 (‘Hague IV’). The Regulations are annexed to the Convention.
The International Military Tribunal (IMT)\textsuperscript{33} — when informed that the absence of treaty provisions on individual criminal liability prevented them from making findings of individual guilt — concluded that violations of certain rules of warfare entailed individual criminal responsibility. The IMT confirmed that these rules were recognised in international law and state practice indicated the intention to criminalise and punish violations.

To add weight to the above dicta the International Criminal Tribunal for the former Yugoslavia declared:

\begin{quote}
[C]ustomary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims in international armed conflict, and for breaching certain fundamental principles and rules regarding the means and methods of combat.\textsuperscript{34}
\end{quote}

Thus, the ICRC argued that the core of Additional Protocol II is now considered customary international law and the ICC must be given jurisdiction to reflect this. More specifically, the ICRC maintained that the following two violations should be included in the definition of war crimes committed in an non-international armed conflict:

\begin{itemize}
  \item to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate; and
  \item the starvation of civilians as a method of warfare.
\end{itemize}

\textsuperscript{33} Charter of the International Military Tribunal, 8 August 1945, 56 Stat 1544, 8 UNTS 279.

\textsuperscript{34} Prosecutor v Dusko Tadic (Jurisdiction), above n 22, para 134.
3. ICRC'S ROLE AT THE DIPLOMATIC CONFERENCE

Throughout all deliberations on the ICC the ICRC was granted observer status with the capacity to give statements on the floor of the Conference. All other organisations given this capacity, such as the UNHCR, representatives from the two ad hoc Tribunals and representatives from the European Union, were inter-Governmental bodies thus highlighting the unique position of the ICRC.

Whilst having submitted papers and spoken on a range of matters at the PrepComs, the ICRC focused upon a number of major issues at the Conference including the definition and scope of war crimes and the jurisdiction of the ICC.

(i) War Crimes

Numerous papers had been written on this topic by the ICRC at the PrepComs as noted above. Other NGOs and non-State actors were also involved in discussions and writings on the topic of the definition of crimes as discussed in the previous Chapter. In a statement made to the Conference by the ICRC on 8 July 1998, 5 major issues relating to war crimes were dealt with. The first of these was the concern that a 'threshold' be placed upon war crimes. A number of proposals had been raised that limited the prosecution of war crimes to those 'committed as part of a plan or policy or as part of a large-scale commission.' The ICRC disputed this stating that the 'ICRC has already indicated that no such threshold exists in humanitarian law – every serious violation of the law is a war crime which States have the obligation to repress.'

35 'Concerns on jurisdiction of the International Criminal Court relating to the Bureau Proposal' (Information conveyed by International Committee of the Red Cross, New Zealand, A/CONF/C.1/L.53).
The next issue concerned the list of war crimes proposed and a number of technical definitions including the need for a chapeau to be attached to the section dealing with prohibited weapons including the words ‘or which are inherently indiscriminate.’ The third matter centred around the need for the ICC to include within its jurisdiction war crimes committed in non-international armed conflicts, in particular:

ICRC considers it essential that these be included in the Statute and urges States to consider carefully the actual acts that are criminal, without reference to which treaty these may appear in. In particular, whether certain States are party or not to Additional Protocol II can be of no importance to this list as it must include actions which are violations of customary law and which are generally recognized by the international community as prohibited heinous acts.36

Fourthly, the statement advised that war crimes were not limited to those listed in the ICC Statute. This means that a range of serious violations under international customary law could exist despite no mention of them in the Statute. Finally, the ICRC cautioned that great attention to detail was required when defining the elements of the crimes, ‘[A]ny inaccuracy could create the danger of such a document amounting to unintended international legislation rather than a reflection of existing law.’37

The daily newsletter published at the Diplomatic Conference, On the Record, reported the ICRC’s concerns with the headlines, ‘Don’t Undermine the Geneva Conventions, Plead Red Cross.’38 The article began:

36 Ibid.
37 Ibid.
38 ‘Don’t Undermine the Geneva Conventions, Plead Red Cross’, On the Record (Rome, Italy), 16 July 1998, 12.
In an extraordinary appeal to the Rome Conference, the International Committee of the Red Cross has warned delegations that horse-trading over definitions in the ICC statute could pose a major threat to humanitarian law and weaken the protection of non combatants in war.\textsuperscript{39}

The final Statute of the ICC includes internal armed conflict within its jurisdiction both in the sense of crimes as defined by Common Article 3 of the Geneva Conventions (Article 8(e) of the Statute) and other crimes. Article 8(e) of the Statute reads, ‘Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.’

Article 8(e) then lists 12 types of acts including, in brief, attacking the civilian population; attacking the emblem of the Geneva Conventions; attacking humanitarian assistance units; attacking protected buildings; pillage; sexual violence; using child soldiers; displacing civilian populations; killing a combatant adversary; declaring no quarter to be given; endangering the health or causing death of persons in the power of another party and the unnecessary destruction of property. It is also important to note that in Article 8(b)(q) of the Statute of the ICC, dealing with prohibited weapons during times of international armed conflict is included the phrase, ‘which are inherently indiscriminate.’

Despite these developments at the final plenary meeting, Yves Sandoz, Head of the ICRC delegation expressed the ICRC’s concern with other limitations of the Statute observing:

\textsuperscript{39} Ibid.
In regard to non-international conflict, whose inclusion we welcome, the lack of specific provisions mentioning the use of famine, indiscriminate attacks and prohibited weapons is to be regretted. Is it not true that today we recognize that it is unacceptable to use against one’s own people weapons which are banned from use against an external enemy?40

(ii) Universal Jurisdiction

Another major issue dealt with by the ICRC at the Diplomatic Conference was that of the proposed State consent regime. Article 21 of the ILC Draft provided the Court with immediate jurisdiction over the crime of genocide, if a complaint had been made under Article 25(1)41 but required the consent of a ‘custodial State’ or ‘territorial State’ for all other crimes. The ICRC deemed this proposal to be technically incorrect and, if implemented, a barrier to an effective ICC.

In a strong statement delivered by Louise Doswald-Beck, Head of the Legal Division of the ICRC, during the final days of the Diplomatic Conference, the ICRC expressed its views on the jurisdiction of the ICC as follows:

It is essential that the International Criminal Court have automatic jurisdiction over war crimes and crimes against humanity, and not only over genocide. If it is to serve as an effective complement to national courts, the Court must be competent to try such cases as soon as a State becomes party to the treaty. By virtue of the principle of universal jurisdiction, every State has the right, and in many instances the duty, under international law to prosecute or extradite suspected war criminals. This principle reaffirms the fundamental rule that war criminals are not immune from prosecution, wherever they have committed their crimes and whatever their nationality. Any form of additional consent, such as an opt-in precondition for the exercise of the Court’s jurisdiction, gives the impression that States can lawfully protect war criminals from prosecution. This could be a retrograde step for international law and would severely limit the Court’s effectiveness.42

40 ‘Statement by Mr Yves Sandoz’ (1998) 3 Australia Red Cross ICC Up-Date 7.
41 Article 25 (1) states ‘A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.’
42 ‘Concerns on Jurisdiction of the International Criminal Court Relating to the Bureau Proposal’,
The ICRC was not alone in urging this point with numerous non-Governmental and international organisations submitting a range of papers on this topic, as discussed previously. In a letter to the Diplomatic Conference Louise Arbour, the Prosecutor for the ICTY and ICTR, wrote:

Universal jurisdiction is important in principle because the crimes are being prosecuted on behalf of humanity as a whole. In practice, universality is also critical, particularly because suspects, witnesses and other evidence, in crimes of that nature, are likely to be scattered all over the world.\(^4\)

In a similar letter, Mary Robinson, High Commissioner for Human Rights stated that:

[T]here needs to be automatic jurisdiction for all core crimes of genocide, war crimes and crimes against humanity. Delegations must not give in to the pressure of an ‘opt-in/opt-out’ regime for war crimes and crimes against humanity. All the core crimes are of similar gravity and to differentiate among them in this way might create an overly complicated, even unworkable, prosecutorial regime.\(^4\)

Previously the ICRC had researched the issue of universal jurisdiction and presented a detailed paper on the topic at the December 1997 PrepCom. In this paper the ICRC had argued that:

the universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people ...therefore, any nation which has the custody of the perpetrators may punish them according to its law applicable to such offences.\(^4\)


The paper argued that in recent times this principle has extended to include war crimes, crimes against humanity and crimes of genocide and was highly technical with detailed research undertaken on domestic prosecutions and relevant international case law.

Copies of this paper were provided to State representatives at the Conference, the ICRC made formal statements and held a large number of private discussions with delegates on the issue of jurisdiction. Once again On the Record reported the ICRC’s concern with the headline, ‘Opting in on War Crimes Would be ‘Retrograde Step for International Law’ Warns Angry Red Cross.’

The final Statute of the ICC reflects a number of these expressed concerns. Article 12(1) gives the Court the power to exercise jurisdiction over genocide, crimes against humanity and war crimes. Thus States do not have to ‘opt in’ to any of the core crimes and rather must accept jurisdiction for these three crimes. In order to exercise jurisdiction, Article 12(2) also requires that either the State on the territory in which the crime occurred or the State of which the person being prosecuted is a national, must be a party to the Statute or have accepted jurisdiction of the Court. Thus, rather than being required to seek the consent of a range of parties, the Court can act, (with other limitations including those in Article 17), if either the ‘territorial’ or ‘national’ State has ratified the Statute or give consent. This is dramatically less cumbersome that the regime envisaged in the ILC’s Draft Statute and that proposed by numerous States throughout deliberations.

46Opting in on War Crimes Would be “Retrograde Step for International Law” Warns Angry Red
However, in relation to jurisdiction over war crimes, the Statute of the ICC includes a ‘Transitional Provision’ in Article 124, which allows State Parties to ‘opt-out’ of the war crime provision. Article 124 states that:

Notwithstanding article 12 paragraph 1, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.

Article 8 refers solely to the definition of war crimes. Article 124 is deemed to be ‘transitional’ and provision is made for this Article to be reviewed at the Review Conference of State Parties and at which time it may or may not be removed. Whilst ‘opting out’ is a more difficult process for State Parties to undertake than the positive duty to ‘opt in’, the ICRC was still concerned with this development. At the final plenary meeting, Yves Sandoz stated:

Article 124 gives even a State party the right – albeit temporary – to exclude from the Court’s jurisdiction war criminals of its nationality throughout the world and for conflicts taking place on its territory. Let us say unequivocally, Article 124 is a hollow stone in the construction of the Court.  

CONCLUSION

The ICRC played an extremely important role during the creation of the ICC Statute. Historically linked to the creation of modern international humanitarian law, with ample experience in the drafting of treaties, the ICRC provided delegates with solid legal analysis in written form, speeches and individual discussion. During debates at

47 Australia Red Cross ICC Up-Date, above n 39.
the Conference numerous copies of the Geneva Conventions and their Protocols were given out by the ICRC to government representatives in a range of languages. Furthermore this organisation did not publicly lobby and rather focused attention strictly upon many of the legal aspects of the drafting process.

Like the activities of the NGO Coalition during the development of the ICC Statute, it is difficult and perhaps dangerous to attempt to quantify the precise level of achievement attained by the ICRC during the PrepComs and Diplomatic Conference. There is no doubt that in the area of the definition of war crimes the ICRC reduced the capacity for States to argue that there was no legal precedent for ‘war crimes’ within internal armed conflicts. The highly technical papers and documents produced by the ICRC were widely read by delegates and at times submitted verbatim as government positions. Both delegates and members of the NGO community sought advice and guidance from the ICRC, especially in the area of war crimes.

A degree of credit must be given to the ICRC in relation to the extensive list of war crimes found in Article 8, in particular those relating to armed conflict not of an international character. However the inclusion of Article 124, allowing States Parties to the Rome Statute to ‘opt out’ of the ICC’s jurisdiction in respect of war crimes, and the lack of any provision in relation to the use of illegal weapons in internal armed conflicts demonstrates some of the limitations to the ICRC’s influence. Despite such compromises inherent in the final Statute, the ICRC played an essential and complementary role with the NGO community in pushing for an effective ICC.
PART 3
SUPPORTING THE *AD HOC* TRIBUNALS:
NON-STATE ACTORS AND THE GATHERING OF EVIDENCE
CHAPTER 5

THE ROLE OF NON STATE ACTORS GATHERING
AND PRESENTING EVIDENCE

This Chapter explores the role non-State actors, in particular NGOs, could play in providing the ICC with evidence by reviewing the experiences of the ad hoc Tribunals. Not all non-State actors will wish to assist the ICC in this capacity. Many humanitarian agencies need to avoid gathering evidence in order to provide unimpeded assistance to victims in the field. On the other hand, human rights and advocacy organisations willing to provide evidence often do not have direct access to the relevant locations. Two case studies are undertaken in which NGOs assisted international criminal proceedings by supplying information and encouraging witnesses. These studies deal in detail with the ICTY and NGOs in ‘third’ countries, Australia and USA. General issues are explored in relation to an NGO and the ICTR, highlighting the dangers when those in the field become involved in this process. This Chapter advises that to ensure the ICC is effective and fully utilise the opportunities NGOs provide, all organisations need to clearly understand each others' mandates and limitations.

1. NGOS AND THE AD HOC TRIBUNALS

In an unprecedented development in international law, Article 15(1) of the Statute for the ICC gives the Prosecutor broad powers to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. This Article does not explicitly identify from where the ‘basis of information’ must come, thus leaving open an interpretation that the information may come from any source, including non-state actors. This interpretation appears more credible when read in the context of Article 15(2) which provides:

The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, inter-Governmental or non-Governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

Thus, the Statute explicitly envisages a role for non-State actors in the initial gathering of evidence, a crucial element in the prosecution process. Unlike *amicus*
curiae briefs, which are submitted directly to the Chamber of the Tribunal or Court, the gathering of information pursuant to an investigation or prosecution can only be presented to the Office of the Prosecutor.

This Chapter explores the numerous ways non-State actors, in particular NGOs, might gather and present evidence to the Prosecutor of the ICC. Using the experience from the ad hoc Tribunals, examples of the best and most effective methods are discussed as well as the difficulties inherent in NGOs becoming involved in the international judicial process.

Before embarking on an analysis of the positive and negative aspects of this procedure, it is important to identify the broad range of NGOs and other non-State actors, and their various attitudes towards providing evidence to assist prosecutions. In this respect non-State actors can be roughly divided into two groups, humanitarian actors and human rights actors. Obviously these two categories do not fit every organisation and a number of actors will fall into both groups at different times during their various activities. There is also a practical need to acknowledge the integral interrelationship between human rights activities and humanitarian relief. However for the purposes of this paper the two categories are useful tools for exploring the attitudes within the NGO community towards gathering evidence for international criminal prosecutions.

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1 P Alston, 'Introductory Speech' (Final report of the Conference on the Cooperation between Humanitarian Organizations and Human Rights Organizations, Medecins Sans Frontieres, Amsterdam, February 1996) 8. Alston states:

[Cooperation between humanitarian and human rights organizations] is no longer an optional proposition but a necessity...The reality is there is no option but to explore the interlinkages between these different concerns and to seek to develop some different forms of cooperation,
(i) **Humanitarian Actors**

International humanitarian organisations, such as the International Committee of the Red Cross (ICRC), *Médecines sans Frontières* (MSF) and the United Nations High Commissioner for Refugees (UNHCR) work on the ground and in the field during armed conflict or times of crisis. Hence, to undertake their tasks they require access to victims of conflict and often the cooperation of the authorities in control, whether this be the warring parties or the government. For access and cooperation it is necessary for humanitarian organisations to have a degree of trust and relatively good relations with those in power. Moving beyond their mandate of assisting victims and into the role of denouncing offenders could create problems with their operations in these countries. Furthermore in providing evidence, staff members in the field may have their personal security compromised. The provision of testimony or supply of information to the ICC by members of humanitarian organisations is likely to severely impact upon their negotiations, various relationships and capacity to deliver assistance to the needy.

Rather than wanting to provide input to the prosecutor’s investigation, a large number of humanitarian organisations wish for protection against giving evidence or at least the discretion to decide whether or not to be involved in the process. This is so they can continue to fulfill their mandate of relieving the suffering of victims on the ground and delivering services during periods of crisis. This mandate often relies upon humanitarian actors remaining separate from the penal system. As Stroun,
Deputy Director of Operations of the ICRC states, ‘public denunciation, for instance, may sometimes compromise the dialogue with the authorities concerned and jeopardise work for victims in the field.’

If such organisations are seen to provide evidence of what they have witnessed, they may be accused of taking a partial approach which could result in the denial of access. Even if access is not denied in the particular conflict from which they provide evidence, it is certainly possible the organisation’s activities could be limited in the context of other conflicts.

Not all humanitarian organisations require access to the same degree and often it is a philosophical dilemma about remaining quiet after witnessing atrocities as much as a practical issue. For example MSF, as will be demonstrated later in this section, perceives the providing of information at international criminal proceedings essential to their mandate. On the other hand, the ICRC who rely more heavily upon confidential dialogue with those in charge, will not give evidence. Not only is the issue of access and trust with the authorities a consideration, a number of humanitarian actors use the principle of neutrality as an ideological position as well as a pragmatic tool. The fear of allegations of a lack of independence in providing evidence at prosecutions is a genuine concern for many of these organisations.

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3 For a detailed examination of the various modes of action of humanitarian players see, Paul Bonard, Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity (1999).
The dilemma faced by humanitarian organisations in the prosecution of those who perpetrate atrocities is ironic in the sense that, of all non-State actors, these organisations have access to the most valuable evidence. Being in the field, often in the middle of breaches of international humanitarian and human rights law, and regularly in contact with the perpetrators, humanitarian actors could provide the richest and most credible details to the prosecutor. However, due to the practical considerations of their work they are unable to assist in this manner, choosing to focus upon immediate assistance and access to victims. Later in this section there will be an examination of the mechanisms in place in the Statute of the ICC to protect a number of humanitarian organisations pursuant to this issue.

(ii) **Human Rights Actors**

NGOs, which focus on human rights, by their very nature, are well equipped to assist the Tribunals in their investigation work. I say this because human rights organizations focus on the monitoring and reporting of human rights violations and seek to prevent future violations. This function is not inconsistent with that of the Tribunal.\(^5\)

Human Rights actors tend to be less visible in the field undertaking practical operations and more focused upon advocacy issues. For example, whilst organisations such as Amnesty International and Human Rights Watch need to gather their data in countries with human rights abuses, the vast bulk of work is done in cities such as London and New York. It is at these sites that campaigns are developed and distributed throughout the world. In many circumstances such campaigns involve education, monitoring States' human rights situations and denunciation.

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Thus, the giving of evidence at international trials involves less threat to the daily work of human rights organisations. This is due to the fact that, in general, human rights actors are less reliant upon trust and detailed negotiations with potential perpetrators. Those gathering evidence for human rights advocacy campaigns tend to undertake very short research trips, develop relationships with local NGOs and often utilise detailed statements from individuals no longer in the country — for example, refugees who are sheltering in another State. Often human rights organisations have to be extremely discrete about the initial source of their information and have strict verification processes. Due to these factors, human rights actors, compared to humanitarian actors, may occasionally have difficulties in obtaining evidence. However there are less restrictions on the use of this information once it is in the possession of human rights organisations.⁶

A number of large human rights actors have substantial technical expertise in international criminal law. As a group, respected human rights organisations also have the support of the academic community and the media. This combined with the willingness and the commitment to give evidence can result in human rights actors playing a crucial role in international criminal prosecutions.

(iii) Experience of NGOs at the ICTY

There is no doubt that in order to be successful, both ad hoc Tribunals have required the cooperation of a range of NGOs. Mr Graham Blewitt, Deputy Prosecutor of the

⁶ Interview with Donato Kiniger-Passigli, External Relations Officer, ICTY (The Hague, 5 November
ICTY, stated at a conference on the topic, 'all of us in the Tribunal have recognised the important role that NGOs play in our work.' Whilst this Chapter focuses upon the role played by NGOs in gathering evidence, this section briefly examines other actions that NGOs have undertaken in relation to assisting the ICTY.

NGOs significantly contributed to the establishment of the ICTY by bringing to the attention of the world’s media the breaches of international humanitarian law and human rights occurring within the Balkans in the early 1990s. In particular, the reports of mass rapes of women in the former Yugoslavia ‘had an electrifying effect and became a significant factor in the demand for the creation of the International Tribunal’. In disseminating the horrors of the conflict, a large number of NGOs suggested solutions in the form of the prosecution of those responsible. NGOs also greatly assisted the Commission of Experts in the gathering of initial details for the United Nations before it decided whether to create the ICTY. The Prosecutor’s Office stated in a position paper that:

NGOs played an important role in focusing the world’s attention on the perpetrated atrocities and overwhelming suffering of the civilian populations. They also voiced the need to establish a lasting peace and to take appropriate action to bring to justice those responsible for the atrocities. The Prosecutor’s Office recognises the significant role that NGOs have also played in relation to carrying out investigations into the atrocities and is anxious to establish cooperative arrangements with all those NGOs involved in information gathering.

1996).
7 Blewitt, above n 5, 23.
10 Interview with Donato Kiniger-Passigli, above n 6.
NGOs played a crucial role in lobbying the budgetary committee of the United Nations (UN) and States to provide the ICTY with adequate funding and resources. A specific NGO, the Coalition for International Justice\(^{12}\) (CIJ) undertook to educate and inform relevant departments of the UN in relation to the funding required to run the ICTY. As most UN Departments had no experience of the prosecution of war criminals and subsequently had no understanding of the costs involved in such proceedings, CIJ ran seminars on the topic and provided influential information.\(^{13}\)

Technical assistance, particularly provided by human rights organisations, is another method in which NGOs are contributing to the work of the ICTY. Such assistance includes undertaking legal research of matters of particular concern to the ICTY. For example Amnesty International completed a study and created a handbook to assist governments to fulfil their obligations under international law to cooperate with the Tribunals. The handbook describes the range of legal obligations and the practical actions States must provide for the Tribunals to be effective. These actions include gathering evidence, arresting suspects, transferring witnesses and the accused to Tribunals. It also deals with the necessary domestic legislation required for such cooperation, providing simple legislative guidelines for those States without such law and describes some of the strengths and weaknesses of existing legislation.\(^{14}\) The process of creating domestic legislation to assist the international trials is essential to

\(^{12}\) The Coalition for International Justice (CIJ) was established in September 1995 by the American Bar Association’s Central and East European Law Initiative.

\(^{13}\) Interview with Donato Kiniger-Passigli, above n 6.

the Tribunals especially when dealing with States which have indicted individuals in their territory, and the handbook has been of great use.\textsuperscript{15}

Technical assistance also includes the sending of trial observers to undertake careful scrutiny of the legal proceedings and to publicise matters of judicial concern. This process not only keeps the ICTY ‘on its toes’ but also continues to highlight the proceedings in the mass media.\textsuperscript{16} Whilst members of the ICTY cannot talk to the media about matters before the Tribunal for reasons of due process, knowledgeable NGOs are not barred and thus can keep the issue alive in the international press. The American Bar Association through its Central and East European Law Initiative (CEELI) and CIJ provided the ICTY with a Liaison Officer to assist in technical legal matters such as elements required for a fair trial, service of process and discovery. The Officer was also involved in coordinating non-Governmental organisations involved with the ICTY and educating the public about the role of both ad hoc Tribunals.\textsuperscript{17}

NGOs have been actively involved in providing support for individuals testifying at the Tribunal and follow up counselling when witnesses return to their country of origin. The ICTY has a Victims and Witnesses Unit that takes responsibility for providing and arranging protection and support when witnesses travel to The Hague to give evidence. NGOs have cooperated with the Unit in formal and informal

\textsuperscript{15} Interview with Graham Blewitt, Deputy Prosecutor, ICTY (The Hague, 7 November 1996).
\textsuperscript{16} Mr Richard Dicker, Counsel for Human Rights Watch, New York, attended the opening of the Tadic trial as a trial observer and gave over 20 interviews in one day on the proceedings.
\textsuperscript{17} ‘CEELI-Initiated Coalition for International Justice Supports the War Crimes Tribunals’ (Annual Report, American Bar Association Central and East European Law Initiative, 1996) 7.
ways. In a number of cases, members of NGOs or local community support groups have accompanied witnesses to The Hague as a ‘support person’ to assist with arrangements and to encourage and motivate the witness. A number of NGOs have written research papers and held conferences in relation to witnesses protection measures and the impact that the giving of evidence has upon individuals who are already traumatised. Such examination is useful due to the fact that there is little written on the topic and it is only relatively recently that the psychological impact of events such as armed conflict is being explored at an international level.

Numerous NGOs pushed for the creation of the ICTY and continue to educate the press, disseminate information about proceedings, lobby for adequate funds, support witnesses throughout prosecutions and generally assist the Tribunal in a range of daily activities.

(a) General areas of concern and caution

Perhaps the most serious problem in the relationship between NGOs and the Tribunals is the tension between the political nature of many organisations and the judicial requirement of impartiality. This issue will be discussed in the following section. While it is most pertinent to the gathering of evidence, there is no doubt that the issue of political agendas arises in all areas of cooperation between the Tribunals and NGOs.

18 Interview with Wendy Lobwein, Support Officer Victims and Witnesses Unit, ICTY (The Hague, 5 September 1997).
20 For further details on this topic see, eg, Y Danieli, S Rodley and L Weisaeth (eds), International Response to Traumatic Stress - Humanitarian, Human Rights, Justice, Peace and Development
In relation to assistance provided to witnesses, there have been a number of instances when individuals from NGOs have become ‘possessive’ of those giving evidence and this can lead to conflict with the Victims and Witnesses Unit.\textsuperscript{21} It has been widely acknowledged that the domestic criminal legal system is not kind to victims, and this is increased in an international legal institution with the focus of the world’s media upon the proceedings. However, whilst there must be a balance between the rights of the witness and the judicial procedure, there are points during a trial that involve strain and stress upon those giving evidence. Issues such as a fair trial for the accused and due process, necessitate at times seemingly harsh treatment of witnesses. If this is not clearly understood by the ‘support people’ and complaints are made, those giving evidence can find themselves in a more emotional state than if they were just dealing with the professionals from the Unit.

Similarly, in providing technical assistance and finance to the Tribunal, it is important that organisations are motivated not through political bias but rather through concern for and expertise in the area. There are occasions when NGOs have attempted to use the Tribunal for their own purposes, either for fundraising or promotion unrelated to the Tribunal’s work.\textsuperscript{22} It is crucial that the Tribunal is not viewed publicly as being ‘hijacked’ by NGOs, in particular human rights organisations. The Tribunal must be seen as strictly independent and not merely the mouthpiece of NGOs.\textsuperscript{23} It is necessary to create a clarity of understanding that NGOs do not work for the Tribunal in any

\textsuperscript{21} Interview with Wendy Lobwein, Support Officer Victims and Witnesses Unit, ICTY (The Hague, 28 September 1998).
formal capacity but rather are involved in an informal and dynamic relationship. This distinction can become blurred, either through misrepresentation by NGOs or a lack of communication. If the Tribunal is perceived as a human rights instrument, rather than a judicial organ, problems can be created when the Prosecutor’s Office requires assistance from the military, governments and diplomats who are more interested in due legal process that human rights issues.24

Whilst NGOs undertake a vast amount of positive publicity and advocacy on behalf of the Tribunal, it is necessary that information used is factual and able to be backed with evidence. The Prosecutor of the Tribunal, Justice Louise Arbour, expressed frustration at the some of the statistics used by NGOs that cannot be substantiated. Such ‘floating figures’ are not helpful to the Office of the Prosecutor as they create unrealistic expectations and extra pressure upon the Tribunal to prosecute in an area with limited evidence.25 Furthermore, this can lead to a situation where NGOs and community groups hold the Tribunal accountable for not taking action, such as indicting certain individuals or investigating certain areas. These areas of concern should not detract from the enormous benefits that NGOs can bring to the international criminal process. To ensure that the relationship between the ICTY and NGOs remains positive and productive, transparency and open communication are required.

22 Interview with Graham Blewitt, Deputy Prosecutor, ICTY (The Hague, 7 November 1996).
23 Interview with Gavin Ruxton, Senior Legal Adviser ICTY, (The Hague, 6 September 1997).
24 Interview with Gavin Ruxton, Senior Legal Adviser ICTY, (The Hague, 28 September 1998).
2. NGOS GATHERING EVIDENCE

It is in the area of gathering evidence that NGOs have perhaps the greatest potential to assist the Tribunal due to their capacity to identify potential witnesses and provide access to vital information. It is also the area fraught with the most dangers if not handled carefully by both the Tribunal and the relevant organisations.

NGOs have access to networks and ‘grassroots’ information in a way that officials of the Tribunal cannot and do not have. Very often survivors and witnesses are suspicious and fearful of formal bodies. In many instances it is members of the State, such as the military or political parties, that have caused the harm. Thus, witnesses often prefer to talk to non-State actors, either in the form of local community groups or established and well known international NGOs.

Many NGOs are voluntary organisations with members undertaking tasks outside working hours. Due to this, there are no traditional working day time restrictions for those who wish to give evidence or identify themselves as potential witnesses. Furthermore discussions can be carried out in an informal way, over a cup of coffee in a lounge room or local community halls, rather than in a formal interview setting. The essential elements of encouraging witnesses to come forward to testify is the establishment of trust, both personal and professional, and the creation of a ‘comfort’ zone. NGOs often have opportunities in this area that are unavailable to officials from the Tribunals’ investigation department and thus such organisations can ‘fill the gaps’ where the Tribunals have limited resources or capacities.
In the area of sexual assault and gender related crimes, Women’s NGOs have been the most active and efficient of all non-State actors. The Sexual Assault Unit at the ICTY advises that without the cooperation of such groups they would have only limited evidence of sexual assault such as rape. Perhaps due to the personal nature of these crimes, NGOs have played a vital role in locating witnesses, encouraging them to speak out and taking limited statements. Work is done with women who have survived sexual violence during armed conflict at a number of levels including local ‘clubs’, in places such as Zagreb and Tuzla, to formal settings such as the Dublin Rape Crisis Centre which assists refugees from the former Yugoslavia. It is necessary for the ICTY to develop relationships with such organisations and identify what the NGO can do to assist the Tribunal and what it cannot. Not every organisation dealing with survivors of sexual violence wishes to set up a partnership with the ICTY. As indicated before, there is a limit to the type of work NGOs can undertake. Thus an important element of the ICTY’s work is identifying potential non-State actors who may be able to assist. Such networking has been undertaken using email, women’s conferences and local Legal Aid Centres who often have details of such groups. Clear communication and the creation of trust is essential if the relationship is to be effective.

NGOs, particularly humanitarian organisations, are likely to be on the site or nearby when atrocities occur and have first hand knowledge of events and the best ability to identify potential witnesses. As discussed previously, some humanitarian actors have

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26 Interview with Patricia Sellers, Legal Adviser on Gender Issues, ICTY (The Hague, 7 September 1997).
27 Interviews with Nancy Patterson, Legal Officer, and Agnes Inderhaug, Investigation Team Leader,
grave concerns in relation to becoming involved in international criminal litigation. However, other humanitarian organisations do not have such concerns and a large number of human rights organisations are able to get direct and indirect access to important information. This is particularly so of human rights actors who have been involved in a country well before the relevant events occur and thus have credibility in the eyes of the local population.

The ICTY has provided some relief for NGOs concerned with matters of confidentiality when providing information. Rule 70 of the Tribunal’s Rules of Procedure and Evidence states:

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

... 

(D) If the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.29

However, Gavin Ruxton, Senior Legal Adviser at the ICTY advises that whilst Rule 70 is an important protective rule, NGOs giving evidence must take some

Sexual Assault Unit, ICTY (The Hague, 7 November 1996).
28 Ibid.
responsibility in the process. If the information is to be useful and used in Court, confidentiality cannot be assured in every single instance.\textsuperscript{30}

This vital role of providing immediate and first hand evidence to international criminal proceedings is complex and requires further debate, review and refinement. Detective Superintendent Alistar Milroy who established and directed the investigation unit of the ICTY until 1995, stated that:

\begin{quote}
I recommend that, a more co-ordinated approach, managed by the UN, involving Government, non Government agencies and the media would avoid the fragmentation, duplication of efforts and the loss of valuable evidentiary material.\textsuperscript{31}
\end{quote}

However, many NGOs are strongly based on the principle of independence and attempts to coordinate activities can be viewed by some actors as restricting the role of civil society and potentially 'co-opting' a sector with valuable informality.

\textit{Problems with NGOs taking evidence}

The gathering of evidence by NGOs for international criminal litigation can create a range of problems if the task is undertaken incorrectly or even with a lack of professionalism. In 1995 the ICTY produced a paper entitled ‘Cooperation between Non-Governmental Organisations and the International Criminal Tribunal for the former Yugoslavia.’ This was distributed widely to all NGOs expressing interest in the Tribunal. In the paper the Office of the Prosecutor clearly outlined the limits of

\textsuperscript{30} Interview with Gavin Ruxton, above n 24.
the relationship. It is worth quoting the section dealing with the role of NGOs in interviewing potential witnesses in full:

Some NGOs have been engaged in interviewing the victims of atrocities, including those who have fled from the war zone as refugees. While recognizing the important work of NGOs in this area, the Tribunal has taken full responsibility for future in-depth interviewing of the victims, witnesses, and refugees for the purpose of obtaining information from those persons regarding war crimes or crimes against humanity. All of these persons are potential witnesses in future prosecutions before the Tribunal and, accordingly, great care needs to be taken not to contaminate the evidence that these witnesses may give.

The Prosecutor's Office must assess the reliability of the testimony and credibility of the persons it intends to call as witnesses. This means that the Prosecutor's representatives must interview all potential witnesses to enable such assessments to be carried out.

Accordingly, any interviewing of potential witnesses by persons not in the Prosecutor's Office, could jeopardize, hinder, or interfere with investigations being carried out by the Prosecutor's Office. Such interviewing could contaminate witnesses or evidence and thus may prejudice the chances of mounting a successful prosecution.32

In numerous other fora, members of the ICTY have continued to stress the need for NGOs to be involved in limited 'screening' of witnesses or providing the Tribunal with the identity of individuals rather than undertaking detailed statements.33 If done incorrectly, the recording of testimonies from potential witnesses can be detrimental to the Tribunal rather than providing assistance. This is particularly so if witnesses are 'tainted' by NGOs or provided with misinformation which impacts upon the quality of the evidence. Information can be taken from survivors of atrocities for various reasons, ranging from the media, historical or advocacy purposes, and the requirement of obtaining humanitarian relief or the determination of a status such as

32 'Cooperation between Non-Governmental Organizations and the International Criminal Tribunal for the Former Yugoslavia', above n 11, 3-4.
33 Médecins Sans Frontières, 'The Relationship Between NGOs and the International Criminal
that of a refugee. In these circumstances the quality and focus of the statement is varied.\textsuperscript{34} As the Prosecutor is required to provide all statements made by witnesses, difficulties can occur during the judicial proceeding with information taken for non-judicial reasons.

A number of NGOs at a conference on this topic expressed the difficulties inherent in restricting non-State actors from talking to potential witnesses — ‘for some NGOs talking to these people is simply part of their work.’\textsuperscript{35} Other concerns were raised such as the protection mechanisms available for victims and witnesses by the Tribunals and the impact that may be felt on the lives of individuals encouraged to give evidence. Finally the issue of NGOs providing information for both the Prosecution and the defence was raised with a focus upon numerous NGOs who work under the principle of impartiality. There is an internal debate within NGOs on whether or not to submit information to the defence:

people who have been in the field and have seen atrocities being committed might have moral objections in giving information also to the defence. Thus, there is a tendency to give information only to the Prosecutor.\textsuperscript{36}

On the other hand, a number of NGOs providing technical assistance to the International Tribunals have focused their attention upon the rights of the accused and issues relating to due process — this is particularly so with trial observers and seminars run by NGOs for the defence.\textsuperscript{37}

\textsuperscript{34} Interview with Justice Louise Arbour, above n 25.
\textsuperscript{35} \textit{Médecins Sans Frontières}, ‘The Relationship Between NGOs and the International Criminal Tribunals’, above n 33, 58.
\textsuperscript{36} Ibid, 59.
\textsuperscript{37} For example, the Coalition for International Justice ran a week long seminar of intensive training for
In the first few years of establishment, the ICTY relied very heavily upon NGOs for specific information, background briefings and general details of the areas under investigation. In many cases NGOs had been involved in the country for many years, even before the conflict, and thus had access to relationships, networks and individual survivors. However in the last year or so the ICTY has created an extremely detailed database on the former Yugoslavia and established its own networks, gaining direct access to refugees and others with evidence rather than relying completely upon NGOs. Whilst the relationship between the ICTY and NGOs is still important, it is no longer as dependent as it was initially.\textsuperscript{38} Furthermore, an increased number of cases at the Tribunals now deal with accused who were in positions of power during the conflict, thus requiring more data relating to military strategy and political policies. NGOs are less likely to have access to such details as they involve State documentation rather than eyewitness accounts.

The change in the relationship between NGOs and the Tribunal is demonstrated clearly in the fact that the ICTY no longer has a full time staff member to deal specifically with NGOs and, rather, this task is undertaken by a Senior Legal Adviser. Whilst available resources always impact upon such positions it is obvious that there is no longer the need for an external relations officer. Such a shift in the dynamics between the ICTY and NGOs is inevitable when a Tribunal is dealing with one

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\textsuperscript{38} Interview with Gavin Ruxton, above n 24.
geographical area and a specific conflict over a large number of years – allowing it to
gather detailed research.

3. CASE STUDIES

In order to examine in detail the positive and negative aspects of NGOs becoming
involved in gathering evidence and identifying witnesses, this section will undertake
two detailed cases studies. These case studies were chosen because the ICTY
specifically identified them as the most useful. A brief discussion on the example of
MSF’s involvement with the ICTR highlights some of the serious problems that
NGOs can experience when gathering evidence.

(i) Australian Committee of Investigation Into War Crimes (ACIWC)

The Australian Committee of Investigation Into War Crimes (ACIWC) was
established in 1994 in Melbourne, Australia. The Committee was formed in response
to a specific request from a Women’s Centre in Zagreb called Tresnjevka. An
Australian woman, Jane Gronow, was sent by Austcare\(^{39}\) to Tresnjevka to assist
women survivors of the conflict in the former Yugoslavia. Whilst Gronow was
working in Zagreb, a women’s group in Melbourne, Women’s Interlink (WIL), wrote
wanting to know what could be done back in Australia to assist those in Tresnjevka.
After discussing the matter with the women in the Zagreb Centre, Gronow responded
that the women wished rape to be deemed a war crime and for it to be prosecuted at
the ICTY.

\(^{39}\) Austcare is an Australian NGO which deals with the problems experienced by refugees.
With limited resources and no access to the Tribunal, WIL decided to investigate what procedures were available within Australia for refugees from the region of the former Yugoslavia to give evidence to the ICTY. It was deemed that the best way to ensure the prosecution of the crime of sexual assault, and thus to create a clear legal precedent, was to encourage women who were survivors to give evidence. After a number of phone calls it became apparent that, despite Australia advocating its strong support for the ICTY and providing Sir Ninian Stephen as a judge for the Tribunal, there was no governmental department responsible for or willing to assist in the gathering of evidence in Australia. Neither was there any NGO or international legal academic group working on the issue. These conclusions led a number of members of WIL and a few other interested individuals to create ACIWC.

In 1995, ACIWC was incorporated under the *Associations Incorporation Act 1981* (Vic). It then contacted Graham Blewitt, Deputy Prosecutor at the ICTY to enquire whether there was any role for a small and non-funded Australian NGO. Blewitt advised that it would be extremely useful if potential witnesses could be identified and screened so that the Tribunal would be able to know the quality and quantity of evidence available within the relevant refugee population in Australia. He also sent information papers to ACIWC including ‘Cooperation between Non-Governmental Organizations and the International Criminal Tribunal for the former Yugoslavia’ and stressed that limited screening would be more beneficial to the ICTY and that the taking of detailed statements would create difficulties.
ACIWC then created an Advisory Committee in order to obtain legal guidance and legitimacy.\textsuperscript{40} The next task was to gain the acceptance and confidence of the Serbian, Croatian and Bosnian-Muslim communities in Melbourne. This was a difficult task as a number of the communities were suspicious as they were feeling under siege by the media and were attempting to cope with a large influx of traumatised refugees who required their community services.\textsuperscript{41}

Numerous informal meetings were arranged with community leaders and personal relationships were established between members of ACIWC and representatives from the relevant ethnic groups. After discussing the proposed screening of witnesses with community members from the former Yugoslavia, it was decided that ACIWC's mandate should be broadened to include any individual (both sexes and all ethnic groups involved in the conflict) who wished to give evidence on any crime within the ICTY's jurisdiction.

A screening kit was drafted and sent to the Prosecutors' Office for review. The kit identified the aims of ACIWC, the background to the Committee and a standard sheet where individuals could answer limited questions. Such questions included the geographical region in which they lived during the period between 1991\textsuperscript{42} and 1995, whether they were victims or witnesses to a crime, the type of crime, whether they knew the identity or details of the perpetrators and whether they would be prepared to

\textsuperscript{40} The Advisory Committee composed Professor Philip Alston, Professor Hilary Charlesworth, Professor Timothy McCormack and Ms Pene Mathew. Justice Elizabeth Evatt agreed to be patron of ACIWC.

\textsuperscript{41} From 1991 until 1995 Australia accepted 14,000 refugees from the former Yugoslavia: M Einfeld 'Humanitarian Aid Delivery in the Balkans' (Report of a Mission, September 1995) 11.

\textsuperscript{42} The ICTY only has jurisdiction over crimes committed after 1991.
provide further details to the Prosecutor's Office. The kit also asked whether the individual wished to be provided with confidential counselling services. The ICTY suggested a few amendments to the kit and ACIWC also consulted the relevant ethnic communities in relation to the process and the documentation. Once the kit was finalised it was translated into the three relevant languages.\(^{43}\)

ACIWC contacted the Federal Attorney General's Department and the State Department of Immigration and Multicultural Affairs to inform them of the preparations and to request financial assistance for tasks such as translation of the screening kit. Unfortunately the governmental departments were unable to provide any funds. ACIWC decided to finance all activities themselves and to submit applications for grants to various philanthropic organisations. Eventually the Myer Foundation\(^{44}\) provided ACIWC with $6,000 to cover the cost of a fax machine, mobile phone, translators, interpreters and transport for those giving evidence.

It was believed by ACIWC that it was important to raise the issue of the prosecution of rape as a war crime with governmental authorities and the general public. In a submission to the Joint Standing Committee on Foreign Affairs and Trade dealing with Australia's response to the conflict in the former Yugoslavia, the Committee listed its aims as:

> The identification of victims or witnesses of war crimes (especially rape and sexual assault) committed in the territory of the former Yugoslavia, from the refugee population in Australia and passing this information to the Tribunal.\(^{45}\)

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\(^{43}\) Australian Committee of Investigation Into War Crimes, *Screening Kit* (1995). A copy of the kit can be found in Appendix 3.

\(^{44}\) The Myer Foundation is a philanthropic organisation based in Melbourne, Australia.

\(^{45}\) Australian Committee of Investigation Into War Crimes, *Papers submitted to the Joint Standing Committee in Foreign Affairs and Trade by the Australian Committee of Investigation Into War Crimes*
Attached to the submission was an appendix outlining the need to create a strong legal precedent at the ICTY for sexual crimes. In concluding, the Committee stated:

ACIWC believes that the identification of individuals who could assist the Tribunal is vitally important, not only for the resettlement process of refugees from the Yugoslavian region, but also for the future of international peace and security.46

Due to the nature of the work to be undertaken, matters of security, both for those giving evidence and those gathering evidence, were deemed important. After discussing the process of screening with a member of the Federal police who had experience within the relevant ethnic communities, a number of suggestions were implemented. These included screenings to be undertaken in a neutral and professional environment and that there would always be at least two members of ACIWC involved at any one time. Previously ACIWC had planned to screen witnesses at Committee members’ homes which was advised against. It was then necessary to identify a suitable location. The screening kit was also amended to clearly indicate that ACIWC was solely interested in victims of war crimes not criminals:

It is important to note that ACIWC is assisting war victims in Australia, but is neither hunting nor investigating war criminals. That task is left solely to the Prosecutor.47

In relation to the protection of those being screened, it was understood that developing adequate systems of confidentiality were essential. In previous international criminal war crimes tribunals, such as Nuremberg and Tokyo, prosecutions were held at the

(1996).
46 Ibid, 3.
end of the armed conflict and there was no fear from those giving evidence that immediate retribution would occur to loved ones still caught in the conflict. With the ICTY at the time this was not the case. Slavic Ilic, a community worker for the Slavic community in Melbourne highlighted this point to ACIWC. Ilic advised the Committee that one of her clients, a woman refugee from the former Yugoslavia who was a survivor of multiple rapes whilst in the region, wished to give evidence to the Tribunal. Ilic stated:

X would very much like to become involved in the process as she wants to see justice done. However her parents are currently being hidden in a supportive neighbour’s place in the territory of the former Yugoslavia. X is terrified that if she gives evidence she will be identified, putting at risk not only the lives of her parents but their protectors as well. X’s dilemma is not unusual for refugees from the region.48

To overcome these fears, ACIWC implemented a code system to ensure that those undertaking the screening process could not be identified. Details of the process were included in the screening kit:

On the attached sheet, there is no information regarding your name or address. Victims and witnesses will be identified by a random identification (ID) number only, assigned at the time of the screening interview. All screening sheets and interviews will be kept confidential. Screening sheets will be placed in a safety deposit box. ID numbers will be kept in a separate safety deposit box.49

Statements of intent to keep all information obtained during the screening interview confidential were drafted to be signed by all parties to the interview including the interpreters. Indeed, ACIWC discovered that identifying the right interpreter was an important task. A wrong interpreter, especially if he/she is of the ethnic group who

47 Screening Kit, above n 43, 1.
48 Interview with Slavia Ilic, Aid-in-grant worker for the Slavic community (Melbourne, 10 October 1994).
perpetrated the initial crime, could create fear and discomfort for an individual giving evidence. In countries of resettlement, such as Australia, communities from the region involved in the armed conflict are small and relative insular. To those considering giving evidence, the fear that an interpreter could ‘gossip’ about the contents of interviews was a grave concern, particularly when dealing with sensitive matters such as sexual assault within the context of different cultural and religious views on sexuality:

People in Australia are very afraid that news about what has happened to them may spread in the community. This would bring great shame upon not only the victim, but also their family. A wrong choice of interpreter could be very dangerous.\textsuperscript{50}

In April 1995, Blewitt faxed ACIWC requesting whether screening could commence with a focus, if possible, upon individuals from the Prijedor region due to the pending Tadic case located in that area. Good contact had already been established with ‘Mohammed’, the Bosnian-Muslim community group in Melbourne. A number of individuals from the area were identified and approximately 10 wished to be involved in the process. Over the next 15 months ACIWC screened approximately 20 individuals from both the Bosnia-Muslim and Croatian community and assisted in identifying over 15 individuals in New South Wales. Whilst approaches had been made to the Serbian community, with some positive communication, no one came forth from this ethnic group to undertake screening with ACIWC.

\textsuperscript{49} Screening Kit, above n 43, 2.
\textsuperscript{50} Interview with Emera Bostjak, active member of the Bosnian Muslim community (Melbourne, 17 October 1998).
The process consisted of a face-to-face interview, with the first stage requiring the interviewee to write down his/her details on a paper to be placed in a safety deposit box and then being allocated an ID number. A standard introduction was given explaining the process and the fact that at this stage only very limited details were required. It was stressed to the interviewee that there should not be any expectations of a need to testify, as despite the quality of the evidence, the ICTY may not require the specific information he/she had to offer. The screening kit was then filled out by the interviewee, often with the assistance of an interpreter. All members of ACIWC had completed a short workshop with counsellors from the Centre for Survivors of Torture and Trauma (Foundation House) so that they were sensitised to some of the issues that may arise in the interview. Each interviewee was asked at the end of the screening process whether they wished for follow-up counselling with Foundation House free of charge. It was understood that in many cases it was not possible for individuals to only give limited ‘yes-no’ answers to questions about horrific events in their lives without stirring up a range of difficult memories and emotions.

The screening kits were then faxed to the Office of the Prosecutor at the ICTY, with only the ID number on the papers. If a member of the Prosecutor’s Office was interested in the initial screening he/she would then contact ACIWC and request a telephone interview with the individual identified by their number. On the basis of this work, the Prosecutor sent a Senior Legal Adviser, Grant Niemann, and an Investigator, Thomas Ackim, to Australia in late 1995 to undertake detailed interviews with a number of the identified witnesses.
ACIWC disbanded in late 1996 for several reasons, including reduced responses from the community groups, difficulty with resources and the time consuming nature of the process. All members were in full time employment and the intensity of the process of screening was hard to balance in the time available. The lack of assistance from relevant government departments was also a problem that could not be easily overcome. Similarly, before the Myer Foundation funding had been granted, the process had been expensive for individual members of ACIWC to cover. For example, no discounted rate for the interview rooms at the Law Society in Melbourne was offered and thus, the cost of $100 per evening, had to be borne by the Committee members. It is apparent that a process such as screening would be easier if professional groups, such as the Law Society or members of the Bar, were able to assist.

As a case study, the experiences of ACIWC provides some useful lessons to NGOs wishing to undertake similar work. The need to communicate with, and take directions from, the international legal body as well as with the relevant community groups is essential. The proper use of interpreters, translators, locations and follow-up counselling are all elements that are necessary if the NGO is to be successful in its aims. Resources are always going to be required and government bodies should at least listen and respond to requests from such organisations if they appear credible and in a position to professionally implement their proposed activities. Similarly, professional organisations should be included in dialogue and provide assistance when they are able. ACIWC did assist the ICTY in gathering important evidence. The Office of the Prosecutor expressed its approval of the work undertaken by ACIWC in a letter written by Blewitt:
From the Tribunal’s point of view NGOs play a very important part in our work, and I am sure that in the event that a Permanent International Criminal Court is established, NGOs will continue to play a critical role. In particular the work of the ACIWC in Australia has lead to the discovery of several important witnesses and I am confident that further witnesses will be identified in the future. The ACIWC is one of the most professional NGOs that the Tribunal is currently dealing with and I applaud the work that it is doing.\footnote{Letter from Graham Blewitt, Deputy Prosecutor ICTY (The Hague 26 September 1995).}

(ii) **American Serbian Women’s Caucus (ASWC)**

In late 1994, Justice Richard Goldstone, Prosecutor of the *ad hoc* Tribunals at the time, delivered a speech in San Francisco, on the ICTY. A number of members of the audience were concerned that the speech dealt exclusively with atrocities committed against the Bosnian Muslims, and made no mention of the Serbs who had suffered. A question was asked in relation to how many cases of war crimes committed against Serbs the ICTY was investigating. The answer was none. Mirjana Samardzija,\footnote{Information for this section was gathered during numerous discussions with Mirjana Samardzija during November and December 1996.} an American-Serbian woman, approached Justice Goldstone and asked if he had any evidence or knowledge of a camp in Tarcin, a town close to Sarajevo, where Serbs were being held as prisoners in a wheat silo. Justice Goldstone advised that he had not heard of this camp.

Goldstone told Samardzija that if she was able to get evidence and documentation in relation to the Tarcin camp and the alleged crimes, he would instruct the Tribunal’s investigators to carefully review and investigate the situation. In response to this discussion, Samardzija created the American Serbian Women’s Caucus (ASWC). The group included a number of professional women, the majority of whom were
from the Serbian community in San Francisco. All members were unpaid and worked on the Caucus after hours.

Previously Samardzija had spoken to a couple who had recently arrived in the United States from Serbia. They had informed her of the Tarcin camp and the conditions under which the Serb prisoners were living in this camp. There had been no reports in the media about this camp, nor of the ill-treatment meted out to the members of the Serbian population in the former Yugoslavia. Samardzija had requested that this couple obtain further evidence, in particular from the female as she had been involved in film production in Serbia before the armed conflict had broken out. The woman promised she would use her skills to gather evidence.

A few months later Samardzija received a film featuring statements from people living in the Tarcin camp. ASWC edited the 36 hours of footage down to the 10 most powerful statements, and wrote a detailed report. Whilst the Caucus was unable to obtain detailed information from the ICRC, they were able to get a statement that the ICRC had visited the Tarcin camp which at least confirmed that the camp existed.

This documentation was then presented to Justice Goldstone at the ICTY. A copy was also passed onto a prominent American-Serb businessman who passed the information on to a US Congressman requesting that the Human Rights Section in Washington look into the matter. The Congressman wrote to the Bosnian Embassy seeking a comment. Whilst ASWC never received a response from the Embassy, they were satisfied that there was some political awareness of their concerns and that the matter was being reviewed at a high level.
In July 1995, Al Milroy, senior investigator at the ICTY, wrote to ASWC advising that he was very impressed with the report and asked whether ASWC would be prepared to work more closely with the Tribunal. Milroy wished to send investigators to the United States if ASWC could provide two ‘good quality’ Serbian witnesses to atrocities who were prepared to talk to the Tribunal.

ASWC placed an ad in the Serbian international newspaper asking for anyone who was a witness to war crimes or knew of anyone who was a witness to war crimes to come forward. They received over a dozen calls from people who knew of others. Previously members of ASWC had asked the State Department how many refugees had arrived in the USA from Serbia in the last few years. They were informed that the US was not accepting Serb refugees, only Bosnian Muslims. However, when people from the Serb community contacted ASWC they told the Caucus that a number of Serbs had recently come to the US with refugee status under the auspices of the UNHCR. Many of these individuals had witnessed, or were victims of, war crimes.

ASWC undertook to be as professional as possible. The individuals who had originally contacted ASWC with details of potential Serb witnesses were called ‘War Crimes Investigation Coordinators.’ ASWC believed it was essential to make volunteers feel that they were an important part of the process. Due to the fear and confusion that surrounded the whole topic of giving testimony to the Tribunal, trust, respect and goodwill were heavily relied upon.
ASWC then developed screening kits in consultation with the Prosecutor's Office of the ICTY. The kit was produced in English and Serbian. Like the ACIWC, the American kits were coded, so no name or personal information was ever sent to the Tribunal. ASWC then asked the War Crimes Investigation Coordinators, across the USA, to encourage and assist potential witnesses to complete filling out the kits. These were then sent back to ASWC who coded the information and then passed it on to the ICTY. ASWC were amazed by the speed and commitment of some of the coordinators.53

In late October 1995, the first group of investigators from The Hague went to Chicago for a month and interviewed over 20 Serb survivors of war crimes. Initially the investigators encountered problems in trying to encourage people to talk as there were many accusations that the ICTY was biased against Serbs. The investigators understood these concerns and clearly and carefully addressed them. ASWC were impressed when they heard that the investigators were very patient and gave people the dignity of responding to their fears. Finally one or two people stepped forward after the discussions and agreed to give evidence. This encouraged others to do so and the news spread by word-of-mouth within the community that the experience of talking to members from the ICTY proved to be a positive one.

Members of ASWC had not yet met the investigators as they had been in communication only by phone and fax. They wanted to get a sense of exactly what

53 For example, one of the War Crimes Investigation Coordinators, a man in Las Vegas, was sent the kit on Saturday. The next day he took copies of the kits to Church and asked all his witnesses to fill them out after Church. On Sunday evening he faxed ASWC a number of completed kits.
the investigators were like and how they were dealing with the process of gathering evidence. On cheap tickets and leaving their children with their husbands or friends, members of ASWC flew to Las Vegas. ASWC were extremely pleased with the way the investigators were treating those giving evidence and were happy to see that many members of the Serb community were involved in the investigators’ visit, for example, by assisting in the administration by booking hotels and flights for the investigators. Most of the statements were taken in local churches so that interviewees were in an environment they were familiar and comfortable with.

When the investigators returned to the Hague, ASWC was informed that there were many witnesses in Serbia, however, the investigators could not get access to them because the Serb Government was refusing to cooperate with the ICTY. Graham Blewitt asked whether ASWC could do anything to assist in resolving this problem. In response to this request, ASWC wrote a letter to all community groups who were dealing with witnesses and survivors of war crimes in Serbia. In a standard letter ASCW informed the groups who they were and that they wanted to assist the ICTY gather evidence of atrocities committed against Serbs.

The Director at the office of the Serbian Unity Congress (SUC) took the letters to all the groups in Belgrade and gave it her stamp of approval. The groups were also supportive of the idea, however, there was a lack of organisation and unity. ASWC requested the groups to create a list of potential witnesses but this did not happen. Finally, ASWC asked the Tribunal to fax the list of people that they were looking for, including those who had been in the Tarcin camp. This list was then faxed to the Director of the SUC. The Director personally took the list to people’s homes,
requesting that they check the list and advise whether or not they would agree to give evidence. This personal and direct contact by a respected member of the community was essential in identifying witnesses and victims.

A meeting was held in Belgrade of all the different groups and individual witnesses. A large number of people ‘came out of the woodwork’ and a cooperative effort was established to deal with the matter. Ten volunteers were appointed to look for witnesses in refugee camps, centres for the homeless and other relevant locations. Meanwhile, in the United States, ASWC passed the project of gathering evidence in Serbia onto a large and wealthy American-Serb Society which became excited by the concept and gave it top priority in the 1996 budget.

It was decided that since witnesses were not able to meet the Tribunal’s investigators in Belgrade, due to the government refusing to grant members of the ICTY visas, those wishing to give evidence would travel to Romania. The investigators would meet witnesses in Romania and interviews would be conducted there. The travel, accommodation and other associated costs were covered by the American-Serb Society. Permission was given by the Romanian Government for the interviews to be held. Samardžija received a letter from Justice Goldstone asking for her help in the preparations. Eventually the ICTY paid for her to visit the Hague and then for her to travel onto Belgrade to assist in the preparation required before the statements were taken.

One week before the event was due to take place ASWC was contacted by an individual in Belgrade and informed that the whole process was to be cancelled as the
witnesses were too embarrassed to face the Prosecution team in their old clothes. Many of those about to give evidence were refugees who felt that their pride and dignity was at stake. ASWC suggested that they find a clothes store in Belgrade to 'sponsor' the event. At first this suggestion was not taken seriously. However, after some investigation, the Serb groups found a store that agreed to assist. Every person giving evidence was supplied with new clothes for their trip. Those present reported that there was much excitement among those involved in the process. For many people this was the first time in many years that they were made to feel important and treated with dignity.

A few days later three mini-buses took off for Romania. It took 10 days to take all the statements. As a direct consequence of the information supplied to the ICTY the first indictments against Bosnian Muslims and Croats were issued. Two months before this the Tribunal had been given access to the people held in Tarcin camp by the Bosnian Government and finally in late 1996 the detainees were released.

In the United States Congressman Dillions, of the Black Caucus, was given a report of details of the Tarcin camp by ASWC. In response to this information he wrote a letter to President Clinton in relation to the treatment of Serb prisoners. In the letter he demanded that America take an equal stand in relation to the treatment of all prisoners in the conflict in the former Yugoslavia. To make sure this was dealt with Dillion had a copy circulated in Congress. Two weeks later President Clinton released a statement that there must be better treatment of all prisoners in the conflict.
ASWC continued to work with the ICTY and another group of investigators were sent to the US to take statements from Serbian witnesses. ASWC also created media kits that they circulated amongst the American media informing them of the treatment of some Serbs in the conflict. The information ASWC received from an American journalist in relation to the whereabouts of an indicted Bosnian Muslim was passed onto the ICTY and resulted in the arrest of an accused. The power of the press and the need to interface with journalists on the ground in the region was re-enforced to ASWC.

The work undertaken by ASWC is an example of a NGO utilising unique skills and relationships to 'fill the gap' where international institutions are unable to work. The ASWC were able to not only identify and contact potential witnesses from a very cynical ethnic group, they were also able to set up complex systems to facilitate the process of gathering evidence. The personal relationships and capacity to build trust were essential. As NGOs do not rely upon governments for permission to work, they have more freedom, can be more creative in their attitudes and are not restricted by factors such as State sovereignty and national borders. Furthermore they can harness the goodwill of business and gain funds from community groups in a way that formal authorities cannot.

Samardzija believes that there is bias in the international media against Serbs and a lack of political will to prosecute other ethnic groups involved in the conflict in the region. In that sense, she views NGOs as essential to assist in pushing and exposing these political parameters. If NGOs supply the ICTY with credible evidence there is no option, despite all the politics, but to investigate actions committed against Serbs.
Such investigations have lead to indictments, prosecutions and convictions. This creates an awareness that individuals from both sides suffered during the conflict. Samardzija is currently continuing to assist the Office of the Prosecutor in developing a detailed database on the events that have occurred in the territory of the former Yugoslavia.

(iii) **Médecins Sans Frontières (MSF)**

*Médecins Sans Frontières* (MSF) is a private, non-profit organisation, whose objective is to provide medical aid to populations in crisis. It was established in 1971 by doctors determined to offer emergency assistance during wars and manmade disasters. The guiding principles of MSF are articulated in a charter to which all members of the organisation subscribe. The principles require that all work is undertaken without discrimination and within an independent framework.

The organisation relies on volunteer health professionals and is largely supported by private donors. During more than 20 years of relief work around the world, MSF has gained a wide range of experience, tested techniques and strategies of intervention that allow it to pool rapidly the logistics and human resources necessary to provide efficient aid. The international MSF network is made up of six operational sections (France, Belgium, Holland, Spain, Luxembourg and Switzerland). There are also delegate offices in twelve countries including Australia.

Unlike many other humanitarian organisations working in the field, MSF bears witness to violations of basic humanitarian principles and denounces them publicly.
MSF believes this is a vital part of their humanitarian mandate and commitment. As Fabien Dubuet from MSF in Paris writes:

To denounce publicly violations of our medical duties and serious breaches of humanitarian law is at the heart of the MSF identity since 1971. But we are not a human rights organization. The priority is to protect people; it means that we have to make noises at the right time, to alert rather than prove. Our main task is not to investigate and prove situations. We speak of violations we have witnessed through our medical activities ... Our message is the one of a medical and humanitarian organization that witnesses on-going war crimes and crimes against humanity on the field and that thinks for those crimes there is an absolute need for justice, beyond medical care.\(^54\)

In a number of situations, becoming actively involved in advocacy and making certain information public has led to MSF being asked to leave the country by those in government. For example, in 1985 MSF workers, whilst undertaking medical activities in Ethiopia, become extremely concerned with the government's policy of forced resettlement of Tigray peoples from the North to the South. MSF medical staff believed that this forced resettlement was resulting in a large number of people dying. When MSF spoke out publicly about their concerns the Government of Ethiopia demanded that they remove their operations from the country.\(^55\) In other instances MSF has chosen to cease its operations due to concerns that its medical aid and assistance in maintaining refugee camps was rejuvenating the armed conflict.\(^56\)

MSF has a long and active history of working in the African region and was present in Rwanda in 1994. With unique access to witnesses of war crimes and crimes against humanity, over a period of many months MSF compiled detailed documents and

\(^{54}\) Fax from Fabien Dubuet, MSF, Paris, 14 January 1999.

\(^{55}\) Discussions with Dr M Toole, Director International Health Unit, McFarlane Burnette Centre (Melbourne, 28 June 1999).

\(^{56}\) This occurred in Zaire in late 1994 when MSF withdrew from refugee camps due to the fact that they were concerned their activities were assisting the combatants as much as civilians. Discussions
evidence for the ICTY. As well as interviewing survivors, using a short standard questionnaire, MSF was able to gather information through their medical activities. The evidence was provided to the ICTY with details, such as names and addresses of witnesses, included. Strong requests were made for this information to be kept strictly confidential. Administrative Officers at the ICTR were extremely impressed with the professional nature of the evidence gathered and the manner in which it was presented. Unfortunately, they made the evidence available to a range of organisations in the field as a precedent for other groups wishing to gather information to assist in prosecutions. A number of the witnesses named in the documents were subsequently killed. It is difficult to get exact details in relation to these events.\textsuperscript{57}

On this topic Roland Amoussouga, Chief of the Witness Unit at the ICTR, states in relation to the massacres in Rwanda:

Some Human Rights NGOs, which should have known better, unfortunately went further in disclosing in their official publications important and relevant information as regards victims and witness statements including their particulars. This has seriously undermined the security situation of these witnesses because some of them were later called by the prosecution to testify in cases before the ICTR.

In any case ... although NGOs have an important role to play in this kind of tragedy, they must absolutely act with caution and think carefully about the individuals who are involved.\textsuperscript{58}

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\textsuperscript{57} Fabien Dubuet, in discussions on 17 June 1999, confirmed that these events did occur. Previously he had written, ['[...]this is a particularly sensitive issue for us and I am afraid not to be able to give you a lot of information nor any written document'; see above n54.

\textsuperscript{58} Discussion with Mr Roland Amoussouga, Chief of the Witness Unit at the ICTR (e-mail, Melbourne, 20 June 1999).
It is unfortunate that there is not a rigorous debate within the non-State actors community on the very serious nature of the implications of gathering evidence whilst working in the field. Not only are there issues relating to humanitarian organisations being able to fulfil their mandate if they provide details for prosecutions, there is also the matter of the safety of all those involved in the process. This paper strongly recommends research and reflection on this issue, from both within the active NGO community and academics. Whilst non-State actors have much to offer in providing evidence at international criminal trials and thus increasing the effectiveness of international law, this must not be at the cost of further lives. The information ‘revolution’ brings great advantages but also drawbacks in relation to increased access to details for all people, aid organisations, members of the government and members of the military. Further work must be done to examine and understand the practical implications of humanitarian organisations providing evidence whilst working in the field. As Gowing, anchor for BBC’s new service, writes:

[F]ew among those who work in the humanitarian community have yet to take on board the inevitable new expectations and responsibilities that come with this pivotal position. They have not come to terms with the new potency of the information and communication dynamics in the new real-time environment...59

(iiv) Non-State actors not wanting to give evidence

As stated previously in this paper, organisations such as the ICRC believe that to continue their work in the field it is absolutely essential that they be granted immunity from giving evidence at the ICC. Other organisations, including the UNHCR, may choose to become involved in litigation but wish, however, to have the capacity to

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refuse to give evidence in certain circumstances. If one examines the Statute of the ICC, it is possible to find reflections of some of these concerns in a number of articles.

Perhaps the most important article in the ICC Statute to protect humanitarian organisations from being compelled to provide information is Article 73, which deals with third party information or documents. It reads:

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, inter-Governmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

This is wider than the correlating rule for the *ad hoc* Tribunals, (Rule 70), which limits confidential material to that 'which has been used solely for the purpose of generating new evidence.' Article 73, above, has no such limitation and could be interpreted as completely blocking the use of all information. On the other hand, Article 73 is limited to information supplied to a State Party by an international organisation and does not deal with a situation where the ICC directly asks such an organisation for information. It should be noted by organisations keen to utilise Article 73 that negotiations in relation to confidentiality must be made with State Parties so that a "pre-existing obligation" can be claimed.

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Article 54(3) entitled ‘Duties and powers of the Prosecutor with respect to investigations’ states:

The Prosecutor may:
(a) Collect and examine evidence;
(b) Request the presence of and question persons being investigated, victims and witnesses;
(c) Seek the cooperation of any State or inter-Governmental organization or arrangement in accordance with its respective competence and/or mandate;
(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, inter-Governmental organization or person;
(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

It must be noted that this Article makes no reference to ‘international organisations’ and rather refers only to inter-Governmental bodies. Prima facie this excludes the ICRC which, as has been previously discussed, is an international organisation. However, as most of the articles dealing with this issue were drafted by different working groups at the Rome Diplomatic Conference, the different terminology may not be as significant as it appears and the ICC could undertake a broad interpretation including other organisations such as those with international and non-Governmental status.60

The use of the words ‘seek the cooperation of’ in Article 54(3)(c) indicates that the ICC has no compulsory power to acquire information, rather that the matter must be negotiated on a case by case basis with the State or inter-Governmental organisation

60 Interview with Mark Jennings, Attorney General’s Department and Australian representative at the
concerned. If this article is deemed to also apply to international bodies, the fact that mention is made of the competence and mandate of organisations may result in the ICRC, which undertakes its work with a mandate of confidentiality and neutrality, being able to claim immunity from giving evidence. If the article does not apply to the ICRC there is no specific obligation for such an organisation to cooperate with the ICC.

Similar to Rule 70 of the ad hoc Tribunals, Article 54(3)(e) only limits the Prosecutor from disclosing information obtained 'on the condition of confidentiality and solely for the purpose of generating new evidence.' This section makes no reference to States and inter-Governmental organisations and thus can be interpreted to apply to international organisations, NGOs and any individuals supplying information. Including the word 'and' restricts the type of evidence that can be privileged as such documents or information in this category must have been provided exclusively to assist in the creation of new evidence. In this sense, the protection is more limited than may be initially assumed.

Article 87 deals with requests for cooperation and does not specifically mention international organisations nor NGOs. This is important, as Article 87(7) contemplates the situation of States Parties' refusing to assist the ICC and the only disciplinary provision envisaged in this section relates to States Parties:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or,
where the Security Council referred the matter to the Court, to the Security Council.

Article 87(6) deals with inter-Governmental organisations, however, if a broad interpretation was given it could be relevant to the ICRC as it states:

The Court may ask any inter-Governmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

In the same vein, Article 93, relating to other forms of cooperation, deals almost exclusively with States Parties. It must be noted that Article 93(4) allows a State Party to deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security. The section refers to Article 72 which extends the privilege of information in this category to individuals as well as State Parties (Article 72(2)).

Hence, an individual worker for an international organisation, such as the ICRC, has the capacity to refuse to supply requested information on the grounds that disclosure would prejudice the national security interests of a State. Considering the type of information that the ICRC often deals with can involve matters of national security, especially during times of armed conflict, this provision could be of assistance to such organisations.

Article 93(9)(b) involves situations where State Parties are not able to provide information requested as they do not have it in their control. The Article states:

Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

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This is important to view in the context of Article 73 which deals with information given to States by international organisations. When a State has information gained from an organisation, it must request permission from the originator before it can supply this evidence to the Court (Article 73). On the other hand, if the information is subject to the control of an international organisation, the ICC must ask the organisation directly for the evidence (Article 94(4)(b)). However, the Statute does not mention any specific obligation such that an organisation has to cooperate with the ICC. Considering these complexities, if an organisation has potential evidence that it does not wish to provide to the Court, it may be worth providing the information and documents to a State in a confidential manner, to avail itself of the protection of Article 73.

This area of the Statute of the ICC obviously requires further clarification in the Rules of Procedure and Evidence which are yet to be drafted. In particular, Article 69(5) states that: ‘[T]he Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.’

To date, however, the ICC provides no specific obligation for international or non-Governmental organisations to cooperate.

CONCLUSION

The two case studies above, as well as the discussion on MSF and examination of the position of the ICRC, indicate the complexity of the relationship between non-State actors and international criminal proceedings. There are a number of important comparisons to be made between the Australian Committee of Investigation into War
Crimes (ACIWC) and the American Serbian Women’s Caucus (ASWC). In relation to differences, it is significant that the ASWC was able to procure a large amount of funds and goods from the Serbian community in the US and Serbia which ensured activities could continue. The ACIWC on the other hand, purposefully not connected to any ethnic group, struggled to gain resources and was not supported by the legal community nor by the federal or state governments in Australia. This raises issues of decisions made by NGOs on whether to be ‘neutral’ or linked to specific groups. There are disadvantages in the latter as the credibility of evidence may be questioned and the potential for perceptions that activities undertaken by the NGO are ‘politically tainted’ is high. There may also be difficulties in the ‘neutral’ approach, as unless there is support from groups such as the Bar Association, NGOs wishing to engage in gathering evidence will not have the resources to undertake their identified tasks. These issues have to be carefully considered by groups embarking upon such activities, and the issues balanced sensitively.

Another area of comparison between the two case studies is the use of the government in both countries. In Australia there was little interest by the relevant governmental Departments and apart from providing a submission to the Joint Standing Committee of Foreign Affairs and Trade the ACIWC had limited interface with the government. On the other hand the ASCW’s communication with the Black Caucus and lobbying of Congress resulted in a public statement from the President of the United States on the need to improve the standards of treatment given to all prisoners in the conflict.

Yet despite these differences, most of the experiences of ACIWC and ASWC were similar. Both groups discovered for example: the need to gain the trust of the
communities from which information is required; the need to give those involved in the process dignity; the need to provide ample information and clear instructions to witnesses; the need to find ‘neutral’ and ‘safe’ places to gather the evidence; the importance of effective administration in relation to choosing interpreters and making travel arrangements; and, the great need for confidentiality.

If the ICC is to be effective, it must review the lessons learnt from the existing Tribunals. It must provide sufficient information in an accessible way for NGOs to inform themselves and potential witnesses. The ICC must provide a position for a staff member to liaise with non-State actors to develop long term and trusting relationships. There should be information at the ICC of the sorts of NGOs, both large and small, international and domestic, that are involved or likely to be involved with witnesses before the Court. It will also be important for staff at the ICC to be available to give papers and provide ideas at NGO Conferences and discussions. In relation to professional organisations like MSF, it is critical that the ICC set in place adequate procedures to protect the identity of those prepared to give evidence. NGOs must understand the dangers of being involved in the process and create mechanisms to ensure that further harm is not the result of their good intentions. The need to critically examine the role of NGOs, in particular in the area of evidence gathering, is of great importance when put in the context of Article 15 of the Statute of the ICC.

The ICC needs to clearly understand the potential dangers of NGOs’ agendas, and potential biases they could import into evidence. However, this needs to be balanced with the skills and unique capacities of NGOs. The ICC must also attempt to understand the different mandates and modes of action that members of the NGO
community adopt, and the reasons for this. If the working relationship between non-State actors and the ICC is to be a long term one there must be mutual understanding and respect of each other.

Such statements could appear obvious and it would be difficult to argue that there should not be better understanding fostered. However in reality the development of this knowledge and relationship is not easy. Even within the domestic NGO community there is often a lack of understanding about the range of mandates and modes of actions adopted by various organisations. Such lack of understanding is compounded at an international level and then exacerbated when dealing with a potentially busy international institution. Staff at the ICC will not necessarily be aware of the complex nature of NGOs and the dangers and opportunities available. Specific time must be set aside for dialogue and sharing of information. At the same time, NGOs currently have enough opportunities before the ICC enters into force to consider whether they wish to play a role in gathering evidence and if so how to do it professionally and carefully. Both civil society and the ICC will have a challenge in ensuring their relationships are honest, well balanced and productive.
PART 4
SUPPORTING INTERNATIONAL JUDICIAL DETERMINATIONS: THE SUBMISSION OF AMICUS CURIAE BRIEFS
CHAPTER 6

THE SUBMISSION OF AMICUS CURIAE BRIEFS IN
DOMESTIC COURTS AND THE INTERNATIONAL
COURT OF JUSTICE

This Chapter examines the role of non-party submissions in domestic and international law in order to illustrate the benefits such mechanisms could bring to the ICC. Issues such as the tension inherent in balancing the ideal of 'correct' judgment with the economies of judicial administration are highlighted in the debates within Australia on the role amicus curiae should play in our legal system. The mechanisms within the International Court of Justice (ICJ) to hear from non-State actors are explored. These provisions are little known and rarely used. A case study of the 'World Court Project' indicates the useful role non-State actors and NGOs played in bringing the case to the Court as well as supplying 'citizens' evidence'. Before major amendments are made to the ICJ to allow broader access, existing mechanisms must be publicised and the Court encouraged to use them. It must be hoped that the experiences from the ad hoc Tribunals and the future work of the ICC will impact upon the ICJ's obvious reluctance to hear information from non-parties to legal actions.

1. AMICUS CURIAE SUBMISSIONS AND DOMESTIC COURTS

Amicus curiae, or 'friend of the court' is an ancient practice first known in Roman law and extensively developed in numerous seventeenth century cases. Amicus curiae are not parties to cases, however, they still present matters of fact or law within their knowledge, to legal proceedings. The presentation of amicus curiae briefs is usually done with the permission of the court and often a variety of criteria must be met before such permission is granted. In most cases, amicus curiae are involved in proceedings when matters of important public interest in the administration of justice are being considered. In this sense, amicus curiae submissions assert interests

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1 S Krislov, 'The Amicus curiae Brief, From Friendship to Advocacy' (1963) 72 Yale Law Journal

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separate from those of the parties involved in the case and deal rather with any long
term and significant matters of public concern. When taking into account the
potential subject matter of the ICC, namely 'the most serious crimes of concern to the
international community as a whole', it is necessary to consider the implications of
*amicus curiae* involvement in international litigation.

For many years there were extremely limited examples of *amicus curiae* submissions
in international legal proceedings. The International Court of Justice (ICJ), as will be
discussed later, has the capacity to allow the submission of written documents by non-
State actors. However, for a range of reasons this mechanism has not been fully
utilised. On a regional level there are a number of international human rights courts
and commissions allowing *amici curiae* participation in proceedings. The European
Court of Human Rights provides for the initiation of individual proceedings from a
complaint of an individual, group or NGO. Whilst there are no formal *amicus curiae*
provisions, this institution allows for the intervention of third parties where it is
deemed to be in the interest of the proper administration of justice.
introduction of the provision for third party intervention and 1994, the Court considered 22 cases in which permission was requested to file a third party submission.⁶

The Inter-American system similarly provides for any person or group of persons or any NGO entity, legally recognised in one of more of the Organisations of American States, to lodge a petition with the Inter-American Commission on Human Rights.⁷ While only States Parties and the Commission may submit a case to the Inter-American Court, the Court is nevertheless viewed as providing an extensive amicus practice.⁸ Despite the absence of a specific provision for the acceptance of amicus briefs, the Court appears to draw authority for this practice from Article 34(1) of its Rules of Procedure.⁹

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⁶ Dinah Shelton, ‘The Participation of non-Governmental Organizations in International Judicial Proceedings’ (1994) 88 The American Journal of International Law 611, 632; See, eg, Goddi Case (1984) 76 Eur Ct HR (ser A) (refusal of an amicus request by the Council of the Rome Bar Association due to untimeliness); Kosiek Case (1986) 105 Eur Ct HR (ser A); Caleffi v Italy and Vocaturo v Italy (1991) 206B-C Eur Ct HR (ser A) (amicus participation by five trade associations deemed to be unnecessary); Modinos v Cyprus, (1993) 249 Eur Ct HR (ser A) (participation requested by the International Lesbian and Gay Alliance to file written comments); Brannigan and McBride v United Kingdom (1993) 258B Eur Ct HR (ser A) (leave granted to the Northern Ireland Standing Advisory Committee on Human Rights, Amnesty International, Liberty, Interights and the Committee on the Administration of Justice to file submissions).


⁸ It has been noted that a number of human rights groups have consistently submitted material to the Court, including the International Human Rights Law Group, the Lawyers Committee for International Human Rights, Americas Watch, Amnesty International and the International Commission of Jurists: Shelton, above n 6, 638-9.

⁹ Rules of Procedure of the Inter-American Court of Human Rights, art 34(1):

The Court may, at the request of a party or the delegates of the Commission or proprio motu, decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function.

The current *ad hoc* Tribunals, the ICTY and ICTR, do allow for, and at times encourage, *amicus curiae* briefs, as will be discussed in the next Chapter. Furthermore, the current draft of the Rules of Evidence and Procedure for the ICC provide for *amicus curiae* submissions. Thus, an examination of the issues involved in *amicus curiae* briefs, the experiences in the domestic courts, ICJ and the *ad hoc* Tribunals is valuable for future proceedings before the ICC.

The fundamental issue needing consideration when reviewing the role of *amicus curiae* in international criminal legal proceedings is the balance between the benefit such briefs bring to a case and the difficulties these briefs can pose. Such difficulties include increased workloads and administrative tasks, the partiality, or otherwise of the actors presenting evidence, and the quality of the information provided through this process. This tension, between the ideal of a ‘correct’ judgment and the economics of judicial administration, is more complex when located in an international rather than domestic arena. There are a number of substantial questions that should be addressed. The major question can be framed in terms of whether parties to an international criminal case should be free from ‘outside’ interference, or whether the ICC has an overriding duty to listen to submissions from non-parties on matters of important international public interest? The answer depends to some extent on the *raison d’être* of the ICC. If it is perceived as a legal institution with a main purpose of prosecuting individuals who are accused of atrocities, then, in the interests of due process, ‘interference’ may not be desirable. On the other hand, if the Court is to establish international legal standards and assist in the development of international peace and security, there may be a range of interests separate from the parties, which
need to be raised during the case. There is no doubt that both these elements were considered during the drafting of the ICC Statute.\textsuperscript{10}

Added to these complexities is the nature of NGOs in relation to international litigation. As previously discussed, NGOs can sometimes experience and create difficulties when involved in the legal process. Many NGOs are political bodies with like agendas. Litigation relies upon the presentation of impartially recorded facts rather than interpretations. This has been highlighted by a number of commentators who assert that:

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\text{[P}a\text{rticularly in those situations where an NGO is performing a watchdog or early-warning function rather than claiming to present well-documented facts, the source(s) of the information must be clear, unless there is a legitimate fear of reprisals...the distinction between NGOs as fact-finders and NGOs as political advocates must be deepened.}\text{11}
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However, it is not only the NGOs who may wish to gain access to international legal proceedings. Individuals, such as academics, and a range of non-State actors, including inter-Governmental organisations, would likely want to submit \textit{amicus curiae} information to international criminal trials, if granted the opportunity. Thus, it is necessary to undertake a broad examination of the benefits and drawbacks of this legal mechanism.

To reflect the nature of non-party contribution to international litigation, it is useful to review the role \textit{amicus curiae} have played in domestic courts. Many of the themes in this area have been considered at a national level and will correlate to questions raised

\textsuperscript{10} For a discussion on the reasons for the establishment of the ICC see Chapter 1.

in international criminal proceedings. The next section focuses upon the Australian experience and briefly comments on the history of amicus curiae representations in the United Stated and the United Kingdom.

(i) Australia

Australian courts have witnessed limited involvement of amicus curiae participation. The capacity to grant leave for amicus submissions or appearances is a part of the implied or inherent power of the Court to ensure that it is properly informed of matters which it ought to take into account in reaching its decision.\textsuperscript{12} The Australian Federal Court has this power by virtue of its status as a superior Court of Record and its power to make appropriate orders in relation to matters in which it has jurisdiction.\textsuperscript{13} Whilst a small number of cases in various jurisdictions have considered this issue, to date there appears to be no coherent view within the Australian legal system on the role of amicus curiae.

What is established is that an amicus curiae does not have the privileges of a party to the proceedings in Australian courts. An amicus does not posses the right to demand service of papers, cross examine a witness, file pleadings nor appeal against a decision. Importantly, the amicus curiae, whilst having no capacity to receive compensation, generally do not have costs awarded against them.

In the Australian context it is necessary to distinguish between an application for intervention and an application to appear as an amicus curiae. Seeking leave to

\textsuperscript{12} CCH, Procedure and Evidence, (at - 96 ) 15 - 635, 9851.
intervene is regulated. Order 6 Rule 2 of the Federal Court Rules, for example, determine the circumstances in which leave is granted. An intervenor becomes a full party to the proceedings as per the abovementioned provision, and has all the privileges of a party including the right to appeal. Thus, in Australia, courts allow appearances or submissions by amicus rather than recognising a right to act in that capacity. Interveners have a right, although the source of the right varies in different jurisdictions. Case law indicates that the right to intervene is restricted to parties whose interests are likely to be either directly or indirectly affected by the proceedings.

The most detailed examination of the role of amicus curiae in the Australian legal system can be found in US Tobacco v Minister for Consumer Affairs. In that case leave was granted by the Federal Court judge in the first instance to the Australian Federation of Consumer Organizations (AFCO) to appear as amicus curiae in a case dealing with the restriction of certain smokeless tobacco products. AFCO requested to be joined as a party but this was refused. On appeal, the full court held that AFCO could be joined as a party and considered the question of amicus curiae appearances. The Court stated that:

No person has the right to address the court as an amicus, and it is for the court to accept the assistance of the amicus as it seems proper to the court to do so... The general principle is that the parties are entitled to carry on their litigation free from the interference of persons who are strangers to the litigation. But there is an overriding right of the court to see that justice is done. An amicus

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14 Procedure and Evidence, above n 12, 9852.
15 See, eg, Australian Railways Union v Victorian Railway Commission (1930) 44 CLR 319; The Queen v Ludeke; ex parte Customs Officers Association of Australia (1985) 155 CLR 513, 522. For a complete discussion on the distinction between amicus curiae and intervenor status in Australia see, D Mortimer, 'Amicus Curiae' (Paper written for the International Commission of Jurists, May 1996).
16 (1988) 20 FCR 520.
may be heard if good cause is shown for doing so and if the court thinks it proper. 17

Traditionally, *amicus curiae* have assisted courts on points of law which may not otherwise have been brought to its attention, 18 or where the court needed assistance in a particular area of law within the expertise of the *amicus*. In this sense, there was previously a focus upon the process of justice rather than specific results arising from the case. Thus an *amicus* was:

An impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. 19

In this role, an *amicus curiae* was understood as providing friendly intervention to assist the court in limited situations. There are numerous examples at the trial level where one party is underrepresented or unable to adequately present a case and the court invites counsel to remain in court and provide submissions as *amicus curiae*. There are also other instances where the court requests a member of the bar to appear as an *amicus curiae* to assist in the proper running of the case. 20

This traditional view of limited third party involvement is consistent with the adversarial nature of the Australian legal system. As Loretta Re writes:

[The adversary system reflects the political and economic ideology of classic English liberalism in three ways: by its emphasis upon self-interest, by the importance it places on individual initiative, and by the significance it attaches to the role of the parties in the legal action. Each of these factors creates a

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17 Ibid 536.
19 *Leigh v Engle*, 535 FSupp 418 (ND Ill, 1982).
barrier to associations and societies wishing to participate in litigation on matters of public interest.\textsuperscript{21}

However, in recent years there has been a move to view \textit{amicus curiae} participation in Australia as allowing the interests of ‘the public’ to be placed before the court during legal action.\textsuperscript{22} This public interest is also seen as more prominent at the appellate rather than trial level, particularly when judges intend setting precedents on issues which have a wide ranging impact on society. As Justice Paul Stien stated:

It is true that there are occasions when the Court is caught between litigants neither of whom represent the general public interest, but rather private interests. What is the Court to do in such circumstances, especially when it is charged in much of its jurisdiction to determine cases having regard to the public interest.\textsuperscript{23}

The movement of \textit{amicus} becoming less neutral and more partisan brings Australia closer to the United States’ use of third party participation. Examples of this can be found in the \textit{Commonwealth v Tasmania}\textsuperscript{24} where the High Court of Australia granted leave to the Tasmanian Wilderness Society to introduce information supportive of the Commonwealth, as well as in \textit{US Tobacco v Minister for Consumer Affairs},\textsuperscript{25} discussed above. In \textit{SCI Operations v TPC},\textsuperscript{26} an applicant was permitted to appear as \textit{amicus} because it raised important issues of public interest not raised by other parties.


\textsuperscript{22} See, eg, ‘Group Opposes Genital Surgery’, \textit{The Sydney Morning Herald} (Sydney), 2 December 1993, 8.

\textsuperscript{23} P Stein, ‘Introductory Comments: Hearing the People: \textit{Amicus Curiae} in Our Courts’ (Paper No 95/16 presented at the PIAC Seminar, Melbourne, August 1995) 23.

\textsuperscript{24} (1983) 158 CLR 1.

\textsuperscript{25} (1988) 20 FCR 520.

\textsuperscript{26} (1984) 53 ALR 283.
*Bropho v Tickner*\(^{27}\) is an example where counsel appeared on behalf of a group of aboriginal people to represent their interests in respect to the development of land on an area deemed a sacred site.

Despite this movement, some commentators argue that the test for *amicus* participation is too discretionary and restrictive. In 1995 the International Commission of Jurists attempted to submit an *amicus curiae* brief in the case of *Kruger v The Commonwealth*.\(^{28}\) The brief dealt with issues such as fundamental constitutional freedoms, protection of the family from undue State interference, and on the international obligation of States to ensure effective remedies when the State is in breach of international human rights instruments. However, the High Court refused to uphold the submissions, ruling that the parties were able to adequately protect their own interests and that the submissions would not be beneficial to the court.\(^{29}\)

Within the judiciary there is no consensus on the exact balance of public versus private interests that must be met before allowing third party involvement. Justice Kirby in his dissenting opinion in *Breen v Williams*, rejecting an *amicus* submission, held that:

> The courts should not turn a blind eye or a deaf ear to the assistance that they may receive from *amicus curiae* on matters of general principle in test cases... The Courts should not forfeit the adaptation of their procedures to slavish adherence to methodologies adopted far way, in different times for different problems.\(^{30}\)

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\(^{27}\) (1993) 40 FCR 165.

\(^{28}\) (1997) 190 CLR 1.


\(^{30}\) *Breen v Williams* (1994) 35 NSWLR 522, 533.
Currently, the debate within Australia in relation to the exact role of *amicus curiae* in legal proceedings is in relation to the increased discussion on the need for clarity of mechanisms which allows for the involvement of *amicus curiae*. As noted above, there is a lack of rules of procedure or case law from which to review the discretionary power of the courts to allow *amicus* submissions. This, combined with the restrictive and cautious approach of Australian courts to *amicus curiae* submissions, has resulted in limited use of such briefs within the domestic legal system. As opined by some commentators:

> Although most community sector organizations include campaigning for law reform amongst their activities, little use has been made of the *amicus curiae* mechanism in Australia, let alone Victoria, to promote law reform through the courts.\(^{31}\)

Debates about the real need to review the capacity for *amicus curiae* to either appear or submit information on important issues are underway. Questions in relation to whether this area needs reviewing have been raised and Rose asserts that:

> [C]hanges in technology facilitate greater data collection and manipulation, allow us to gather information from the Internet and production of documents easier. Are the courts getting sufficient access to such material? Would greater use of friend of the court allow them to make more informed decisions based on more information than the parties can, or want, to provide?\(^{32}\)

In an attempt to deal with this concern the Australian Law Reform Commission (ALRC) has submitted recommendations to the effect that the current categories of ‘intervenor’ and ‘friend of the court’ should be replaced for public law proceedings by a single statutory framework giving the courts a general power to allow intervention

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on terms and conditions that it specifies. In advocating for an expansion of the role of amicus submissions in the Australian courts, Roxon and Walker opine:

This would provide a more informed judicial decision making process. Amica briefs would also assist in the legitimation of difficult and far-reaching decisions by indicating that the court has fully considered the impact of its decision on all sectors of the community likely to be affected by the decision.

Similarly Durbach admits that ‘amicus interventions allows judges to be confident of the social consequences of their decisions and enhances the legitimacy of the courts.

On the other hand, this process is not free from criticisms, with arguments that increased non-party participation makes the judicial system vulnerable to political pressures and takes away an element of independence. In the United States, it is argued by some critics that the American practice ‘smacks of a desire by counsel to flaunt their names before a court, uninvited in most instances, as a form of undignified self advertising’. Perhaps the most serious concern is that of the potential delays and costs that could result in increased participation in the legal system.

Suggested methods to expand the role of amicus submission in Australian courts include either legislating for change or amendments to the relevant court rules. In either case the need for a ‘threshold test’ has been advanced. Such a threshold could

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require both parties to consent to the participation of the *amicus*. However, concerns have been expressed in relation to the necessity of parties’ consent:

The rule is attractive in that it acknowledges the primacy of the litigating parties in determining the scope of the action. On the other hand, it must be recognized that where any one particular litigant is a frequent party in public interest litigation, there is a possibility that it will adopt a tactic of automatically declining consent.\(^{37}\)

Thus, the approach has been advanced that leave, of some kind, could be required from the court. Guidance could be given to the court, similar to that given in the United States. Rule 37.1 of the Supreme Court Rules, together with Rule 28, indicate the American judicial approach to the effect that: ‘An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.’

Even broader criteria for submission of *amicus* briefs in the Australia legal system has been suggested in which a review of the public interest involved in the case is required and an open policy encouraged. Some commentators view the position thus:

There may be advantages in courts listening to *amicus* in cases where at the outset they will not necessarily be able to anticipate what may be said or what those benefits may be.\(^{38}\)

In a paper written by the Public Interest Advocacy Center (PIAC) in response to the ALRC’s report on standing, a very wide capacity to submit briefs was advocated:

PIAC believes that any person should have the right to intervene as a friend of the court. PIAC agrees with the ALRC’s view that a potential friend should not need to show an interest in the litigation nor in its outcome. The principal purpose of intervention, as distinct from the principal test for intervention

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37 Loretta Re, above n 21, 532.
should be whether the person is able to assist the court to be properly informed of relevant matters.\textsuperscript{39}

It has been argued that the ability to assist the court should not be narrowly or technically construed. Rather, the potential friend should be able to provide the court with a fresh perspective on a public issue which goes beyond the interest of parties to the litigation.\textsuperscript{40}

On the other hand, to combat criticism that increased \textit{amicus} participation could reduce the efficiency of the court system, adding to the potential cost burden of the parties, causing delays and duplicating arguments already raised by parties to the dispute, a number of commentators have suggested limitations. These suggestions include restricting potential \textit{amicus curiae} to public interest groups or government bodies or officers. This would exclude individuals and corporations from participating. Further limitations have been suggested involving general participation through written briefs, with leave granted for oral argument only in extreme circumstance. Finally, it has been noted that the court could retain an unfettered discretion to refuse leave if the efficiency or justice of the case may be prejudiced.\textsuperscript{41} It has also been proposed that courts in Australia should have the capacity to notify individuals and organisations which they consider would oblige courts in providing assistance.

\textsuperscript{39} Alan Rose, 'The Australian Law Reform Commission’s consideration of \textit{amicus curiae}', above n 38, 15.


\textsuperscript{41} Roxon and Walker, above n 34, 113.
Indeed the ALRC has stated that ‘[t]he experience of the last ten years with the courts and statutes that have open standing tests has been that the feared flood of litigants has not occurred.’\textsuperscript{42}

The debate within Australia of the role of \textit{amicus curiae} submissions and the methods to allow and restrict non-party involvement is necessary to reflect the growing complexities of litigation and the increased public awareness of the impact of legal decisions upon the community at large.

\textbf{(ii) The United States}

There is a long history of using \textit{amicus curiae} briefs in American courts and the role of non-party involvement in cases is extensively developed. After federation of the States of America, concerns were expressed by numerous commentators that not only state and national interests were potentially in conflict, but, even in private litigation, many public interests were under represented. The first use of an \textit{amicus curiae} submission came to light when the Federal Attorney-General made a request to become a party to the proceedings in the case of \textit{Florida v Georgia}.\textsuperscript{43} This request was ultimately refused. However, the Attorney-General was permitted to appear as an \textit{amicus curiae}. Soon thereafter \textit{amicus curiae} appeared in cases to safeguard Federal and State Government interests. Over time this process has become a major means of effecting social change and of ensuring that the courts consider broad public issues in reaching decisions.\textsuperscript{44}

\textsuperscript{42} Ryland, above n 33, 36.
\textsuperscript{43} 58 US 463 (1908).
\textsuperscript{44} See, eg, Loretta Re, above n 21, 525.
The use of *amicus curiae* has developed within the American judicial system to the extent that judges generally grant broad rights of intervention if the non-party’s requests fit within certain categories such as addressing information not presented by parties on matters likely to impact upon the general public. In *Grand Rapids v Consumers’ Power Co.*, a statement was made that ‘in cases involving questions of important public interest, leave is generally granted to file a brief as *amicus curiae*.’

In recent years in the United States, there is a shift from the utilisation of *amicus curiae* by individual lawyers to its use by large organisations. The latter include partisan advocates representing governments, professional and occupational groups and non-Governmental public interest groups, for instance, consumer groups, trade unions, civil liberties groups, and minority groups. Benefits to public groups of using this process include the low cost of submitting information. Not only are *amicus* free from filing fees but no costs can be awarded against them within the American legal system. The benefits that this process provides have been acknowledged by many interest groups and are reflected in the increased use of non-party participation in American legal proceedings. Studies undertaken between the late 1920s and the 1960s indicated that, in approximately 18% of all non-commercial cases heard by the United State’s Supreme Court, various interest groups had filed

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45 185 NW 852, 854 (Mich, 1921). See also, Shelton, above n 6.
amicus curiae briefs. The figures for the years 1960-70 show that 64% of such cases involved amicus submissions.47

In the United States, the role of amicus curiae is usually limited to filing written briefs with participation in oral argument permitted 'only for extraordinary reasons.'48 This is consistent with the strong focus upon written argument throughout the American legal system, in particular in all levels of the appellate courts. As stated above, amicus curiae submissions are covered by Supreme Court Rule 37 and they may be submitted both at the stage of petition (maximum of 20 pages) and at the time for briefs on the merits (maximum 30 pages).49 If parties consent to the involvement of amicus, they automatically play a role in proceedings. If there is no consent, a motion for leave must be filed with the court.

Recent studies indicate that amici have had a major impact upon the development of constitutional and environmental law in the United States. Furthermore, it appears that the subject has not been deeply researched in other countries, particularly those with civil law systems, who accept amici in their proceedings. The involvement of non-parties in cases in the United States is significant: 'Amicus briefs may have shaped judicial decisions in more cases than is commonly realised, courts often relying on factual information, cases or analytical approaches provided by amicus.' 50

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48 Federal Rules of Appellate Procedure, United States, r 29.
49 United States Supreme Court Rules, r 33.
50 Shelton, above n 6, 616.
(iii) **The United Kingdom**

As is the case in Australia, courts in the United Kingdom do not have a history of extended use of *amicus curiae* submissions. English courts tend to rely heavily on oral presentations, and, as a result, the capacity for non-parties to submit written information tends to be limited.\(^{51}\)

In a number of cases involving *amicus curiae* appearances in English courts, there has been no consideration of this issue in the judgments, leading to a paucity of jurisprudence in this area. Those cases that do deal with the topic indicate that the courts of the United Kingdom view the role of *amicus curiae* as an impartial ‘friend of the court’ and not a mechanism for expression of public interest. In *Allen v Sir Alfred McAlpine & Sons Ltd.*,\(^{52}\) counsel for the UK Law Society, Mr Wilmer, appeared before the Court of Appeal as an *amicus curiae*. Justice Salmon commented on the counsel’s performance thus:

> I had always understood that the role of an *amicus curiae* was to help the court by expounding the law impartially or if one of the parties were underrepresented, by advancing the legal arguments on his behalf. As I listened to Mr Wilmer’s cogent and forceful argument, I gained the impression — although no doubt it was an illusion — that in reality he held a watching or indeed a speaking brief on behalf of hardly impartial third parties who feared that their interest....might be prejudiced should these appeals be dismissed.

In this sense the English Courts view *amicus curiae* in the traditional manner of advocating for a party with no representation rather than appearing on behalf of general ‘public interests’. There is little other jurisprudence on this topic within the

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\(^{52}\) [1968] 2 QB 229.
United Kingdom’s legal system and at this stage no ‘push’ to increase or encourage the use of *amicus curiae* participation in cases in the English courts.

**CONCLUSION**

The use of *amicus curiae* submissions domestically ranges widely, from the United States’ experience in which they play a significant role, to the United Kingdom’s situation of limited use. The debate within Australia highlights some of the tensions and complexities involved in the use of *amicus curiae* submissions. It concurrently emphasises that, in numerous instances today, courts need to consider matters beyond the immediate interests of the parties. The debates at a domestic level also highlight the connection between increased access to information by the public, especially utilising new information technologies, and the increased interest by many in society in legal matters that may impact upon their lives.

It is important to acknowledge that most examples of domestic *amicus curiae* deal with constitutional issues and that there is limited evidence of such submissions in criminal cases. When drawing parallels with the *ad hoc* Tribunals, this fact must not be forgotten and should be rather woven into any attempts to balance interests of all parties to proceedings. Criminal cases obviously can result in the incarceration of the defendant. The question can be posed whether the court has a higher obligation to limit interference from non-parties due to the potential outcomes of the cases? In the instance of the ICC, ordinary criminal cases will not be heard. Rather only ‘the most serious crimes’ such as genocide, crimes against humanity and war crimes. Such crimes have been deemed to be of interest to all humanity and of weighty public concern. In deciding to allow *amicus curiae* submissions to the ICC and other
international criminal legal proceedings, the international community has acknowledged that despite the potential impact upon the defendant’s life, non-party interests should be heard when important subject matter are being considered.

2. AMICUS CURIAE SUBMISSIONS AND THE INTERNATIONAL COURT OF JUSTICE

There has been extremely limited participation by non-State actors, including NGOs, in proceedings before the International Court of Justice (ICJ). A number of articles in the Statute of the ICJ contemplate the involvement of non-State actors in matters before the court. However, there is no reference to their ability to submit amicus curiae briefs. Those articles that do allow non-party participation in cases before the ICJ are little-known and used even less. Thus it is important to set out in detail and analyse the relevant articles:

Article 34
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted there under is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all written proceedings.

Article 50
The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 66
1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.
2. The Registrar shall also, by means of a special and direct communications, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting,
by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Therefore, 'public international organizations' can be requested under Articles 34 and 50 of the Statute of the ICJ to provide the Court with information in contentious cases. In the case of Advisory Opinions, 'international organizations' may provide the ICJ with oral or written statements under the conditions set out in Article 66. The broad nature of Article 50 indicates that a range of non-parties, from individuals to commissions, can render expert opinions if requested. A 'public international organisation' is defined in Rule 69(4) of the Rules of the ICJ as 'an international organization of States.'

There is no formal definition of 'international organizations' in the Rules of the Court. However, by reviewing precedents set by the only organisation ever granted permission to submit information in advisory proceedings, there can be no doubt that NGOs are deemed to be included within the scope of Article 66.

One of the few examples of NGOs utilising, albeit unsuccessfully, the procedures within the Statute of the ICJ to submit information to the Court, is that of the

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54 For an excellent examination of the historical development of the terms 'public international organizations' and 'international organizations' within the ICJ's jurisdiction see, Shelton, above n 6.
International League for Human Rights (International League). Formed in 1941 and granted consultative status with the UN in 1947, the International League focused much of its activities on issues concerning colonial territories.\(^5\) Having been involved in the General Assembly’s decision to ask the ICJ for an Advisory Opinion on the status of South West Africa, the International League addressed a letter to the Court requesting permission to provide oral or written statements at the proceedings. The Registrar of the ICJ replied in a telegram that the:

> International Court of Justice is prepared to receive from you before April 10 1950 a written statement of the information likely to assist Court in its examination of legal questions put to it in the Assembly request concerning South-West Africa stop This information confined to legal questions must not include any statement of fact which Court has not been asked to appreciate stop Court does not contemplate resorting further to League for Rights of Man in present case.\(^6\)

The International League did not forward the submission until May and was informed by the Court that the statement was too late to be included in the proceedings. No permission had been granted for oral presentations and so the International League was unable to participate in the case. On numerous levels this outcome is unfortunate. The statement by the International League, submitted late to the Court, dealt not only with substantive legal issues in relation to the case before the ICJ but, also with the rights of organisations to submit written and oral pleadings in international proceedings. By reviewing the practice of the Permanent Court of International Justice (PCIJ), which in a number of instances had allowed unofficial organisations to be heard, the International League submitted that:

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\(^6\) Ibid, 117.
It seems self-evident that this Court cannot accord less liberal rights of participation to private international organizations than did the P.C.I.J...Indeed it seems unthinkable, one of the avowed purposes of the United Nations being the protection of fundamental human rights, to deny the rights of participation to non-Governmental organizations – which alone can speak for the conscience of man.\(^{57}\)

By missing out on the opportunity to witness the benefit of NGO participation in proceedings before the ICJ, critical issues relating to the potential role of NGOs in international legal proceedings remained unresolved. To date, this matter has not been formally reviewed and little or no precedent has been set. Research indicates that the ICJ has yet to send a notice to an NGO requesting it to supply evidence in an Advisory Opinion pursuant to Article 66(2), nor has the Court since granted leave to any international organisation to provide evidence in such cases.

Twenty years after the *South West Africa Cases*, the International League again applied to the ICJ to submit information in relation to another advisory proceeding on the same topic. This time the International League was refused permission by the Court without any reasons assigned. Other individuals, such as Professor Reisman, also attempted to provide evidence in this case, but were rejected by the Registrar of the Court due to the fact that they were not an ‘international organization’ as stipulated by Article 66. Discussions between these two individuals indicate that Professor Reisman inquired whether he could submit a document similar to an *amicus curiae* brief arguing that:

> I appreciate that this has not been done before, though there appears to be some faint precedent in the Court’s willingness to accept a document from the International League...in 1950. On the other hand, there seems to be no explicit bar in the Statute or Rules to accepting a document from an interested

\(^{57}\) Ibid, 121-2.
group or individual, despite the fact that such group or individual could neither initiate a case nor plead orally.\textsuperscript{58}

Reisman also impressed upon the Registrar that, in domestic courts, \textit{amicus curiae} briefs have provided useful information and 'served as a means for integrating and buttressing the authority and conflict resolving capacities of domestic tribunals.'\textsuperscript{59} The Registrar’s response expressed that the 'faint precedent' related to the International League’s status as an 'international organization', as is limited in Article 66, and that the court would be 'unwilling to open the floodgates' by allowing evidence from individuals.

In relation to contentious cases, at the time of the initial request in 1950, Mr Robert Delson, a board member of the International League also asked whether his organisation could participate in the \textit{Asylum Case}, a contentious proceeding between Colombia and Peru. The Registrar rejected the International League’s request on the ground that Articles 66 and 34 of the Statute of the ICJ applied to two different categories of cases. The former concerned the involvement of 'international organizations' in Advisory Opinions, and the latter applies to the involvement of 'public international organizations' in contentious matters. The Registrar concluded that the International League could not be characterised as a public international organisation.\textsuperscript{60}

\textsuperscript{58} Ibid, 119.
\textsuperscript{59} Ibid.
\textsuperscript{60} See, Shelton, above n 6, 623.
More recently, in 1994, the International Physicians for the Prevention of Nuclear War (IPPNW) made a request to the ICJ to submit information it possessed in the matter of the Advisory Opinion on The Legality of the Use by a State of Nuclear Weapons in Armed Conflict. This request was denied. In a letter from the International Court of Justice dated 28 March 1994 the Registrar wrote that:

The Court has considered your offer with all the care it deserves…

Having regard to the circumstances of the case and in view of the scope of WHO’s request, the Court, while grateful to the IPPNW for its offer, has decided not to ask your organization to submit a written or oral statement in connection with the request.

Thus, with limited response and no reasoning behind the decision, the ICJ refused to allow an NGO to provide evidence during this Advisory Opinion. However, due to a large number of interesting issues raised by the NGOs in instigating the case, as well as in submitting ‘citizens’ evidence’, the ‘World Court Project’, as it came to be later known, is worthy of a detailed case study.

3. CASE STUDY OF THE WORLD COURT PROJECT

The case is unusual not only because of the sweeping questions it addresses, but also because it has been brought as a result of a campaign not by governments, but by the private citizen.

Like many instances involving coalitions of civil society, the history of the World Court Project is complex and different sections of the coalition have emphasised various issues in approaching the question. But there is no doubt in the fact that the

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61 Advisory Opinion on the Threat or Use of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66 (‘WHO Opinion’).
62 Letter from the International Court of Justice to the Executive Director of the International Physicians for the Prevention of Nuclear War, 28 March 1994.
63 S Kinzer, ‘World Court Weighs Legality of Atomic War’, New York Times (New York, USA), 20
ruling of the ICJ in 1996, in relation to the illegality of nuclear weapons, was urged on behalf of, and perhaps even brought about by, the efforts of NGOs. Another significant aspect of this case is that, for the first time in an international judicial proceeding, recourse was had to ‘citizens’ evidence’ provided by non-State actors.

(i) The role played by NGOs initiating the case

Much of the earlier efforts to obtain a declaration banning nuclear testing in the South Pacific appears to have been initiated in New Zealand. In March 1987, Harold Evans, a retired District Judge from Christchurch, sent an Open Letter to the Prime Ministers of New Zealand and Australia urging them to initiate action which could lead to an Advisory Opinion ‘on the legality (or otherwise) of nuclear weaponry at international law.’\(^{164}\) The Australian Prime Minister at that time, Bob Hawke, responded to the letter advising that he considered arms control negotiations a more promising avenue for disarmament, and New Zealand’s David Lange, whilst giving cautious encouragement, eventually rejected the proposal formally.

However, the idea of seeking international judicial assistance through the ICJ to determine the status of nuclear weapons was spreading and gaining rapid support amongst citizens’ groups throughout Australia and New Zealand. In late 1987, Harold Evans addressed a lengthy letter to all 71 UN Member States with diplomatic accreditation in Canberra and Wellington, urging their governments to initiate an UN Resolution on the topic. A number of diplomats expressed interest and passed on the proposal to their respective Governments.

In 1988, lawyers from 11 countries assembled in Sweden for the inaugural meeting of the *International Association of Lawyers Against Nuclear Arms* (IALANA). The creation of this association had been proposed by the *Lawyers' Committee on Nuclear Policy*, USA (LCNP) and the *Association of Soviet Lawyers* in 1987. From its inception, IALANA had a clear and positive mandate viz:

IALANA takes the position that the use or threat of use of nuclear weapons violates international law and constitutes a crime against humanity and peace. The organization’s ultimate goal is an international legal system in which inter-state disputes will be settled peacefully, without the use or threatened use of violence. Nuclear weapons, which in the past have repeatedly been used as a means of exerting pressure in international politics, will have no part to play in such a legal order.65

A year later IALANA held its first World Congress in The Hague with over 200 lawyers from many nations in attendance. The major theme of the discussions at the Congress involved the relationship between nuclear arms and international law. A closing declaration was prepared stating that ‘the use or threat of use of nuclear weapons constitutes a violation of international law and should be regarded as a war crime and a crime against humanity.’ The concept of obtaining a declaration from the ICJ to this effect received prompt attention and support from the delegates. Subsequently, *The Hague Declaration of the International Association of Lawyers against Nuclear Arms* was adopted by IALANA’s General Assembly at the Congress. Article 11 of The Hague Declaration reads:

IALANA appeals to the Government of all States Members of the United Nations to take Immediate steps towards obtaining a resolution by the United Nations

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65 International Association of Lawyers Against Nuclear Arms, *Nuclear Arms and the Law - Lawyers are Uniting* (1990) 8.
Assembly under article 96 of the United Nations Charter, requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons.\footnote{Ibid, 24. The UN Charter art 96(1) reads: The General Assembly or the Security Council may request the International Court of Justice to give advisory opinion on any legal question. It is important to note that States cannot request advisory opinions from the ICJ nor can they prevent the giving of an advisory opinion which the United Nations considers to be necessary for the proper exercise of its functions.}

In the same year, the IPPNW became interested in a legal opinion relating to nuclear weapons. IPPNW is a federation of physicians’ organisations with affiliates in 76 countries and more than 200,000 members with a central aim of abolishing nuclear warfare.\footnote{N Grief, The World Court Project on Nuclear Weapons and International Law: A Joint Project Of The International Association Of Lawyers Against Nuclear Weapons, The International Peace Bureau and The International Physicians For the Prevention Of Nuclear War (1993) 8-14.} During its Montreal Congress, IPPNW identified a second complementary avenue to obtain an Advisory Opinion from the ICJ; that was through the use of the World Health Organization (WHO). WHO had recently completed a study on the effects of nuclear weapons and health and concluded that the only treatment of the health effects of nuclear warfare was the prevention of nuclear war.\footnote{World Health Organization, Effects of Nuclear War on Health and Human Services (2\textsuperscript{nd} ed 1987).}

WHO, along with other United Nations Specialized Agencies, are authorised, pursuant to Article 96(2) of the UN Charter, to seek Advisory Opinions on matters relevant to their activities.\footnote{UN Charter art 96 (2) reads: Other organs of the United Nations and specialized agencies, which may at time be so authorized by the General Assembly, may also request Advisory Opinions of the Court on legal questions arising within the scope of their activities.} Under the auspices of this provision, an agreement was entered into between the UN and WHO, the latter being authorised to request Advisory Opinions from the ICJ ‘on legal questions arising within the scope of its competence.’\footnote{Agreement between the United Nations and the World Health Organization (1947-8) UNYB 919, art}
In 1989 the International Peace Bureau (IPB) also endorsed the strategy of using international judicial mechanisms to assist in attempts to eliminate nuclear warfare. The IPB is a global network of independent and nonaligned organisations with a permanent Secretariat located in Geneva. Founded in 1892, it brings together groups of all sizes and types in the common pursuit of non-violent settlement of conflicts. In the words of Mothersson:

IPB has consistently emphasized the need to support the disarmament work of the United Nations and to further strengthen international law. At the same time we recognize that grass roots people’s movements for peace are of vital significance. Furthermore, peace cannot be separated from the wider issues of economic justice, environmental security and human rights.\(^{71}\)

With this agenda on the table for the next few years, the aforementioned organisations, as well as a myriad other interest groups throughout the world, continued to build upon this concept. Citizen’s groups, as diverse as trade unions, the Women’s International League for Peace and Freedom (WILPF), the World Peace Council, Friends World Committee for Consultation, and Quaker groups, to name a few, became involved in the cause. Lobbying was undertaken at Commonwealth Bar Association meetings, at the Non-Proliferation Review Conference in Geneva and at a number of diplomatic missions in New York and Geneva. Finally, in 1992, IALANA, IPB and IPPNW formally launched the World Court Project on Nuclear Weapons (World Court Project).\(^{72}\)

\(^{10}(2).\)

\(^{71}\) Mothersson, above n 64, 183.

\(^{72}\) For a full account of citizen actions and activity through-out the World Court Project see, Kate Dewes and R. Green, The World Court Project: How a Citizen Network Can Influence the United Nations (1995).
In many ways, the strength of the World Court Project can be seen to be the interplay of unity and diversity between the three core organisations. Whilst the three worked jointly, they also focused upon their respective target groups — IALANA, on the legal profession and the diplomatic community, IPB, on numerous grassroots groups; and, IPPNW, on the medical profession.

In 1992, for example, IPPNW began intense lobbying of delegations to the World Health Assembly, the membership body of WHO. As a result, in the very same year the Colombian delegation put forward a proposal to add to the agenda of Committee B, a request for an Advisory Opinion from the World Court on the legal status of nuclear weapons.73 However, at this time, concern was raised by WHO’s Legal Counsel in relation to the competence of the organisation’s referral capacity on this question. The issue was raised again the following year in the Assembly. This time, however, pursuant to detailed discussions on the issue of competence, members cast their votes by secret ballot to adopt a resolution, and in May 1993 the WHO Assembly adopted a resolution to seek an opinion on the health implications of nuclear weapons from the ICJ. The question was framed in the following terms:

In view of the health and environmental effects, would the use of nuclear weapons by State in war or other armed conflict be a breach of its obligations under international law including the WHO constitution?74

At this point of time the Lawyers Committee on Nuclear Policy (LCNP), in furtherance of IALANA’s strategy to encourage the UN General Assembly to request an Advisory Opinion, commenced lobbying the UN in New York. Mr Alan Ware,

73 Møthersson, above n 64, 35, 120.
Executive Director of LCNP, had identified potentially supportive States by reviewing voting records on nuclear issues in the UN. Mexico, Costa Rica, Colombia, Samoa, New Zealand and other Pacific Island-States had a precedent of being supportive of anti-nuclear initiatives. In 1992, Ware commenced fulltime lobbying at the UN, provided States with materials and position papers, discussed the matter at length with concerned diplomats and built up what he describes as a mixture of ‘trust and usefulness.\textsuperscript{75}

Ware found that the strongest support came from States belonging to the Non-Aligned Movement (NAM) and Pacific Island-States. In late 1993, Zimbabwe proposed that the 110 members of NAM sponsor a resolution to the ICJ to determine the legal status of nuclear weapons. This proposal immediately became controversial. Schapiro sums up the mood of the various States’ representatives:

\begin{quote}
Mexico’s Geneva-based disarmament counsellor... offered a blunt assessment of the scene at the world body during the last two weeks of November. ‘The nuclear powers’ he said, ‘are scared shitless. Their turn is up. And they are holding on to the only toys that have been the guarantee of their legitimacy.’ Or as the Canadian disarmament ambassador, Peggy Mason, described it, ‘Hysteria is not too strong a word to describe the nuclear weapons states’ point of view around here’... In the end, ‘incredible pressure,’ in the words of one Latin American delegate, forced the NAM (which requires a unanimous vote of its member to act) to retreat. Within NAM, a small group of nations with close ties to the nuclear powers succeeded in blocking a consensus to bring the resolution to the floor for a vote.\textsuperscript{76}
\end{quote}

It took a year of negotiations and lobbying before the resolution was finally put to vote at the UN General Assembly. Strategies such as a push to have the matter

\textsuperscript{75} Interview with Alan Ware, Executive Director, Lawyers Committee on Nuclear Policy (New York Office, 8 December 1996).

determined important, thus requiring a two-third majority rather than mere majority,77 and attempts to make the issue a 'non-action vote' were dealt with.78 On 15 December 1994, Resolution 49/K was adopted by 78 votes to 43 (France, the Russian Federation, the United Kingdom and the United States voting against) with 38 abstentions.79 Resolution 49/K from the General Assembly of the United Nations requested that the ICJ determine:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

(ii) The Case

Between 30 October and 15 November 1995, the ICJ heard oral arguments in relation to the two requests for Advisory Opinions from the WHO and the UNGA.

This case, for the first time, sought to test the legality of the nuclear policies of the five nuclear States in a direct manner.80 Over 20 countries, and the WHO, were involved in oral presentations, and an additional 23 countries submitted written pleadings to the Court on this matter. To date, this case holds the distinction of involving the maximum number of States in a single proceeding before the World Court.81

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77 Article 18(2) of the UN Charter states: Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting.

78 Interview with Alan Ware, above n 75.

79 Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, GA Res 49/75, 49 UN GAOR, Supp No 49 at 71, UN Doc A/Res/49/75 (1995) ('UNGA Opinion').

80 The International Court of Justice had previously determined that it was not required to address the merits of a case brought by New Zealand and Australia challenging the legality of atmospheric nuclear tests conducted by France in the South Pacific: Nuclear Tests Case (Australia v. France) [1974] ICJ Rep 253; Nuclear Tests Case (New Zealand v. France) [1974] ICJ Rep 457.

81 Other cases with a high participation include the Namibia Case, 13 countries (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding
In relation to the questions posed, below is a brief summary of the arguments addressed by participating countries:

- 4 countries, France, Russia, the UK and the USA contended that the threat or use of nuclear weapons could be legal depending on the circumstances in which they are used;

- countries such as, France, Germany, Italy, Russia, the UK and the USA submitted during oral arguments that the Court should refuse to answer the question posed by the WHO at the very outset, on the ground that the WHO did not have the capacity or mandate to refer such a question. With reference to the UN General Assembly’s question, these countries argued that the Court should use its discretion when answering questions for the reason that the question was primarily a political, not a legal one. Furthermore, they submitted that such an opinion from the ICJ was likely to affect negotiations on the disarmament process that were underway;

- countries such as, Egypt, Indonesia, Mexico, Marshall Islands, Iran, Malaysia, Aotearoa-New Zealand, Philippines, Qatar, Samoa, San Marino, Solomon Islands, Costa Rica and Zimbabwe argued that the ICJ ought to respond to both questions. These countries asserted that the threat and use of nuclear weapons is illegal and that the Court ought to affirm this proposition. This argument was based on the

fact that the threat or use of nuclear weapons would violate the principles of international law of armed conflict, including those that prohibit: the indiscriminate use of weapons or military tactics; the use of poisonous substances; violations of the principles of neutrality, causing superfluous injury or unnecessary suffering, causing widespread and long term damage to the environment and causing damage or destruction disproportionate to the level of provocation.\footnote{Ibid, 2-3.}

(iii) \textbf{The role played by civil society during proceedings}

As previously discussed, under Article 66(2) of the Statute of the ICJ, the Court may receive written or oral submissions from non-State Parties. It was under this provision that the IPPNW endeavoured to submit information to the Court relating to the WHO Opinion. However, as has already been noted, the Registrar of the Court replied by advising that permission to furnish the ICJ with information was refused, despite a careful consideration by the members on the Bench. In this regard, NGOs came to play no formal role in the Court proceedings.

The ICJ did, however, receive "citizens' evidence" for the first time in the Court's history.\footnote{The World Court Project, \textit{Implications of the Advisory Opinion by the International Court of Justice on the Legal Status of Nuclear Weapons} (1996) 12-13.} On 10 June 1994, the ICJ Registrar received a citizens' delegation representing over 700 NGO organisations which had endorsed the initiative to request the ICJ for an Advisory Opinion. The delegation presented "citizens' evidence" consisting of a unique collection of documents, which included:
• individually signed Declarations of Public Conscience invoking the ‘Martens Clause’, the Preamble to the Hague Convention II of 1899 and Convention IV of the 1907 Hague Convention;\textsuperscript{84}

• a sample of more than 50 million signatures to the Appeal from Hiroshima and Nagasaki;

• signatures to the MacBride Lawyers’ Appeal Against Nuclear Weapons;

• material surveying over 50 years of citizens’ opposition to nuclear weapons.

Subsequently, over 3.5 million more Declarations of Public Conscience were presented to the ICJ. Over 3 million of these were from Japan alone. After accepting these documents, the Registrar undertook to draw the judges attention to this information during the period of deliberations on the judgment. Throughout the proceedings, NGOs were notified that the ‘citizens’ evidence’ had not been accepted as legal evidence. Nevertheless, by submitting this information to the Court it had, ‘indicated that the ICJ acknowledged the strength of public concern worldwide about the issue — indeed, several judges drew attention to this aspect in their separate Opinions.\textsuperscript{85}

\textsuperscript{84} \textit{Final Act of the International Peace Conference}, opened for signature 29 July 1899, 91 BFSP 963; (1898-1899) 1 \textit{American Journal of International Law (Supp)} 103 (‘1899 Final Act’); \textit{Convention Concerning the Laws and Customs of War on Land (Hague IV)}; opened for signature 18 October 1907, 205 CTS 277; (1908) 2 \textit{American Journal of International Law (Supp)} 900 (entered into force 26 January 1910) (‘1907 IV Hague Convention’). The Regulations are annexed to the Convention. The Martens clause, found in the Preamble to the two instruments states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

\textsuperscript{85} The World Court Project, above n 83, 12.
The move to provide judges with an informal access to a wide range of ‘citizens’ evidence’ encouraged governments supportive of the NGOs to include citizens as witnesses and members of a State’s legal team. For instance, an invitation extended to the Mayor of Hiroshima, Mr Takashi Hiroaka, to participate in the proceedings was refused by the Japanese Government. Mr Hiroaka was not permitted to be included as a member of the Japanese legal team. This situation was leaked to the Japanese people by their own press. Consequently, there was a community outrage in Japan and the embarrassed Japanese Government was forced to invite Mr Hiroaka to The Hague to provide evidence independently of the Japanese Government’s stance.\(^{86}\) For the first time in the history of the ICJ, non-State officials were given the opportunity to provide testimony before the court. Mr Hiroaka provided a poignant account. He stated in part:

> History is written by the victors. Thus the heinous massacre that was Hiroshima has been handed down to use as a perfectly justified act of war. As a result, for 50 years we have never directly confronted the full implications of this horrifying act for the future of the human race... Five to six years after the bombing, a dramatic increase was recorded in leukemia and other late effects. Characteristic late effects were keloids (excessive growth of scar tissue over healed burns), cataracts, leukemia, thyroid cancer, breast cancer, lung cancer and other cancers.

Those exposed in their mothers’ wombs were often born with microcephalia, a syndrome involving mental retardation and incomplete growth... The bomb reduced Hiroshima to an inhuman state utterly beyond human ability to express or imagine. I feel frustrated at not being able to express this completely in my testimony about the tragedy of the atomic bombing. For that reason, I would like to ask you, the judges, to visit Hiroshima and Nagasaki to verify for yourselves the actual result of the bombing to deepen your understanding of it.\(^{87}\)

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\(^{86}\) Interview with Alan Ware, above n 75.

\(^{87}\) 'Refusing to Learn to Love the Bomb: Nations Take Their Case to Court', *The New York Times* (New York, USA), 14 January 1996.
The Government of the Marshall Islands included as part of their legal representation the testimony of Mrs Lijon Eknilang, who gave a personal statement on the effects of nuclear testing in the Marshall Islands, on her life and the lives of her family, friends and other citizens of the Marshall Islands. Mrs Eknilang was assisted by LCNP, which funded her travel to The Hague and provided her with accommodation. It was important for Mrs Eknilang to give her evidence in English, which was not her first language, and those who listened to her found her speech deeply moving. Below is an excerpt from her Oral Presentation:

I hope that the Court will understand that I cannot be unemotional about the facts of my experience with nuclear weapons. The important point is that they are facts, and are not ‘abstract’... On the morning of 1 March 1954, the day of the ‘Bravo’ shot, there was a huge, brilliant light that consumed the sky. We all ran outside our homes to see it. The elders said that another world war had begun. I remember crying. I did not realise at the time that it was the people of Rongelap who had begun a lifelong battle for their health and a safe environment... My own health has suffered very much, as a result of radiation poisoning. I cannot have children. I have had miscarriages on seven occasions. On one of those occasions, I miscarried after four months. The child I miscarried was severely deformed; it had only one eye... I have lumps in my breasts, as well as kidney and stomach problems for which I am receiving treatment. My eyesight is blurred, and everything looks foggy to me....

The most common birth defects on Rongelap and nearby islands have been ‘jellyfish’ babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. The babies usually live for a day or two, before they stop breathing. Many women die from abnormal pregnancies and those who survive give birth to what look like strands of purple grapes which we quickly hide away and bury.

My purpose for traveling such a great distance to appear before the Court today is to plead with you to do what you can not to allow the suffering that we Marshallese have experienced to be repeated in any other community in the world.

88 Interview with Alan Ware, above n 75.
89 R S Clark and M Sann (eds), The Case Against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons (1996) 239-42.
(iv) **The Court’s decision**

On 8 July 1996, the ICJ delivered two separate opinions to the questions posed by WHO and UNGA. In relation to the WHO request the Court found, by 11 votes to 3, that WHO lacked competence to request an Advisory Opinion of the legality of the threat or use of nuclear weapons and hence it did not consider the merits of the case. Whilst addressing this issue, the Court was called upon to examine whether the three pre-conditions prior to rendering an Advisory Opinion had been satisfied. The conditions in brief are:

- the requesting agency must be duly authorised to seek an opinion; and
- the opinion requested must be on a legal question; and
- the question must arise within the scope of the work of the requesting agency.\(^{90}\)

The ICJ accepted that the first two criteria had been met in the case of the WHO, however, the majority opined that the third condition was not satisfied. They held the view that questions concerning the legality of the use of nuclear weapons was not a matter that arose ‘within the scope of [the] activities’ of WHO as defined by its Constitution.\(^{91}\)

The WHO argued that its capacity to request an Advisory Opinion was based on the objective and functions provided by its Constitution. WHO also submitted that instead of pursuing the questionable project of planning contingency measures to

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\(^{90}\) The World Court Project, above n 84, 13.
\(^{91}\) *WHO Opinion*, above n 61, 15
counter the health effects of a nuclear war, it had on the other hand, resolved to develop a 'public health' prevention strategy and asserted that:

Just as smallpox, domestic violence, and drug trafficking can be characterized as public health issues, so too can nuclear weapons. And one way to attack the prevention problem is by questioning the legality of the weaponry. 92

The majority, however, were not convinced with this line of argument. On the contrary, they found that the WHO's work, of coordinating the care of survivors of nuclear war, would continue to be the same irrespective of whether nuclear weapons were illegal or legal. While agreeing with counsel for the WHO that Article 2 of the WHO Constitution authorises the UN agency to deal with the effects of nuclear weapons on health and undertake preventative measures in the event of the use of such weapons, it did not, however, consider that the WHO would have any legal standing to request an Advisory Opinion on these lines. The court stipulated that,

[The question put to the Court in the present case relates, however, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them. 93

A number of States had strongly objected to the WHO's request. France submitted that WHO's action, 'seems nothing less than an abuse of the court's advisory function and, to say the least, a somewhat alarming trend.' 94 It urged the court that:

WHO has no more competence to put this question than it would have, itself, to declare that the use of a particular kind of weapon was unlawful or to rule on the international legality of a particular kind of conflict; it has not the slightest competence in this area. 95

92 Clark and Sann, above n 89, 9.
93 WHO Opinion, above n 61, 10.
94 CR 95/23, 56-57.
During debates at the WHO Assembly in relation to the referral of the question to the ICJ, a number of representatives from various States had expressed concerns regarding the juridical basis for seeking the Advisory Opinion. The United Kingdom representatives characterised the referral as, 'pointless and expensive, and a disruptive exercise.'\textsuperscript{96} The United States stressed that, '[t]his resolution would inject the World Health Organization into debates about arms control and disarmament that are the responsibility of other organisations in the United Nations system.'\textsuperscript{97}

The French representatives advised that the subject matter had purely political connotations. Russia stated that the resolution to refer the matter to the ICJ went beyond the competence of the WHO and could lead to the politicisation of the Organization and involve it, without having a proper perspective, in the setaceous debates on nuclear disarmament.\textsuperscript{98}

The three dissenting judges\textsuperscript{99} considered the question of legality of nuclear weapons as within WHO’s competence and responsibility, particularly in the light of the WHO’s dealings with preventative medicines. A number of the dissenting judges pointed to the fact that this was the first time that the ICJ had refused to consider a request of an UN agency for an Advisory Opinion. Judge Weeramantry stated: 'It is important therefore that when such a request is declined for the first time in the

\textsuperscript{95} Ibid, 56.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid, 15.
\textsuperscript{99} Judges Shahabuddeen, Weeramantry and Koroma.
Court’s jurisprudence, the reasons for so declining must be compelling. He further added that:

It is therefore a mistake to read into WHO’s inquiry an attempt at dabbling in the political question of prevention of nuclear war. It keeps well within its mandate in seeking information which it considers necessary for discharging its constitutional obligation of preparation to render assistance in the event of nuclear war... If these are legitimate weapons of war, WHO’s state of readiness to cope with the medical problems they raise must surely be different from the situation where the law of nations accepts that they are illegal and should not be used in any circumstances... I find it difficult also to accept that an organ of the United Nations, empowered to seek an Advisory Opinion on a question of law, has no competence to seek an interpretation of its own Constitution.

In relation to the UNGA question the Court produced a 34 page Opinion and over 200 pages of individual declarations and dissenting Opinions. The Opinion is complex and to some extent, has been hailed by both sides as a victory. In this instance the Court, with Judge Oda dissenting, complied with the request for an Advisory opinion. It unanimously found that there was no specific authorisation of the threat or use of nuclear weapons in either customary or conventional international law, nor any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. It held that a threat or use of force by means of nuclear weapons, contrary to Article 2(4) of the United Nations Charter and outside the scope of Article 51, was unlawful. Furthermore, the Court concluded that a threat or use of nuclear weapons should be compatible with the requirements of international law applicable in armed conflict, particularly those principles and rules of international humanitarian law, and specific obligations under treaty, and other undertakings, which expressly deal with nuclear weapons.

\[100\] WHO Opinion, above n 61, (Dissenting Opinion of Judge Weeramantry).
\[101\] Ibid.
In light of these requirements, the Court was evenly split (the President casting the deciding vote), in concluding that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law. However, in view of the current state of international law and the facts at the Court’s disposal, the Court could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State was at stake. Finally, it was held unanimously that there exists an obligation to pursue, in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects, under strict and effective international control.

(v)  ‘Citizens’ evidence’ and the World Court

As previously mentioned, Judges did make reference to a number of pieces of the formal and informal evidence available from citizens during the case. During an examination of the Martens Clause and the Nuremberg Principles, the ICJ confirmed that these are vital components of the principles and rules of humanitarian law which apply to nuclear weapons. Over 3 million individual ‘Declarations of Public Conscience’ were submitted by citizens to assist the Court in determining the ‘dictates’ of public conscience. From the Court’s reliance on this evidence it can be concluded that the Judges in fact acknowledged, albeit implicitly in some cases, that the use of nuclear weapons would have an immense impact on the human race.

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102 The Dispositif sets out the major elements of the Advisory Opinion: See Appendix 4.
The ICJ cited the continuing spread of nuclear weapon-free zones as a testament to, 'a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons.'

The Dissenting Opinion of Judge Shahabuddeen dealt with a statement made by the International Committee of the Red Cross (ICRC) after the nuclear attack on Hiroshima in 1945. The ICRC at that time expressed concern over the use of nuclear weapons and the adverse impact it would have upon the laws of war. Some Judges made detailed references to the evidence of the Mayor of Hiroshima and of the Marshall Islands delegation. Judge Koroma dedicated over five pages of his decision to reviewing this evidence. Judge Weeramantry observed that:

The Mayor of Hiroshima has given the Court some glimpses of the lingering agonies of the survivors — all of which is amply documented in a vast literature that has grown up around the subject... Reference should also be made to the many documents received by the Registry in this regard, including materials from the International Symposium: Fifty Years since the Atomic Bombing of Hiroshima and Nagasaki. It is not possible in this Opinion even to attempt the briefest summary of the details of these sufferings.

However, not all Judges viewed the involvement of NGOs as being of assistance during their deliberations. Judge Oda was the only Judge to dissent in relation to the UNGA question. His reasons for dissent centred around concerns that the whole exercise was a 'plot' by NGOs and thus an abuse of process and position. He added that:

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103 *WHO Opinion*, above n 61, [78] -[87].
104 Ibid, [63].
The idea behind the resolution whereby the General Assembly (and also the WHO) requested Advisory Opinions, had previously been advanced by a handful of non-Governmental organizations which initiated a campaign for the total prohibition of nuclear weapons but failed to persuade the States' delegations in the forum of the General Assembly... Some NGOs seem to have tried to compensate for the vainness of their efforts by attempting to get the principal judicial organ of the United Nations to determine the absolute illegality of nuclear weapons, in a bid to persuade the member States of the United Nations to press for their immediate and complete prohibition in the political forum... This gives the impression that the Request for an Advisory Opinion which was made by the General Assembly in 1994 originated in ideas developed by some NGOs.\textsuperscript{107}

There is undoubtedly a thin line between NGOs being perceived as moving beyond their sphere of influence, and NGOs contributing to a depth of judicial debate. This is particularly so vis-à-vis the topic of nuclear weapons, which, \textit{per se}, has the potential to profoundly impact upon humanity. The fact that the ICJ, unlike domestic courts, is not located in the politics of one society brings to bear the question of the type of limited influences placed upon this Court. Any domestic legal system responds to public perception and requires a broad-based confidence in the judiciary for it to function effectively.\textsuperscript{108} Due to the limited involvement to date of non-State actors in the ICJ’s proceedings, there has been little analysis on the potential benefits and disadvantages of broader ‘civil society’ participation in the ‘World Court’.

\textsuperscript{107}\url{www.ddh.nl/org/ialana/oda.htm#part 12,8}

\textsuperscript{108} A example of this is the review of the role of Justice Beech of the New South Wales Supreme Court, and the response by many civil society groups in the case of R v J (Unreported, Supreme Court of South Australia, Bollen J, 26 August 1992) 13. This case dealt with the issue of consent in marital rape and the summation to the jury by Justice Bollen that a husband could seek to persuade his wife to have sexual intercourse in a manner involving 'routher than usual handling'. See, eg, Barbara Ann Hocking, 'The Presumption Not in Keeping With \textit{Any} Times: Judicial Re-Appraisal of Justice Bollen's Comments Concerning Marital Rape' (1993) 1 \textit{Australian Feminist Law Journal} 152; Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law 'Reform' (1994) 3 \textit{Australian Feminist Law Journal} 30; Peter Moses, 'Non-Consent in Rape' (1993) 18 \textit{Alternative Law Journal} 290.
With increased technology and growing communication networks, there is no doubt that more citizens have access to information. This is likely to lead to wider education on matters such as the important judicial role of the ICJ, which in turn may result in more interest and willingness for individuals and groups to participate. To date, matters such as requests to submit information to ICJ proceedings have been dealt with in an *ad hoc* matter. For example, in the case at hand, the Registry was predisposed to the workings of NGOs and thus, not only allowed ‘citizens’ evidence’, but also directed the attention of the judges to it. Whilst this development is a positive advance, it is of concern that such matters are purely at the discretion of individuals, in this case the Registrar. Such discretion does not encourage any form of consistency and sets a personal rather than professional precedent. The situation also has the potential to alter dramatically with a change of staff.

If, in this case, the use of ‘citizens’ evidence’ was deemed useful to the ICJ’s deliberations, a minor amendment to the rules of procedure allowing the Court discretion to formally review such information would not only create a strong precedent but also inform other potential contributors of the possibilities. Relying upon the goodwill of an individual within the ICJ also creates problems to the extent that this process can be used by powerful NGOs which have the capacity to make strong personal contacts and the resources to travel to The Hague and directly present information. The ICJ needs to carefully consider the existing procedure in relation to non-party participation and perhaps potentially amend its Statute. There also needs to be broader information available to the public of the type of access that can be granted, and the process to apply for this access.
(vi) **The impact of the decision on civil society groups**

In legal terms, the ICJ's decision on the legality of nuclear weapons is ambiguous to the extent that the Court could not 'conclude definitively' that in all cases the threat or use of nuclear weapons is illegal. Much has been written on the worldwide legal impact of this ruling.\(^{109}\)

Many members of NGOs involved in the World Court Project have taken a broad philosophical view of the decision:

> Whilst it is not as definite as we would have wanted, the judgment has played a very important part in an educative process and we now have something specific and concrete to work with. The oral and written statements submitted by Governments to the Court on their nuclear policy are essential resources for continuing work on this issue.\(^{110}\)

Using the whole process as a platform on which to educate the international community about the Court's ruling has been important. The interest created by the case, both in the media and within community groups, allowed a more intense and informed debate on the issues surrounding nuclear weapons to be embarked upon.

Roger Clark, Legal Counsel of Samoa, reflecting on the process, writes that:

> This was a very moving personal and professional experience for all of us involved. In the months following the oral argument in November 1995, I was invited to speak about the cases to all sorts of groups at universities and schools in the Netherlands, the United States and New Zealand. I was buttonholed by friends and by total strangers. Somehow, arguing in a strange court about the survival of humankind stretches the imagination... So many questions! Some of the best came from my children and from my daughter Ashley's ten-year-old colleagues in Mrs. E's fifth-grade class. (That's heartening, isn't it? The case is about keeping a planet for them to live on.)\(^{111}\)

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\(^{110}\) Interview with Franseska van Holthoon, Member of the International Secretariat, International Association of Lawyers Against Nuclear Arms (The Hague, 17 November 1996).

\(^{111}\) Clark and Sann, above n 89, 29.
To harness the interest and support of the public on this issue, a campaign called *Abolition 2000* was launched. The campaign’s central aim is the development of a Nuclear Weapons Convention, to be open for signature by the year 2000, which should include a firm timetable for the elimination of nuclear weapons. Work is steadily progressing on this project with groups involved utilising not only the jurisprudence of the World Court and the respective government’s statements, but also the Canberra Commission Report\(^\text{112}\) and subsequent UNGA initiatives. In particular, the unanimous agreement by the Court of the need to pursue disarmament discussions has greatly influenced numerous States in their domestic policies and at the United Nations, in general.\(^\text{113}\)

Another example of the way civil society is utilising the Opinion of the ICJ case is in regard to the defence of activists opposing nuclear weapons in domestic courts. This is a creative interpretation of the impact of international litigation on national law. The validity of such a defence will vary depending upon countries and courts, however, it adds a depth to legal debate. According to some:

> By its decision, the ICJ has implicitly confirmed that opposing nuclear weapons it lawful. The Opinion gives legal authority to all those opposing nuclear weapons. Domestic law is affected: citizens now have a powerful new defence in support of civil resistance and attempts to challenge in court government nuclear weapon policies and military practices.\(^\text{114}\)


\(^\text{113}\) See, eg. 51 UN GAOR 1\(^\text{st}\) Comm (37\(^\text{th}\) mtg), UN Doc A/C.1/51/L.37 (1996).

\(^\text{114}\) The World Court Project, above n 83, 20.
The Advisory Opinion on the legal status of nuclear weapons importantly drew the world’s attention to the under-used ICJ. As the principle judicial organ of the UN, it has not played as significant a role as it ought to have done in determining matters impacting upon the whole of humanity.¹¹５ In cases such as the use of nuclear weapons, which are governed by no specific international legal provision, the ICJ walks a fine line between ‘declaring what the law is’ and ‘breaking new ground.’

Whilst the Statute of the ICJ and the UN Charter are silent on the role of the ICJ in the development of international law,¹¹⁶ the judicial process inevitably involves decisions which clarify what the law should be. In this respect, the use of the Court to deal with nuclear weapons was an innovative strategy.

The World Court Project demonstrated the opportunities available in the international legal process to NGOs, and concerned citizens. It also highlighted the need to view international litigation as a valid tool for change. Whilst the ICJ is a legal avenue restricted to State Parties, this section has indicated the role non-State actors can play in instigating proceedings and providing valuable support during a case. Professor Richard Falk, addressing the first IALANA World Congress in The Hague, characterised international law as, ‘the sleeping giant of the peace movement’¹¹⁷ indicating the potential of the international legal regime. It remains too early to tell whether the Advisory Opinion will influence the status and use of nuclear weapons. However as Falk writes:

¹¹⁵ Since 1946 the ICJ has delivered 68 Judgments on legal disputes submitted by States and given 24 Advisory Opinions. There are currently 21 cases pending. See <http://www.icij.org/icjwww/igeneralinformation/icjgnot.html> (as at 4 July 1999).
¹¹⁶ UN Charter, art 13 requires the General Assembly to, ‘institute studies and make recommendations for the purpose of...encouraging the progressive development of international law and its codification.’ For further discussion on this subject see, Clark, above n 89, 33-5.
Jurisprudentially, the Advisory Opinion confirms the capacity of the transnational NGO community to make use of the World Court to advance its goals, in this case by mounting the decisive pressure that led to the requests being forwarded by the WHO and the UN General Assembly. That will prevent the outcomes from being altogether lost in the noise of geopolitics.\footnote{International Association of Lawyers Against Nuclear Arms, above n 63, 7.}

(v) **Revision of the ICJ**

Currently there is revision of the role the ICJ plays in the international arena. Professor Vicuna’s report to the Centennial of the First International Peace Conference on Peaceful Settlements of Disputes deals with measures to broaden access to the ICJ. In relation to Article 34 of the ICJ Statute, which places strict limitations on States being the only entities with access to the contentious jurisdiction of the Court, Vicuna argues:

> But because States are no longer the exclusive actors of the international community there is no fundamental reason why this restriction should not be relaxed.\footnote{Richard Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 Transnational Law and Contemporary Problems 351.}

Vicuna goes on to advise that there is a growing body of opinion supporting a range of broader access to the Court including access by international organisations, non-Governmental organisations, corporations and individuals. Vicuna states that:

> [T]he precedents established in terms of direct access of individuals by the Court of Justice of the European Union, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration, ICSID, the Iran-United States Claims Tribunal and other arrangements, strongly suggest that the desirable option is that Article 34 of the Statute of the Court be amended to allow for a controlled access by the new actors of international law.\footnote{Professor O Vicuna, 'The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century - Report to the 1999 Centennial of the First International Peace Conference' (1999). Text available at <http://www.bz.minbuza.nl/english/f_sumconferences14.html> (copy on file with author) [para 134].}

\footnote{Ibid, [para 137].}
However, before embarking upon dramatic amendments questions must be asked in relation to the current mechanisms which allow non-States to be involved in cases before the ICJ. In contentious cases, has the ICJ asked ‘public international organizations’ for relevant information in considering cases as outlined in Article 34(2)? How often has the ‘World Court’ used Article 50 which allows it to obtain an expert opinion from a range of sources including individuals and organisations? When dealing with Advisory Opinions, why is it that the ICJ has never utilised Article 66(2) and directly notified an ‘international organization’ (NGO) that it could ‘furnish information’ on a question before the Court? Recent rejections of requests to supply information to the ICJ raise questions about the suitability of suggestions to broaden access to the ICJ due to the lack of will of the Court to hear from non-State parties through existing mechanisms.

Publicising the existing mechanisms that allow non-State parties access to the ICJ, as well as demanding that the Court itself review its obvious reluctance to gain information from a range of ‘new actors of international law’, may be more productive, at this point in time, than suggestions of amendments.

In relation to amendments, if these were to occur, it could also be more feasible to commence with the introduction of mechanisms to allow *amicus curiae* submissions by non-State actors, rather than giving direct access to such entities. Despite expressed fears of opening the ‘floodgate’ it must be remembered that any court accepting *amicus* participation retains discretion to deny permission to any or all petitioners. To allay fears, limitations could be made on the type of ‘international organizations’ given access to the ICJ. One possibility, for example, could be only to
allow NGOs with consultative status at the United Nations, as articulated in Article 71 of the Charter, to apply to submit written briefs or appear as *amicus curiae*.

**CONCLUSION**

There are numerous benefits to be obtained in allowing a range of actors discretionary capacity to provide information to important cases during international litigation. It is fortunate that the Draft Rules of Evidence and Procedure for the ICC allow *amicus* participation. Perhaps, drawing on the experience of the two *ad hoc* Tribunals and the future work of the ICC, the ICJ may either amend its Statute or begin to use the existing provisions. On this matter Shelton states that:

The Court's institutional interest favour non-Governmental *amicus* participation. Although additional materials will be filed in a number of cases, these materials could serve to provide relevant information to the Court, especially concerning broader issues of public interest and legal analysis, which would assist in reaching the best resolution of the dispute and thus further the rational development of the law. The stature of the Court and its opinions could also increase in public opinion if limited public participation - a fair hearing - were seen to be available. The long-term institutional interests of the Court may be best served by ensuring that its opinions are based upon the fullest available information and reflect consideration of the public interest, as well as the desires and concerns of the litigating parties.\(^{121}\)

The case study of the 'World Court Project' highlights the practical benefits available when the ICJ accepts information from non-State actors. Most of the judges made some reference to the 'citizens' evidence' and those individuals who gave oral statements to the Court added a depth of real experience to the important issues being considered. In the case of NGOs, the growing skills, resources, knowledge and interest in international litigation should be reflected in the 'World Court' at least

\(^{121}\) Shelton, above n 6, 626.
utilising its limited capacity to hear the voices of non-State actors on matters which
effect all humanity.
CHAPTER 7

THE SUBMISSION OF AMICUS CURIAE BRIEFS

BEFORE THE AD HOC TRIBUNALS

This Chapter makes apparent the benefits amicus curiae will bring to the ICC by reviewing the experiences of the ad hoc Tribunals. The ICTY and ICTR have provisions to allow such submissions and an accompanying internal process and strict selection criteria. Three detailed case studies indicate the benefits amicus curiae have provided to the ad hoc Tribunals, particularly in areas limited by a lack of international precedent. Two cases studied focus upon the ICTY, one dealing with the issue of subpoenas at international criminal law and the other the protection of witnesses. The third case study is located in the ICTR, on the topic of international prosecution for sexual violence. Each case study examines in depth the effect of the submission upon judgments, demonstrating the ability for this process enhance the quality of judicial consideration and thus international jurisprudence. The need for amicus curiae submissions not to be perceived as 'political lobbying' is noted. In order to maintain a balance between 'access' and judicial economy the ICC should utilise a process similar to that currently employed by the ad hoc Tribunals. Finally, broad publication of the process as well as the pending work of the Court, using information technology, would ensure that the ICC obtains truly inclusive participation.

1. AD HOC TRIBUNALS AND AMICUS CURIAE BRIEFS

Unlike the ICI, there is a formal capacity for non-State actors to submit amicus curiae briefs to the ICTY\textsuperscript{1} and ICTR.\textsuperscript{2} Rule 74 of the Rules of Procedure and Evidence of both the Tribunals states that:

A Chamber may, if it considers desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.\textsuperscript{3}

\textsuperscript{1} Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, SC Res 827, 48 UN SCOR (3217\textsuperscript{th} mtg), UN Doc S/Res/827 (1993); 32 ILM 1203 ('Statute of the ICTY').

\textsuperscript{2} Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, UN Doc S/RES/955 (1994), 49 UN SCOR (3453\textsuperscript{rd} mtg); 33 ILM 1598 ('Statute of the ICTR').

\textsuperscript{3} International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,
The term ‘organization’ is broad and the numerous precedents set by the two
Tribunals over the last few years indicate that NGOs are classified as ‘organizations’.
The ICTY has advised that requests for leave to file amicus briefs may be submitted
unsolicited, or in response to a general invitation from a Trial Chamber. At its
discretion, a Chamber may solicit an amicus submission from a particular State,
organisation or person. Amici may be invited to participate in oral arguments at the
Chamber’s sole discretion.  

The filing of an amicus brief with the ICTY and ICTR is a two step procedure. The
judges and Prosecutor consider the brief before the hearing. Thus, it is necessary to
first send an application to file such a brief to the Registrar of the Tribunal who then
forwards the application to the Trial Chamber for a decision pursuant to Rule 74 of
the ICTY Rules of Procedure. The application may be accompanied by the written
amicus brief which the applicant seeks to have the Chamber accept, or the brief may
follow once the application has been accepted.

The application to file such a brief must contain the following details as outlined in a
document provided by the ICTY entitled ‘Information Concerning the Submission of
Amicus Curiae Briefs’:

a) the applicant’s name, address, and interest in the case;

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Procedure’).

4 Information Concerning the Submission of Amicus Curiae Briefs, UN Doc IT/122 (1997) (‘ICTY
Internal Guidelines’), Appendix 5.
b) the issue or issues the applicant seeks to address, and the nature of the information or analysis the applicant proposes to submit;

c) applicant’s qualifications or competence of the organisation to address the issue;

d) whether the applicant makes application for leave to submit an *amicus* brief, or to appear as *amicus curiae*:
   i) in response to a general invitation for applications by the Chamber; or
   ii) at the applicant’s own initiative;

e) the applicant’s reasons for believing the submission will aid in the proper determination of the case or issue;

f) a statement identifying and explaining any contact or relationship the applicant had, or has, with any party to the case.  

It is advised that in all cases *amicus* submissions shall be made in writing although the *amicci* may be invited to participate in oral argument at the Chamber’s discretion. The ICTY cautions that, in general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of the crime charged. Applicants are informed that if the Chamber solicits or invites *amicus curiae* briefs, the Chamber shall give each party the opportunity to oppose the *amicus* submission, and any event shall retain the power to reject the offered submission.

The Chamber may also determine the timing of *amicus* submissions and, in certain circumstances, set page limits on the length of such submissions. Whilst parties will

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5 Ibid, 1.
be given an opportunity to comment on such amicus briefs as have been accepted, amici will not be cross-examined, nor will they be allowed to call witnesses. Finally, amicus curiae are expected to bear their own expenses in a majority of cases. However, if the amicus has been specifically invited to apply or appear by the Chamber, the Registry may be authorised to reimburse the reasonable expenses incurred in connection with participation in the Tribunal’s proceedings.⁶

To date, in the proceedings at the ICTY, a number of large NGOs, some academics and several States have successfully submitted such briefs.⁷ The ICTY does not permit the submission of amicus curiae at Rule 61 hearings.⁸ In order to determine the use of such submissions the following section of this Chapter will undertake a case study of three instances which have involved input from non-State actors. The first is in relation to the capacity for the ICTY to subpoena States, and the second is the procedural issue of the identification and protection of witnesses. Finally, there will be a review of an amicus submission made to the ICTR relating to the prosecution of sexual assaults.

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⁶ Ibid, 2.
⁷ For example, leave was granted by the ICTY to the United States Government to submit a brief on the proceedings relating to the Tribunal’s jurisdiction due to the United States’ ‘special interest and knowledge as a Permanent Member of the United Nations Security Council and its substantial involvement in the adoption of the Statute of the Tribunal’: Prosecutor v Tadic (Submission of the Government of the United States Concerning Certain Arguments made by Counsel for the Accused) UN Doc IT-94-I, 1 (1995).
Further examples during the Tadic trial include leave granted to Juristes Sans Frontières to submit an amicus curiae brief on the jurisdiction issues. Leave was denied to Courtroom Television Network who wished to appear as amicus curiae to oppose a defence motion to curtail press access to the trial.
⁸ For example, Croatia was refused permission to submit an amicus curiae brief on the basis that Rule 61 hearings are solely for the Prosecutor to present evidence to the Chamber: Sean Murphy, ’Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia’ (1999) 93 American Journal of International Law 79.
2. **CASE STUDIES**

(i) **Subpoena Duces Tecum: The Blaskic Case**

(a) **Legal History of The Request For Amicus Curiae Briefs**

On 15 January 1997, Judge Gabrielle Kirk McDonald, presiding Judge of Trial Chamber II at the ICTY, while confirming the Indictment against Tihomir Blaskic, issued *subpoena duces tecum* to the Republic of Croatia, the Croatian Defence Minister (Mr Susak), Bosnia and Herzegovina and the Custodian of the Records of the Central Archive. The order was issued pursuant to a request by the Office of the Prosecutor. A *subpoena duces tecum* is a compulsory order for the production of documentary evidence under threat of sanction. It sought twelve general categories of documents and information, as well as the minutes of a 1992 meeting, to be used in the trial of Blaskic.

On 10 February 1997, Croatia, through its counsel, Dr Jelinic, challenged the capacity and legal authority of the International Tribunal to issue a *subpoenae duces tecum* to a sovereign State. It also challenged the naming of a high government official in a request by the International Tribunal for assistance, pursuant to Article 29 of the Statute of the ICTY. Croatia claimed that such a request for assistance should be exclusively directed to a State and that, in assisting the International Tribunal, a State

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9 *Prosecutor v Tihomir Blaskic (Order Issuing Subpoenae Duces Tecum, 15 January 1997), IT-95-14-I.*

10 Formally the Ministry of Defence of the Croatian Community of Herceg Bosna.

11 Article 29 provides:
(1) States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
(2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons*;
has a right ‘to tailor its assistance in a manner such that its national security interests are protected.’

On 14 February 1997, the first hearing was held at which the addressees of the subpoenae duces tecum were requested to appear to answer questions relevant to the production of the subpoenaed documents. A representative from the Government of Bosnia and Herzegovina appeared and explained the steps that were being taken by his government in furtherance of the subpoena. Croatia failed to appear.

On 19 February 1997, Judge McDonald suspended the subpoena request issued to the Republic of Croatia and to Mr Susak, pending a meeting amongst the parties to informally resolve the disputes and also because of Croatia’s challenge to the authority of the ICTY to issue such orders. A series of hearings were then held before Judge McDonald on the question of the Tribunal’s competence. On 7 March 1997, Judge McDonald issued an order directing all parties to file with the Registry by 1 April 1997, briefs on issues relating to the power of a Judge or Trial Chamber of the International Tribunal to issue subpoenae duces tecum to States and high government officials. It also requested the parties to supply information in relation to the appropriate remedies for non-compliance. The Order called for briefs to be filed by 11 April and set a hearing for 16 April 1997.

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12 Prosecutor v Tihomir Blaskic (Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, 18 July 1997) IT-95-14, 3.
13 Ibid, 7.
On the 14th March 1997, Judge McDonald, due to the importance of the matter, ordered that the matter be heard by the full Trial Chamber II and invited *amicus curiae* submissions on the topic. The order ran as follows:

NOTING the Order Regarding *Subpoena Duces Tecum* dated 7 March 1997; CONSIDERING the significance of the issues to be addressed on 16 April 1997 at 10 a.m.; PURSUANT TO RULE 54, ORDER that this matter be considered by the full Trial Chamber, comprising Judge Gabrielle Kirk McDonald, presiding, Judge Elizabeth Odio-Benito and Judge Saad Saood Jan; PURSUANT TO RULE 74, INVITE requests for leave to submit *amicus* briefs by 7 April 1997 on the following issues:

- the power of a Judge or Trial Chamber of the International Criminal Tribunal for the former Yugoslavia to issue a subpoena duces tecum to a sovereign State;
- the power of a Judge or Trial Chamber of the International Criminal Tribunal for the former Yugoslavia to make a request or issue a subpoena duces tecum to a high government official of a State;
- the appropriate remedies to be taken if there is non-compliance of a subpoena duces tecum or request issued by a Judge or a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia;
- any other issue concerning this matter.

Opportunity was given for each party in the trial to comment on the proposed participation of *amicus curiae* on 8 April 1997. The granting of such an opportunity was consistent with internal guidelines.

It is extremely significant that the Trial Chambers of the ICTY not only accepted but invited the submission of *amicus* briefs, from States as well as non-State actors. In this specific case, such a request indicates judicial acknowledgment that in an unexplored area of international law, such as the competence of international tribunals

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14 *Prosecutor v Tihomir Blaskic* (Order Submitting the Matter to Trial Chamber II and Inviting *Amicus Curiae*, 14 March 1997) IT-95-14.
15 *ICTY Internal Guidelines*, above n 4.
to issue *subpoenas*, there is value in obtaining views from a range of sources, including individuals and NGOs. This contrasts dramatically with the ICI's obvious resistance to such input. It is interesting to note that the request came from a Judge whose background is that of the American judicial system which, as previously discussed, looks favourably upon *amicus* submissions in proceedings concerning matters of public interest. Judges involved in international trials are no doubt influenced by domestic experiences.

(b) **The Blaskic Indictment**

Blaskic was indicted on 20 counts of violations of international humanitarian law in the territory of the Republic of Bosnia and Herzegovina between May 1992 and January 1994. Charges include: Grave Breaches of the Geneva Conventions, Violations of the Laws or Customs of War and Crimes Against Humanity involving, persecution; wilful killing and causing serious injury; destruction and plunder of property; destruction of institutions dedicated to religion or education; and inhumane treatment.¹⁶

The indictment states that Blaskic, in his capacity as Commander, had authority and responsibility for the combat readiness of troops under his command, the mobilisation of armed forces and police units and the appointment of commanders at all times material to the indictment. It is claimed that he exercised his control in military matters in a variety of ways including deploying troops, artillery and other units under his command; issuing orders to municipal HVO headquarters and controlling HVO
military units and detention centres that were operating within his area of command.

It is also claimed that, from May 1992 to January 1994, members of the HVO committed serious violations of international humanitarian law against Bosnian Muslim cities, towns, villages and hamlets in the territory of the Republic of Bosnia and Herzegovina.\textsuperscript{17}

Thirteen \textit{amicus curiae} briefs were submitted prior to the 16 April 1997 hearing. A range of organisations and individuals were involved, including groups such as the Croatian Association of Criminal Science and Practice,\textsuperscript{18} the Max Planck Institute for Comparative Public Law and International Law,\textsuperscript{19} \textit{Juristes san Frontieres},\textsuperscript{20} and Lawyers Committee for Human Rights.\textsuperscript{21} Individuals who submitted briefs included, Bartram Brown,\textsuperscript{22} Peter Malanczuk,\textsuperscript{23} Bruno Simma,\textsuperscript{24} Thomas Warrick, Rochelle Stern and J Stefan Lupp\textsuperscript{25} and Ruth Wedgwood.\textsuperscript{26} Of these submissions, seven individuals were also granted leave to address the Trial Chamber.

The next section of this Chapter will undertake an examination of two \textit{amicus} briefs and appearances by \textit{amicus curiae} before the Tribunal which impacted upon the deliberations on the decision from the 16 April hearing.\textsuperscript{27} one from an individual and

\textsuperscript{16} \textit{Prosecutor v Tihomir Blaskic} (Second Amended Indictment) IT-95-14 (1997).
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid, RP D4758 bis/1-9.
\textsuperscript{19} Ibid, RP D4547-4607.
\textsuperscript{20} Ibid, RP D 4538 bis/1-20.
\textsuperscript{21} Ibid, RP D4709-26.
\textsuperscript{22} Ibid, RP D4539-45.
\textsuperscript{23} Ibid, RP D4608-23.
\textsuperscript{24} Ibid, RP D4763-86.
\textsuperscript{25} Ibid, RP D4496-4501.
\textsuperscript{26} Ibid, RP D4624-59.
\textsuperscript{27} \textit{Prosecutor v Tihomir Blaskic} (Decision on the Objection of the Republic of Croatia to the Issuance of \textit{Subpoena Duces Tecum}) 18 July 1997, IT-95-14-PT, 74.
one from an NGO. By reviewing the substance of the briefs and identifying instances where judges made use of the arguments submitted by the *amicus*, it is apparent that non-State actors have the potential to add significantly to the judicial debate at international criminal trials. The two briefs considered are the submission by Ruth Wedgwood, an academic, and that of The Lawyers Committee for Human Rights, an NGO. These briefs were chosen because they are mentioned more often than other briefs in the judgments.

(c) *The Wedgewood Brief*

Professor Ruth Wedgwood, from Yale Law School, argued in her *amicus* brief that the Tribunal had the power to issue a *subpoena duces tecum* to sovereign States that were belligerents in the conflict. She based this conclusion on ‘two fundamental pillars’,\(^{28}\) the authority created by the General Framework Agreement for Peace in Bosnia and Herzegovina (Agreement for Peace)\(^ {29}\) and the Court’s own Statute. Furthermore, Wedgwood claimed that Heceg-Bosna was never recognised by the UN and thus had no claim to resist production of records of an entity that was never sovereign.

She asserted that, to discharge its responsibilities, the Tribunal had to make determinations to approve the indictments and ultimately make decisions whether to acquit or convict defendants. The power to compel production of evidence from

\(^{28}\) *Prosecutor v Tihomir Blaskic* (Order Granting leave to Appear as *Amicus Curiae* and *Amicus Curiae* Brief of Ruth Wedgwood) 11 April 1997, IT-96-14-PT, 3 ("*Amicus Curiae Brief of Ruth Wedgwood*").

\(^{29}\) This Agreement was initiated in Dayton, Ohio 15 November 1995 and signed in Paris 15 December 1995.
military archives of the former belligerents is necessary for the Tribunal to fulfil its mandate. She submitted:

International law rests on a principle of efficacy — ut res magis valeat quam pereat — an instrument should be interpreted to make it effective. It would have been meaningless to create an international tribunal, without the power to command the production of necessary evidence.  

In relation to the Agreement for Peace, the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia were the three State Parties to sign the document in Paris in 1995. In signing, the States undertook the following treaty promise as parties to the agreement:

ARTICLE IX: The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this agreement, or which are otherwise authorised by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.  

Wedgewood alleged that this treaty promise, backed up with a Security Council Resolution under Chapter VII, limited the actions of otherwise Sovereign States. She claimed that, in signing the Agreement for Peace, State Parties undertook to comply with the Tribunal’s orders and waived any claim of immunity from the processes of investigation.

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30 Amicus Curiae Brief of Ruth Wedgewood, above n 28, 2.
31 Ibid, 5 (emphasis added).
32 SC Res 1031, 50 UN SCOR (3607th mtg), UN Doc S/Res/1031 (1995): It states that the Security Council, acting under Chapter VII of the Charter of the United Nations, 5. Recognizes that the parties shall cooperate fully with all entities involved in implementation of the peace settlement, as described in the Peace Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.
Wedgewood identified the second source of authority to issue a *subpoena duces tecum* in the Tribunal’s Statute. In Resolution 827, the Security Council, acting under Chapter VII of the UN Charter, created the International Tribunal and adopted the Tribunal’s Statute as proposed by the Secretary General. Article 29 states:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

   …

   (b) the taking of testimony and the production of evidence.

Wedgewood asserted that the capacity to issue *subpoenae duces tecum* to belligerent parties of the war was implemented in the Rules of Procedure and Evidence adopted by the Tribunal. She argued that if the Tribunal’s responsibility is to establish liability for violations of international humanitarian law, the provision of information concerning the conduct of war is essential. Thus, an interpretation of Security Council Resolution 827 and the Court’s Statute and Rules required the production of all documents by States who acted as belligerents within the theatre of combat.

Wedgewood argued that the conduct of charges, such as ethnic cleansing, included official acts undertaken by military, police, and civilian officials. In this context, she submitted that an order requiring production of the records of military operations of the belligerents was a reasonable application of the Tribunal’s power. As Bosnia and Herzegovina and Croatia were parties to the Geneva Conventions and the Additional

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33 Rule 54 provided that a Judge or Trial Chamber; ‘may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.’ See also, Rule 39 (ii), (iii) and (iv): *ICTY Rules of Procedure,*
Protocols they were under the obligation to search for persons alleged to have committed grave breaches of the Geneva Convention and to prosecute such individuals. They were also obliged to suppress all acts contrary to common article 3 during non-international conflicts.

National military information — necessary for effective prosecution — is available to a domestic government trying war criminals. This type of evidence is important in establishing or disproving command responsibility and Wedgewood argued that the availability of belligerent records is important to both sides of the trial. She also claimed that the power to compel the production of documents was necessary to determine whether the conflict was internal or international. Wedgewood wrote:

In creating a Tribunal intended to enforce the law of armed conflict, the Security Council properly endowed the court with power to obtain the necessary evidence of the international nature of the conflict.\textsuperscript{35}

The amicus brief submitted by Wedgewood contended that many of the records summoned were held by a non-sovereign entity. The defendant, Tihomir Blaskic, was Commander of the Regional Headquarters of the HVO Armed Forces in Central Bosnia with duties set forth in the ‘Decree on the Armed Forces of the Croatian Community of Herceg-Bosna.’\textsuperscript{36} The Croatian Community of Herceg-Bosna was never recognised as an independent or sovereign State by the United Nations, the European Union or by any other member of the international community other than the Republic of Croatia. In this sense, Wedgewood claimed that many of the

\textsuperscript{34} Bosnia and Herzegovina declared in December 1992 that it was party to the Geneva Conventions and the Additional Protocols. Croatia declared the same in November 1992: Amicus Curiae Brief of Ruth Wedgewood, above n 28,14.

\textsuperscript{35} Ibid, 20.
subpoenaed documents were not created as part of any State authority recognised as sovereign by the international community. Furthermore, Herceg-Bosna, the self-proclaimed 'entity', did not exist, obviating any claim that its records would be immune from subpoena.

Finally, Wedgewood argued that the Tribunal was competent to provide reasonable safeguards for protecting sensitive information through the implementation of innovative procedures. She provided an example of the statutory framework of the Classified Information Procedures Act (CIPA), which is designed to meet concerns about the safeguarding of sensitive information at trial.

In relation to the appropriate remedies for noncompliance with a subpoena duces tecum, Wedgewood maintained that in the case of a State Party or government official the Tribunal should enter a finding of contempt and levy a fine. In the case of a natural person, Rule 77 of the Rules of Procedure (failure to answer a question before the Tribunal) provides for a term of imprisonment. While the present Rules of the Tribunal provide for a fine up to US $10,000 for refusal to answer a question, the Tribunal could provide, by its Rules, for larger fines. As Wedgewood stated, 'the purpose of civil contempt is to induce the compliance of the witness, and this requires a fine likely to have a coercive effect.'

36 Ibid 22.
37 18 USC, ibid, 24.
38 Ibid, 28.
(d) The Brief Of The Lawyer’s Committee for Human Rights

The amicus brief submitted by Donald Donovan for the Lawyers Committee for Human Rights covers many of the same matters articulated in Wedgewood’s brief. The brief contended that the Tribunal had the authority under its Statute and Rules to issue a binding subpoena duces tecum to a State or a high government official of a State, and that it also had the authority to enforce the subpoena by appropriate remedies. The brief commenced with details of the interest of the amicus curiae. It stated that The Lawyers Committee was founded in 1978 to protect and promote fundamental human rights and that the Committee’s work is impartial and attempts to hold governments to the rule of law and the human rights standards reflected in international instruments.

The brief also advised that The Lawyers Committee had lobbied for international support for the Tribunal and urged governments to support and cooperate with the Tribunal through the adoption of implementing legislation. The Committee had also been involved in promoting the competence of the Tribunal to conduct effective and fair trials and advocates the establishment of a permanent international criminal court.

The first argument advanced by the Lawyers Committee as to why Croatia must comply with the subpoena involved Security Council Resolution 827 and relevant

39 Prosecutor v Blaskic (Order Granting Leave to Appear as Amicus Curiae and Amicus Curiae Brief of Mr Donald Donovan for The Lawyers Committee for Human Rights) 11 April 1997, IT-96-14-PT, 1-2 (‘Amicus Curiae Brief of The Lawyers Committee for Human Rights’).
Articles of the Tribunal’s Statute, in particular Articles 29, 18 and 19. Article 18 provides that in conducting investigations, the Prosecutor, ‘shall have the power to question...witnesses, [and] to collect evidence’ and that ‘[i]n carrying out these tasks the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.’ Article 19 provides that upon confirmation of the indictment, ‘the judge of the Trial Chamber to whom the indictment has been transmitted...may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.’

The Lawyers Committee’s brief also dealt with Rules 39, 40 and 54 of the Tribunal’s Rules of Procedure. Rule 39 provides that ‘[i]n the conduct of an investigation, the Prosecutor may...(i)summon...witnesses and...collect evidence’; that the Prosecutor may, ‘seek, to that end, the assistance of any State authority concerned’; and that he or she may ‘request such orders as may be necessary from a Trial Chamber of Judge.’ Rule 40 provides that, ‘[i]n case of urgency, the Prosecutor may request any State...to seize physical evidence’ and ‘to take all measures to prevent... the destruction of evidence’, and expressly mandates that ‘[t]he State concerned shall comply forthwith, in accordance with Article 29 of the Statute.’ In the light of these provisions, the Lawyers Committee’s stated that:

Given the importance of the evidence-gathering function and the clarity of a State’s obligation to cooperate, the Statute and Rules should be read to give

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40 Ibid, 2.
41 Ibid, 4.
42 Ibid, 5.
full effect to the Security Council's grant of authority to the Tribunal to command the assistance of States in its efforts to collect evidence.\textsuperscript{43}

It was averred to in the amicus brief by the Lawyer's Committee that Defence Minister Susak must also comply with the subpoena as the Tribunal has a clear authority to issue a subpoena to a high government official of a State, particularly when one reviews Rule 54. The brief contended that a State may only act through its competent officials and claimed that, just as a State has an obligation to cooperate with the Tribunal, so too do those officials who have the authority to act on behalf of States. It was asserted by the Lawyers Committee that, as a State may not resort to the principles of sovereignty to immunise itself from the obligation to comply with a Tribunal subpoena, neither could an official of that State in like terms disobey the ICTY's summons.

The amicus brief by the Lawyers Committee also contended that the obligation to comply with a Tribunal subpoena runs directly to the individual State's Official, and authority could be found in Article 18 of the Statute of the ICTY and Rules 39 and 54 of the Rules of Procedure which, in various ways, expressly provide that the Tribunal may invoke and compel the assistance of State officials in collecting the evidence necessary for an investigation or trial. The Lawyers Committee's advised that the Tribunal had the capacity to subpoena any person found within a State and may call upon State authorities to assist in enforcing such an order.

\textsuperscript{43} Ibid, 6.
Contrary to Croatia’s assertion that a request for assistance could be directed to a State, but not specially to a named high government official, the Lawyers Committee argued that there was no support for the claim in the Statute and Rules of the Tribunal. As expressed in their brief:

Where a subpoena issues to a State alone, the State may appropriately designate any appropriate government official to appear on its behalf before the Tribunal. However, where, as here, the subpoena issues to a specific individual, that individual must comply.\textsuperscript{44}

Similarly, Croatia’s view that Minister Susak ought to be excused from complying with the subpoena because Croatia had designed another body to cooperate with the Tribunal, was dismissed by the Lawyers Committee as incorrect on the ground that, ‘a State may not invoke its internal law to justify a failure to comply with an international obligation.’\textsuperscript{45}

Finally, the Lawyers Committee maintained that, as the Tribunal had the authority to hold a State or person that wilfully fails to obey a Tribunal order in contempt, it should exercise its authority accordingly. In relation to Croatia, the brief stated that, after due opportunity is given to a hearing of the matter, the Tribunal ought to make a finding and hold Croatia in contempt of the Tribunal. The brief reads: ‘A declaration by an international tribunal that a State has breached an international obligation is itself a serious sanction.’\textsuperscript{46} With respect to Minister Susak, the Lawyers Committee suggested a range of remedies including orders that Croatia seize the documents and provide them to the Prosecutor, that Minister Susak be suspended from his official

\textsuperscript{44} Ibid, 12.
\textsuperscript{45} Ibid, 13.
\textsuperscript{46} Ibid, 14.
duties, that a fine be imposed or that Croatia, or any other State in which he might be found, arrest him. The Lawyers Committee also advanced the view that the Tribunal consider recourse to the Security Council and seek sanctions if Croatia failed to cooperate with the Tribunal and continues to ‘frustrate the measures taken by the Security Council in Resolution 827.'

(e) Use Of Briefs By The Trial Chamber

Trial Chamber II handed down its’ decision in relation to the objection of the Republic of Croatia to the issuance of subpoenae duces tecum on 18 July 1997. residing Judge McDonald, Judge Elizabeth Odio Benito and Judge Saad Saood Jan reinstated the subpoenae duces tecum and ordered the Republic of Croatia and Mr Susak to comply with the subpoenae within 30 days of the date of the decision. Throughout the decision, reference is made to a number of the amicus curiae briefs and oral submissions, indicating the importance non-party contributions played in the proceedings. The following section will examine the instances where the decision expressly mentions the two amicus briefs discussed above.

The first mention of the Wedgewood brief is made with reference to the allegation that the Tribunal is an international institution whose jurisdiction is such that concrete evidence required for the determination of cases will often be in the possession of States. A large number of the crimes detailed in Articles 2, 3 and 5 of the Tribunal’s Statute relate to the conduct of military operations. Thus, the records of those

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48 Prosecutor v Tihomir Blaskic (Decision on the Objection of The Republic of Croatia to the Issuance of Subpoena Duces Tecum) 18 July 1997, IT-95-14-PT, 74 (‘Blaskic Trial Decision’).
operations are likely to constitute vital evidence. The decision states that the fact that the required papers are government documents should not automatically bar their production. It reads in part:

See, *amicus* brief by Ruth Wedgewood... During her oral presentation, Wedgewood emphasized the fact that when a case concerns command responsibility, the nature of much of the evidence means that it will most likely be in the possession of States, from whom production must be ensured.\footnote{Ibid, 16.}

Reference is made to the Lawyers' Committee for Human Rights brief and the judgment discusses the need for a Judge or Trial Chamber to have the authority to oblige States to submit whatever material is necessary to evaluate the case effectively and fairly. There is also a reference to the Lawyers' Committee brief in the context of the fact that States must act through their officials and thus this authority, 'by necessary implication carries the authority to issue such orders to their officials.'\footnote{Ibid, 33.}

The decision further deliberates on the nature of State sovereignty in relation to the establishment of the International Tribunal and the principle of non-interference in domestic affairs versus the application of enforcement measures under Chapter VII. It states that State sovereignty must give way 'to measures taken by the Security Council to maintain and restore international peace and security'\footnote{Ibid, 40.} and footnotes the Lawyers' Committee brief to this effect.\footnote{Ibid, footnote 130.} On the same page, Wedgewood's brief is footnoted to validate the submission that Croatia and Bosnia and Herzegovina are bound by decisions of the Security Council under Chapter VII due to there admission
as members of the United Nations.\textsuperscript{53} The next footnote\textsuperscript{54} is attributed to the Lawyers' Committee to justify the proposition that:

In voluntarily exercising their sovereignty in joining the United Nations, these States obligated themselves, along with all others, to comply with the International Tribunal as a Chapter VII enforcement measure.\textsuperscript{55}

Wedgewood's brief is referred to in a footnote\textsuperscript{56} during a discussion on the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and their lack of applicability to the International Tribunal, to the effect that:

[T]he driving force behind [the Conventions] — the fear of harassment of diplomatic officials — is not valid for an international criminal tribunal established by the Security Council\textsuperscript{57}.

The chamber also made a detailed reference to Wedgewood’s reasoning in relation to Croatia’s challenge that the information requested in the subpoena \textit{duces tecum} is protected due to its importance to national security interests:

See Wedgewood Brief at pp.4 and 23. She notes that the documents requested from Croatia belonged to the community of Herceg-Bosna. She maintains that since Herceg-Bosna was never a sovereign state, it can hardly be argued that the production of the documents in question may prejudice the security of Croatia. Furthermore, she avers that the origin of the documents is relevant for the resolution of the present dispute since ‘many of the documents under subpoena were not created as a part of any state authority recognized as sovereign’. She also notes that ‘documents created by agents of Herceg-Bosna were created for a rump entity, not a sovereign state. There is no imaginable claim to resist production of records of an entity that was never sovereign. What is more, Herceg-Bosna has ceased to exist.’ In oral argument, the representative of Croatia responded to the arguments raised by this \textit{amicus}, and noted that the discussion should focus on the substance of the documents rather than on their origin.\textsuperscript{58}

\textsuperscript{53} Ibid, footnote 132.
\textsuperscript{54} Ibid, footnote 133.
\textsuperscript{55} Ibid, 41.
\textsuperscript{56} Ibid, footnote 149.
\textsuperscript{57} Ibid 44.
\textsuperscript{58} Ibid, footnote 182.
The decision also declared that information relating to military operations is vital for cases such as the one being considered. In this respect the decision states that:

In Wedgewood’s opinion the concept of availability of national military information is recognized under the provisions of the Geneva Conventions of 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide. She argues that Croatia as a party to those instruments cannot invoke its national security as grounds for non-compliance with the International Tribunal’s orders.

The following footnote, continues to deal with the same issues raised in Wedgewood’s brief, in which,

Wedgewood emphasizes that the power of the International Tribunal to compel production of evidence from military archives of the former belligerents is a necessary condition for the International Tribunal to perform its adjudicative task.

The Final reference to Wedgewood’s reasoning supports her statement that the Trial Chamber may hold in camera hearings pursuant to rule 55(c) of the Rules of Procedure.

(f) Use Of Briefs By The Appeals Chamber

The decision of the Appeals Chamber was handed down on 29 October 1997. 59 Rule 74 of the Rules of Procedure does not limit the submission of amicus briefs or leave for appearances to the Trial Chambers alone. The term used in the Rule is ‘Chamber’ which has been interpreted as also including the Appeals Chamber.

The decision reached at the Appeals Chamber on this issue by Judges Cassese, Li, Stephen, Vohrah and Karibi-Whyte was unanimous with Judge Karibi-Whyte submitting a separate opinion. The judges made four findings:

1. That the International Tribunal is empowered to issue binding orders and requests to States which are obliged to comply pursuant to Article 29, non-compliance findings can be transmitted to the United Nations Security Council;
2. The International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity;
3. The International Tribunal may summon, subpoena or address binding orders to individuals acting in their private capacity with non-compliance being dealt with either by the relevant State or contempt proceedings at the International Tribunal;
4. States are not allowed to claim national security interests and withhold documents and other evidentiary material however practical arrangements can be adopted by the Trial Chamber to make allowances for legitimate concerns of States.\textsuperscript{60}

There are over half a dozen references to non-State actors’ submissions in the Appeals Chamber decision, which indicates that the Judges found the quality of many of the briefs high. For example, it was held that: ‘The significance of this judicial finding of the International Tribunal has been perceptively emphasised in the amicus curiae brief submitted by Luigi Condorelli.’\textsuperscript{61}

And that:

As perceptively pointed out in the amicus curiae brief submitted by J.A Frowein on behalf of the Max-Planck-Institute for Comparative Public Law and International Law... the Statute of the International Tribunal to some extent reflects an oscillation, in the mind of the drafters, between the ‘horizontal’ approach and the ‘vertical approach.’\textsuperscript{62}

The Wedgewood brief is also footnoted in the decision with the judges stating that:

\textsuperscript{60} Ibid, Disposition, 57.
\textsuperscript{61} Ibid, footnote 49, 26.
\textsuperscript{62} Ibid, footnote 71, 42.
The Appeals Chamber therefore fails to see the merit of the contention made by one of the *amici curiae*, whereby the obligation under discussion would be incumbent solely upon the former belligerents, i.e. States or Entities of ex-Yugoslavia. This view seems to confuse the obligations stemming from the Dayton and Paris Accord of 21 November and 14 December 1995, which apply only to the States or Entities of the former Yugoslavia, with the obligation enshrined in Article 29, which has a much broader scope.\(^{63}\)

There can be little doubt that non-State actors contributed to the debates and considerations undertaken by the ICTY in examining the Tribunal’s capacity to issue *subpoenas* on States and individuals as well as enforcing the options available. The Trial Chamber judgment made over 50 references to non-State *amicus* submissions and State parties, such as Croatia, addressed some of the issues raised by these non-parties.\(^{64}\)

The Appeals Chamber made 8 references to such submissions, and whether in agreement with, or contesting the arguments, there is strong indication that the broad range of views put before the Tribunal was considered.

(ii) **Protection For Witnesses: The Tadic Case**

(a) **Legal History Of The Case**

On 18 May 1995, the Prosecutor of the ICTY, in the case of *Prosecutor v Dusko Tadic*,\(^{65}\) requested the Trial Chamber to issue orders for specific protective measures for seven witnesses (with the pseudonyms A, F, G, I, J and K) and to issue general protective measures for all witnesses who were to testify in the case. The Defence

\(^{63}\) Ibid, 20.

\(^{64}\) *Blaskic Trial Decision*, above n 48, footnote 182.

\(^{65}\) *Prosecutor v Dusko Tadic (Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses)* 10 August 1995, 105 ILR 599 (*’Tadic Protective Measures Decision’*).
filed a Response objecting in part, and agreeing in part, to the protection sought by the Prosecutor. On 21 June 1995, the motion was heard in camera. In reviewing the issues, the Trial Chamber considered not only the oral and written arguments of the parties but also two amicus curiae submissions. One of these submissions came from Professor Christine Chinkin, Dean and Professor of Law, University of Southampton, United Kingdom (the Chinkin Brief) and the other was a joint brief on behalf of a range of United States Human Rights Institutions (Joint U.S brief). This section will focus upon the Chinkin Brief, due to the significant role it played in the Trial Chamber’s Decision on this matter.

In relation to the protection of witnesses, Article 22 of the Statute of the ICTY states:

The International Tribunal shall provide in its rules of evidence and procedure for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.

However, the rights accorded to witnesses need to be read in conjunction with the principal guarantees of the rights of the accused found throughout the Statute, including Article 21, which in part reads that:

All persons shall be equal before the International Tribunal:
1. In the determination of charges against him,
2. The accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

In particular, in outlining ‘minimum guarantees’ in Article 22(4)(e), the accused is entitled: ‘[t]o examine, or have examined, the witnesses against him and to obtain the

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66 These institutions included: the Jacob Blaustien Institute for the Advancement of Human Rights of the American Jewish Committee, New York; the Centre for Constitutional Rights, New York; the International Women’s Human Rights Law Clinic of the City University of New York, New York; the
attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.\(^67\)

Thus, the Trial Chamber was tasked with identifying the degree and extent of protection that could be accorded to a witness in an ICTY hearing. The protective measure sought by the Prosecutor fell into five major categories: ‘confidentiality’ involving protection of their identity from the public and media; ‘anonymity’ involving protection of their identity from the accused and his counsel; protection from re-traumatisation, potentially caused by confronting the accused; miscellaneous measures for certain witnesses and general measures for all witnesses testifying before the ICTY in the future.

Whilst the Defence agreed to grant a number of the measures requested, the area of dispute arose in relation to protective measures involving limiting information given to the accused and his counsel. These measures included testimony given by a one-way closed circuit television, witnesses using voice and image altering devices and, in particular, withholding from the accused and defence identifying data concerning certain witnesses.\(^68\) The Defence argued that any measures involving ‘anonymity’ would breach the accused’s right to a fair trial as outlined by the Statute and as understood by reference to decisions in other jurisdictions.

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Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Service, both of Cambridge, Massachusetts.

\(^67\) Statute of the ICTY, art 21(4)(e).

\(^68\) Tadic Protective Measures Decision, above n 65, (7), (8) and (11).
(b) The Tadic Indictment

Dusko Tadic was first indicted in February 1995 and charged with 34 counts of crimes including Crimes against Humanity, Grave Breaches of the Geneva Conventions and violations of the laws and customs of war. This figure was later amended by the addition of two more counts in December 1995. These charges included participating in attacks on Bosnian Muslims and Croats, campaigns of terror involving killings, torture, sexual assault, beatings, mutilations, and psychological abuse. The atrocities were alleged to have occurred at the Omarska camp in Prijedor, in the Kozarac area and in the villages of Jaskici and Sivic between May and December 1992. In April 1995, Tadic was formally charged and he pleaded not guilty to all accusations.

(c) The Chinkin Brief

The brief, and the decision of the ICTY on the issue of the anonymity of witnesses, has been widely discussed in international legal circles and has been the matter of much controversy. The purpose of this section is not to engage in the debate on the tension between protective mechanisms and due process, but rather to briefly examine the content of the brief and to draw conclusions as to whether this submission had an impact on the legal reasoning of the ICTY. It is important to note, however, that the

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69 Prosecutor v Dusko Tadic (Initial Indictment) 13 February 1995, IT-94-1-I.
70 Prosecutor v Dusko Tadic (Second Indictment) 14 December 1995, IT-94-1-I.
71 See, eg, Monroe Leigh, ‘The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused’ (1996) 90 American Journal of International Law 235. In this article Monroe states:

   It is the thesis of this commentator, who has been and remains a strong supporter of the tribunal, that this second ruling [following the suggestions made in the Chinkin brief] if acted upon, will deny the accused the ‘fair trial’ and the right ‘to examine...witnesses against him’ which are required by the Statute as well as by international law.

articles and debates resulting from the Chinkin submission indicate that such submissions are an important part of the development of international legal jurisprudence in their own right.

In short, Chinkin submits that the ICTY should give every attention to preserving the anonymity of witnesses for as long as possible throughout the criminal process. She also stresses that a witness’ application for anonymity should be reviewed in the context of each individual case and is especially, but not exclusively, applicable to survivors of sexual assault.

The question that this brief addresses is how to balance the right of the accused to a fair trial, against the rights of the victims to security, safety, and privacy. It is not just a matter of balancing the rights of private individuals (the accused and the victims), but of vindicating the public interest in the fair administration of justice and bringing accused persons to judgment.72

The Chinkin Brief articulates the varying degrees of anonymity that witnesses are able to obtain. These range from full disclosure of witness’ identities in all public documentation and the media; limited anonymity where details are restricted to those formally involved in the trial with such information removed from all public records and media publication; to preservation of anonymity from the accused who would have no access to either names or any other identifying features of witnesses. In the latter case, Court officials, including the Judges of the Tribunal, would have this

information and the question of whether the accused’s legal representatives would have access to such details would require separate consideration.\textsuperscript{73}

An examination of the relevant articles of the Statute of the ICTY, as well as the applicable Rules of Procedure relating to confidentiality, or to the non-disclosure of the identity of witnesses to the public and media is undertaken. The Chinkin Brief then reviews this principle in relation to municipal courts in the United Kingdom, Canada, the United States and Australia, as well as international standards for a fair trial. The Brief then embarks upon the Articles and Rules relevant to the non-disclosure of the witness’ identity to the accused. In other words, whether anonymity is compatible with the rights of the accused at the ICTY and within certain domestic courts, namely New Zealand, the United Kingdom, Australia and the United States. This principle is also examined in relation to cases before the European Court of Human Rights and the European Commission of Human Rights.

The issue of non-disclosure justified by policy considerations in the trial of sexual assault cases is dealt with by the Chinkin Brief in detail. Chinkin submits that cases of sexual assault are appropriate for consideration of anonymity for reasons including the nature of the offences; the threat to the survivors and their families because of the continuation of the conflict and the interests of the international community. When discussing the nature of rape in armed conflicts the brief states that, ‘[f]ailure to accord anonymity where it is requested risks invalidating potential witness’ testimony

\textsuperscript{7} Criminal Law Forum 179, 182. 
\textsuperscript{73} Ibid, 180.
and undermining their credibility. This in turn reinforces the traditional silence about rape in armed conflict.\(^{74}\)

Pointing to the lack of international criminal procedure for the trial of sexual assault cases, Chinkin alerts the International Tribunal to the fact that it ‘has a unique opportunity to demonstrate that the concerns and needs of women are taken seriously within the international arena, as well as those of all victims of violations of international humanitarian law.’\(^{75}\) In conclusion, the Chinkin brief explores the various procedures to reduce disadvantage to the accused when providing protection to witnesses and summarises some of the devices currently available.

### (d) Use Of The Brief By The Trial Chamber

On August 10 1995, the Trial Chamber of the ICTY handed down its decision on the Prosecutor’s motion requesting protective measures for victims and witnesses.\(^{76}\) In a two to one decision, the Trial Chamber in the majority (Judges McDonald and Vohra) ruled on a number of issues including that:

> The Prosecutor may withhold from the Defence and the accused the current identity of, and other identifying data concerning, witness G and the names of, and other identifying data concerning, witnesses H, J and K.\(^{77}\)

The majority also ruled that the testimony of witnesses H, J and K may be given using voice and image altering devices to the extent necessary to protect their identities from becoming known to the accused. The granting of confidential anonymity was

\(^{74}\) Ibid, 206.
\(^{75}\) Ibid, 209.
\(^{76}\) Tadic Protective Measures Decision, above n 65.
\(^{77}\) Ibid, Disposition, 11, 631.
deemed only to be appropriate in 'exceptional circumstances' with the majority of the Chamber looking at a range of factors before restricting the right of the accused to examine, or have examined, witnesses against him. These factors include the real fear for safety of the witness or his/her family; the importance of the witness testimony to the case; satisfaction by the Trial Chamber that no prima facie evidence exists that the witnesses is untrustworthy; the ineffectiveness of witness protection programmes and that the measures are strictly necessary. In relation to procedural safeguards to ensure a fair trial when allowing anonymous witnesses, the majority advocated three such procedures:

1. the judges must be able to observe the demeanour of the witness;
2. the judges must be aware of the identity of the witness in order to test their credibility; and
3. the defence, in order to test credibility must be allowed ample opportunity to question the witness on issues other than those which would reveal identity.\(^78\)

Judge Stephen dissented in this case opining that granting anonymity to witnesses at the ICTY in any circumstances could result in an unfair trial and that this was inconsistent with the Statute's guarantee of a fair trial.\(^79\) Despite raising the issue of special need for protective measures for victims and witnesses in cases of rape or sexual assault, Judge Stephen made no specific reference to the Chinkin brief in his decision.

Whilst it is difficult to claim that any one factor is the major influence in decisions made by judicial bodies, there is no doubt that the Chinkin brief played a significant

role in the reasoning of Judge McDonald\textsuperscript{80} and Judge Vohrah in this case. Many of
the ideas expressed in the Chinkin brief are woven throughout the judgment and there
are a number of instances where the findings specifically mention this submission.

In the section of the judgment dealing with the Pleadings a short summary of both the
amicus curiae briefs is given. In effect it states:

The Brief of Professor Chinkin recognizes the right of the accused to a fair
trial and addresses the question of how to balance this right with the rights of
the private individuals, the public interest in the proper administration of
justice and the interests of the international community in seeing those accused
of violations of international humanitarian law brought to trial. Professor
Chinkin addresses both non-disclosure to the public (confidentiality) and to
the accused (anonymity), and discusses how non-disclosure to the accused can
be made compatible with the right to a fair trial and is justified by policy
considerations in sexual assault cases.\textsuperscript{81}

When examining measures to prevent disclosure of the identities of victims and
witnesses to the public, the Chamber discusses domestic jurisprudence in this area as
prevalent in the United Kingdom, Canada and Australia and, in doing so, footnotes
the Chinkin brief.\textsuperscript{82}

In relation to the Chamber considering the protection of four specific witnesses,
allegedly victims of sexual assault, both of the amicus briefs are referred to. The
Chamber stated that:

\begin{flushright}
\textsuperscript{67.}
\textsuperscript{79} Tadic Decision on Protective Measures, above n 65, 641 (Stephen J dissenting).
\textsuperscript{80} Interview with Judge Gabrielle Kirk-McDonald, Judge, International Criminal Tribunal for the
Former Yugoslavia (New York, 18 August 1997).
\textsuperscript{81} Tadic Protective Measures Decision, above n 65, 605.
\textsuperscript{82} Ibid, 615-29.
\end{flushright}
It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim’s family and community. (Brief of Professor Chinkin at p.4).\textsuperscript{83}

The judgment goes on, and refers to both briefs by observing that:

The need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States. (See ..., and Brief of Professor Chinkin at 5-6).\textsuperscript{84}

In a later part of the judgment, further direct reference is made to the submission of Professor Chinkin to the effect that, ‘[t]he Brief of Professor Chinkin suggests that it is in the public interest for the International Tribunal to discharge its obligation to protect victims and witnesses and the Trial Chamber so finds.’\textsuperscript{85} The explicit and implicit references of the Chinkin Brief in the decision of the ICTY relating to the protective measures for victims and witnesses indicate that such submissions are used by judges in their reasoning and substantially add to the development of the international criminal law jurisprudence.

(iii) \textbf{Sexual Violence During Armed Conflict: The Akayesu Case}

(a) \textit{History Of The Amicus Brief}

In early 1997, a number of women’s human rights legal scholars and non-Governmental organisations\textsuperscript{86} (Women’s Coalition) submitted an \textit{amicus} brief to the

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\textsuperscript{83} Ibid, 618.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid, 621.
\textsuperscript{86} This group consisted of: the Centre for Constitutional Rights; Centre for Women’s Global Leadership; International Centre for Human Rights and Democratic Development; the International Women’s Human Rights Law Clinic of the City University of New York School of Law; the Jacob Blaustein Institute for the Advancement of Human Rights; the Latin American and Caribbean Women’s Health Network; the Lawyers’ International Forum for Women’s Human Rights, Rassemblement Algerien Des Femmes Democratiques; the United Methodist Office for the United Nations; Women Living Under Muslim Laws; Women Refugees Project; the Cambridge–Somerville Legal Services and the Working Group on Engendering the Rwanda Tribunal.
Trial Chamber of the ICTR. The brief entitled 'Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and other Sexual Violence within the Competence of the Tribunal, Re: The Prosecutor of the Tribunal against Jean-Paul Akayesu,'\textsuperscript{87} called upon the Tribunal to examine the failure of the Prosecutor to thoroughly investigate sexual violence and accordingly indict Akayesu, the first defendant brought to trial in Rwanda.

The brief was conceptualised from a report published in late 1996 by Human Rights Watch entitled 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath.'\textsuperscript{88} Shattered Lives stated that, during the 1994 genocide, Rwandan women were subjected to sexual violence on a massive scale, and:

[although the exact number of women raped will never be known, testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced 'marriage') or sexually mutilated.\textsuperscript{89}]

However, more importantly for the submission of the \textit{amicus} brief, the Human Rights Watch Report indicated that the ICTR had the potential to prosecute sexual assault cases. The coalition of women's human rights NGOs discovered that,

contrary to the assertions of the ICTR's prosecutors that women would not speak of rape and that, therefore, it could not be prosecuted, there were many women who could provide evidence of rape and sexual violence in the Taba commune ... \textit{Shattered Lives} also documents the systemic failure of the ICTR to properly investigate sexual violence and provide meaningful witness protection.\textsuperscript{90}

\textsuperscript{87} \textit{Prosecutor v Jean-Paul Akayesu (Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence within the Competence of the Tribunal) ('Amendment Brief') ICTR-96-4-T} (1996). Original copy of the brief supplied by Professor Rhonda Copelan.
\textsuperscript{89} Ibid, 1.
\textsuperscript{90} V Oosterveld and R Copelan, 'First Rape Charges Brought at the Rwandan Tribunal' (1997) 4
Shattered Lives not only provided pages of detailed evidence of sexual assault, (in many cases provided by the survivors themselves), it also expressed strong recommendations that should be undertaken by the ICTR. It stated that the ICTR must fully and fairly investigate and prosecute sexual violence. Furthermore it stipulated that rape, sexual slavery and sexual mutilation should be recognised and prosecuted as crimes against humanity, genocide and/or war crimes. In particular it insisted that:

The International Tribunal must step up its efforts to integrate a gender perspective into its investigations. Previous investigative methodology and procedures, which have failed to elicit rape testimonies, must be amended. In particular, the Tribunal must ensure that the issue of violence against women is treated with the same gravity as other crimes against humanity within its jurisdiction. Investigation of rape and other forms of sexual violence should be conducted by teams that include women investigators and interpreters (preferably women) skilled in interviewing women survivors of gender-based violence in the larger context of the atrocities which occurred.\(^1\)

On the release of the Human Rights Report, the Women’s Coalition sent an urgent letter to the Chief Prosecutor, Justice Louise Arbour, requesting internal reforms to be carried out within the Rwandan Tribunal to ensure effective investigation into sexual violence perpetrated as part of the Rwandan genocide. In particular, the Coalition was concerned with the fact that Akayesu, the first defendant indicted, had not been charged with any crimes of sexual violence despite the fact that he was the powerful mayor of the Taba community, an area in which rapes had occurred.

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\(^1\) Human Rights Tribune 16.

\(^91\) Ibid, 9.
Although Justice Arbour responded in a positive manner to the letter sent by the Coalition, no changes were made to the indictments and the Akayesu trial began without the inclusion of charges of sexual violence in late 1996. During the Akayesu trial, information surfaced, whilst a judge was questioning witnesses, pertaining to Akayesu’s responsibility in relation to the occurrences of sexual violence. Frustrated at the exclusion of sexual assault as a charge against Akayesu, an *amicus* brief was drafted by the Women’s Coalition and submitted to the Registrar.

(b) *The Akayesu Indictment*

Akayesu was indicted in February 1996, and initially charged with 12 counts of crimes including Genocide, Crimes Against Humanity and Violations of Article 3 common to the Geneva Conventions, the same was amended to take the count to 15 charges. As the bourgmestre, the most powerful figure in the Taba commune in Rwanda, the indictment stated that Akayesu was responsible for maintaining public order, execution of laws and regulations and the administration of justice including holding exclusive control over the communal police. During April and June 1994, whilst Akayesu was bourgmestre, at least 2,000 Tutsis were killed in the Taba commune and the indictment states, ‘[a]lthough he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.’ As well as omissions, the indictment charges Akayesu with acts including murder, extermination, torture, cruel treatment, other

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92 Ibid, 16.
93 Discussions with Professor Rhonda Copelan at the International Women’s Human Rights Law Clinic (City University of New York Law School (CUNY), 27 September 1997).
inhumane acts and incitement to commit genocide. All acts and omissions allegedly took place between January 1994 and December 1994.

In June 1997, during the Akayesu trial, the Prosecutor amended the indictment to include three more counts and three additional paragraphs dealing with acts of sexual violence. These new charges included rape (Crimes Against Humanity, Article 3(g) of the Statute of the ICTR), and outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault (Violations of Article 3 common to the Geneva Conventions and Additional Protocol II, Article 4(e) of the ICTR Statute.) Akayesu pleaded not guilty to all counts in the original and subsequently amended indictment.

(c) The Women's Coalition Brief

The Women's Coalition brief expressed concern that the Rwanda Tribunal fulfil its mandate to ensure the prosecution of serious violations of humanitarian and human rights law. In particular, crimes such as rape and other forms of sexual violence comprising war crimes, crimes against humanity and genocide within the competence of the Tribunal under Articles 2 to 4 of its Statute should be dealt with. In this respect the amicus brief requested the Trial Chamber to exercise its supervisory authority to:

- call upon the Prosecutor to amend the indictment against Jean-Paul Akayesu to charge rape or other serious acts of sexual violence as crimes within the competence of the Tribunal;

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94 *Prosecutor v Jean-Paul Akayesu (Amended Indictment)* ICTR-96-4-I (1996).
• evaluate whether to supplement the record on such charges either through calling its own witnesses pursuant to Tribunal Rule 98, or through calling upon the Prosecutor to consider supplementing the investigation and/or evidence in this case;

• examine why none of the indictments issued thus far have included charges of rape or other forms of sexual assault despite reliable reports documenting widespread rape and other forms of sexual violence committed by the Hutu as part of the widespread and genocidal violence, and, thereby, indicating the availability of probative evidence.96

The brief then dealt with the fact that the Trial Chamber has the supervisory authority to correct the failure of the Prosecutor to charge, and if necessary prove, rape and other sexual violence. The Women’s Coalition argued that the ICTR’s mandate is to bring to justice to those persons who have violated international humanitarian law and from this mandate flows an inherent supervisory authority. Furthermore, it is claimed that this supervisory authority must be used,

_except by way of objection from an amicus curiae or by proprio motu of a Judge or Trial Chamber, acts of the Prosecutor which are in violation of the Rules and which constitute a miscarriage of justice, but which would benefit the Accused, would go unremedied.97

The brief pointed to the numerous rules of the ICTR which give the Trial Chamber authority to oversee, as well as supplement, the work of the Prosecutor in order to

95 Ibid, 12.
96 Prosecutor v Akayesu (‘Amendment Brief’), above n 88, 2.
97 Ibid, 6.
ensure that the mandate of the Tribunal be fully effectuated. It also highlighted the capacity for the Trial Chamber, on its own motion, to issues orders such as subpoenas and warrants as necessary for the purpose of investigation, preparation or conduct of the trial. Other rules authorise the Judges of the Trial Chamber to order either party to produce additional evidence or summon witnesses or order their attendance. Rule 5 advises that respect for the principles of fairness and avoidance of a miscarriage of justice are at the root of the authority of the Tribunal and the Trial Chamber.

The Women’s Coalition submitted that the ICTR had the power to amend the indictment of the defendant Akayesu. It was claimed that a failure to do so, where there has been clear evidence at trial of sexual violence and further evidence available through documentation, produces unfairness and constitutes a miscarriage of justice.

_Prosecution Of Sexual Violence Within The Jurisdiction Of The Tribunal_

The submission made in the brief was that rape is explicitly cited as a crime against humanity in Article 3(g)(f) of the Statute of the ICTR, as well as a serious violation of Article 3 common to the Geneva Convention and Additional Protocol II in article 4(e). The Women’s Coalition also argued that sexual violence can be pleaded as torture and cruel treatment pursuant to Article 4(a). In certain circumstances, the

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99 ICTR Rules of Procedure, rule 54.
100 Ibid, rule 98.
101 Ibid, rule 5.
amicus submitted, rape and other forms of sexual violence, such as the killing of pregnant women, could constitute genocide referred to in Article 2(2)(a)-(d) of the Statute.\textsuperscript{102} Thus the brief advised that the ICTR, 'is unquestionably mandated to prosecute persons who have raped or been responsible for rape ...or other sexual violence'.\textsuperscript{103}

Occurrence Of Rape In Rwanda

The Women's Coalition maintained that excerpts from the testimony from Jean-Paul Akayesu's trial as well as reports from bodies, such as the UN Commission of Experts,\textsuperscript{104} Africa Rights,\textsuperscript{105} Human Rights Watch\textsuperscript{106} and UNHCR\textsuperscript{107} disclosed that sexual assaults were an integral part of the widespread genocidal violence against Tutsi women. Furthermore, testimony from Akayesu's trial showed the availability of probative evidence, particularly from witnesses 'H' and 'J'.\textsuperscript{108} Witness 'H' testified to having been raped and having witnessed the rape of other women who had taken refuge in the Bureau Communal under the control of Akayesu. Witness 'J' testified that she had witnessed the rape of her six year old daughter by three Hutu men when they came to kill her father.\textsuperscript{109}

\textsuperscript{102} For sexual violence to be pleaded as genocide it is necessary to prove that it was an integral part of a genocidal campaign, designed to result in death or destroy a women from a physical, mental or social perspective, and her capacity to participate in the reproduction of the community.
\textsuperscript{103} \textit{Prosecutor v Akayesu ("Amendment Brief")}, above n 88, 7.
\textsuperscript{106} \textit{Shattered Lives}, above n 89.
\textsuperscript{107} M Daniel, Community Services Coordinator, UNHCR, Kigali, \textit{Report on Assignment to Rwanda (12 June to 24 July 1995)}.
\textsuperscript{108} \textit{Prosecutor v Akayesu ("Amendment Brief")}, above n 88, 9.
\textsuperscript{109} \textit{Ibid}, 10.
The Women’s Coalition pointed out that the Prosecutor opened his case with a statement that referred to sexual violence in the following terms:

Our evidence will show that in 1994 in Rwanda, there was systematic and widespread murder, imprisonment, torture, persecution and sexual assault and mutilations ...against the Tutsi population.\textsuperscript{110}

The brief reviewed, in some detail, Akayesu’s criminal responsibility for the rape of Tutsi women in Taba and stated:

On the basis of the evidence of witnesses ‘H’ and ‘J’, on the documented cases of rape in the Taba commune and the available evidence concerning Akayesu’s criminal responsibility for these acts of sexual violence, it is submitted that the Prosecutor should, as provided for by the Statute, seek leave of the Trial Chamber to add charges of rape to Akayesu’s indictment.\textsuperscript{111}

It was claimed by the Women’s Coalition that the absence of charges of rape in the Akayesu indictment was not unique to the ICTR and that there were methodological and staffing problems in the Prosecutor’s office which contributed to the omission of sexual assault charges. The brief deemed that such failures deny Rwandan women who have survived sexual violence equal justice, recognition and vindication of their suffering.

In conclusion, the Women’s Coalition submitted that the ICTR should fulfil its mandate by calling upon the Prosecutor to amend the indictment and charge Akayesu with:

- the rape of Tutsi women under Article 3(f), (g) and (h), Article 4(a), (e) and (h);
- the mutilation of genitalia and breast of Tutsi women under Article 3(f), 4(a) and (e) of the Statute;

\textsuperscript{110}Ibid, 9.
the parading of Tutsi women naked under Article 4(a), (e), (h) and (i);

rape as an act of genocide pursuant to Article 2(2)(b), (c) and (d) of the Statute.

(d) Use Of The Brief By The Trial Chamber

On 2 September 1998, the Trial Chamber of the ICTR found Akayesu guilty under 9 counts and not guilty under 6 counts listed in the indictment\textsuperscript{112}. He was found guilty of rape and other inhumane acts pleaded as a Crime Against Humanity, but not guilty of outrages upon the personal dignity, in particular rape, as pleaded as a Violation of Article 3 common to the Geneva Conventions and Additional Protocol II. Akayesu was also found guilty of Genocide, murder and torture as pleaded as a Crime Against Humanity.

There is no specific mention of the \textit{amicus} submission of the Women’s Coalition in the judgment. However, there is an interesting discussion relating to the Prosecutor’s decision to amend the indictment to include charges of sexual violence. The section is worth quoting in full:

\begin{quote}
[O]n 17 June 1997, the indictment was amended to include allegations of sexual violence and additional charges against the Accused under Article 3(g), Article 3(l) and Article 4(2)(e) of the ICTR Statute. In introducing these amendments, the Prosecutor stated that the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal. The Prosecutor stated that evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence. The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual
\end{quote}

\textsuperscript{111} Ibid, 16.
\textsuperscript{112} Prosecutor v Jean-Paul Akayesu (Judgment) 2 September 1998, ICTR-96-4-T (‘Akayesu Judgment’).
violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-Governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.\textsuperscript{113}

This clearly indicates that the judges were aware of the \textit{amicus} and examined issues such as the international judicial need to prosecute those alleged to have perpetrated sexual crimes as well as the special methodological requirements necessary to gather evidence. The Akayesu judgment greatly advances international legal jurisprudence in regard to sexual assault and is the first to examine, in detail, sexual violence during armed conflict.\textsuperscript{114} It acknowledges that there is no commonly accepted definition of rape in international law, indicating the limited precedents of prosecutions for sexual violence in international humanitarian law, and stated that:

\begin{quote}
The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances as coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.\textsuperscript{115}
\end{quote}

Furthermore, whilst Akayesu's indictment did not charge him with sexual assault pursuant to the crime of Genocide, the judges dealt with this issue anyway and stated that, under Article 2(2)(d) of the Statute of the ICTR (imposing measures intended to prevent births within the group), sexual assault could be included in this category, and

\textsuperscript{113} Ibid, 170-1.
\textsuperscript{114} Catherine Cisse, 'The End of a Culture of Impunity in Rwanda? Prosecution of Genocide before Rwandan Courts and the International Criminal Tribunal for Rwanda' (1998) 1 Yearbook of
added, '[f]or instance, rape can be a measure to prevent births when the person raped refuses subsequently to procreate.' Thus, in certain circumstances rape could be deemed as part of genocide. This was reinforced later in the judgment, which reads, 'sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.'

This brief included matters of fact as well as those relevant to the law despite the regulations of the International Tribunals cautioning that amicus are generally limited to matters only of law. However, all facts were couched in the context of the Trial Chamber’s supervisory authority and the legal question of the amendment of indictments. NGOs claim that the eventual inclusion of charges relating to sexual assault was the result of their work and said that, '[t]his amendment was precipitated by the filing of an amicus curiae brief before the ICTR.'

There is enough evidence to indicate that, before the submission of the brief, the Prosecutor, despite hearing the evidence of witness ‘H’, had not yet indicted Akayesu with sexual assault charges. After the amicus curiae submission was made, the indictment was amended. However, the Prosecutor’s office, as demonstrated in the judgment, would be likely to deny that they were influenced by ‘public pressure’ and it may be that it was merely a matter of time, not lack of intention, before the indictment was changed. It is important to acknowledge the potential dangers for the

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*International Humanitarian Law* 171.


113 Ibid, 208.

117 Ibid, 289.

118 *Information concerning the submission of amicus curiae briefs, IT/122 27 (1997)*, above n 4.

119 Oosterveld and Copelan, above n 91, 16.
Office of the Prosecutor if it is perceived by the Defence or the international community as undertaking actions due to pressure from NGOs rather than based on evidence and due process. With the ample evidence available, relating to sexual violence in the Taba commune, this is not an example of such ‘political pressure’, but the matter must be carefully considered to ensure that the International Tribunals are accorded credibility.

Whether the Women’s Coalition brief was a catalyst or not to amending the indictment, there can be little doubt that it advanced and strengthened arguments on the duty of the ICTR to investigate and prosecute rape and sexual violence. It also raised a number of issues, such as genocidal rape, not previously considered by either the Prosecutor’s office or by the international criminal legal system and this was reflected in the considerations of the judges.

CONCLUSION

Section 7, Article 85 of the Australian draft Rules of Procedure and Evidence of the ICC provides:

(a) The Trial Chamber, may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit a brief on any issue specified by the Chamber. The Chamber may also invite or grant leave to a State, organization or person which has submitted a brief to make submissions to it at the hearing of the case.

(b) A brief submitted under subrule (a) shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence.

(c) The Trial Chamber shall determine what time-limits shall apply to the filings of such briefs.

(d) Briefs shall satisfy any requirements laid down in the Regulations.\(^{120}\)

\(^{120}\) Draft Rules of Procedure and Evidence of the International Criminal Court (Australian Delegation submission, January 1999).
This draft is similar to that submitted previously. The current proposals reflects Rule 74 of the Rules of Evidence and Procedure of the ICTY and ICTR, however is more restrictive stating 'Trial Chamber' rather than 'Chamber'. It is of concern that the ICC proposals limit the submission of \textit{amicus curiae} to the Trial Chamber, implicitly restricting such submissions from the Appeals Chamber. As discussed above, a broad range of \textit{amicus curiae} briefs have been submitted to the \textit{ad hoc} Tribunals in both the Trial and Appeals Chambers from States, academics and NGOs. Elements of these briefs are often referred to in judgments and there is no doubt that they are a valuable resource at all levels of proceedings. In instances of invoking the submission of \textit{amicus curiae} briefs, the Tribunals acknowledge the important benefit obtained from non-party actors contributing to international legal proceedings, assisting in the development of jurisprudence and providing expert information of specific issues.

Due to the unique nature of the ICC, in particular the fact that it will be the first permanent legal institution of its type, there will be many instances where there is no international jurisprudence to provide direct precedents for cases being considered. The role of \textit{amicus curiae} is therefore vital to ensure judges, responsible for determining matters that will have an impact upon the international community, are exposed to a depth and breadth of information and ideas. Any amendments to allow such submissions access to Appeal Chambers will strengthen the ability of the

\footnote{Report of the Preparatory Committee in the Establishment of an International Criminal Court II (Compilation of proposals), GA Official Records 55, Session Supplement No.22A (A/51/22) 188.}
International Criminal Court to produce intellectually sound and carefully considered judgments.
CONCLUSION

This thesis has argued that non-State actors and international criminal law have connections arising from the personal and individual nature of this area of jurisprudence. The first international criminal prosecutions, especially the Nuremberg Trials, saw many individuals and groups actively involved in gathering evidence despite not being granted any formal role in the trials.\(^1\) Subsequently, civil society, including non-State actors such as NGOs, international organisations and academics, has made significant contributions to proceedings before the ad hoc International Criminal Tribunals. A range of non-State actors were also actively involved in all negotiations to create a permanent International Criminal Court. Through their activities at the PrepComs and Diplomatic Conference, non-State actors assisted in the creation of a Statute which will no doubt lead to a more effective International Criminal Court.

In examining a range of practical case studies relating to the development and enforcement of international criminal law, this thesis has aimed to convey the sense of human agency intrinsic to the prosecution of those accused of heinous international crimes. These case studies have been diverse and have included the activities of civil society in developing legal norms incorporated in instruments such as the Rome Statute and the Ottawa Treaty to the enforcement of international criminal law at the ad hoc Tribunals and proceedings before the ICJ. Whilst dealing with different areas

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of international law and a variety of international institutions, the case studies have had a common link. They have all demonstrated that there is an important place for non-State actors in literature reviewing developments in international law. As Falk states:

It is no longer satisfactory to conceive of international law on the basis of classical ‘sources of law’ and ‘enforcement’. A global law of peoples is emerging, and it is past time for jurists to provide a suitable framework for its comprehension and assessment.  

This conclusion turns now to focus upon practical suggestions that should be considered when the Rome Statute has entered into force and the Court is operational. In doing so, this conclusion will draw together the threads from the case studies together and provide a framework in which to harness the unique capacities of civil society.

(i) **Practical suggestions**

(a) **Gathering Evidence**

As this paper has demonstrated, many non-State actors, in particular NGOs, are in an empowered position to gather and present evidence to international legal institutions. This thesis has also highlighted the complexity of the process. Domestic NGOs must ensure that they have a frank dialogue with the ICC and their own governments as well as asking for assistance from professional bodies such as Law Institutes, Counsellors and the Police Force. Security for all involved must be a top priority and thus adequate systems of confidentially must be developed as well as interpreters

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carefully chosen. Treating all involved with dignity and in the most professional manner possible will assist in the experience being a positive rather than negative one.

For NGOs in the field, a serious review must first be undertaken on whether providing the ICC with evidence fits into such organisations' mandate. All potential consequences should be honestly canvassed before embarking upon this process. If gathering information for prosecution is a priority for an organisation, extra care must be taken for the safety of both witnesses and workers. Importantly, there must be further reflection and a transparent debate among humanitarian organisations working in the field of situations already experienced with the ad hoc Tribunals. Learning from the lessons of the past will assist the ICC in avoiding some of the horrific consequences that have been experienced.

In relation to the future ICC, it is critical that when organisations provide the Office of the Prosecutor with information the confidentially of these details are respected. In order for the ICC to make the most of non-State actors’ various contributions, the Court should create a position for a Coordinator or Liaison Officer to deal professionally with and to create an open dialogue between the range of non-States actors.

Unlike the ad hoc Tribunals, which, due to their mandate, deal with only one geographical location within a limited time frame, the ICC will not be able to build up a detailed database on each area of prosecution. When the ICC is operational, there is likely to be a number of different prosecutions being held concurrently in different situations. In this sense, each event, situation and geographical area will not be able
to be researched in full detail by the ICC to the same extent as the ad\thoc Tribunals. Thus, it will be important for the ICC to have a strong dialogue with non-State actors in the field and in third countries where large numbers of potential witnesses are sheltering. Supplying non-State actors with ample and clear information, similar to the briefing paper provided by the ICTY, will be essential. Providing a standard screening kit to those considering gathering evidence would be of significant assistance both to the ICC and non-State actors, particularly members of the NGO community.\textsuperscript{3} This thesis highly recommends that the ICC run training sessions to educate non-State actors of the opportunities and dangers involved in working closely together.

The creation of a list of non-State actors, identifying the sort of work they are undertaking and where this work is located, could be a useful tool for the ICC. This ‘Who’s Who’ of civil society would provide the Office of the Prosecutor at the ICC with vital contacts and a place to start approaching those who may have valuable evidence. Those non-State actors not wishing to give evidence, such as the ICRC, would not have to put their details in the list and the ICC would see the range of options they have with other organisations. Providing information to non-State actors and encouraging an honest and rigorous dialogue on the topic of what these actors can and cannot do will ensure a profitable relationship for the ICC with this vital sector.

\textsuperscript{3} The ICTY has a general screening kit to be used by non-State actors in gathering information. See Appendix 6.
(b) *Amicus curiae submissions*

In the examination in this paper of the role of *amicus curiae* briefs in domestic as well as international proceedings, it has become obvious that there will always be a tension between the ideal of 'correct' judgment and the practicality of judicial administration. On reviewing the experiences of the *ad hoc* Tribunals, there is no doubt that these institutions have grappled with this issue and created internal guidelines with strict criteria. The guidelines are straightforward and simple and the ICC should consider the implementation of a similar procedure. To also ensure that these guidelines are accessible, they should be posted on a web page containing other material relating to the ICC. This web page should include details of cases to be heard by the ICC to enable non-parties to consider if they have any relevant information to add. To be truly inclusive the ICC must allow broad access — not just to those organisations with internal networks with the court or the capacity to travel to The Hague.

On the other hand, any public information must stress the nature of *amicus curiae* submissions being of a highly technical legal nature, not involving uninformed and individual opinions of international law. The vetting process and requirement of criteria must be strictly applied to avoid wasting precious resources of the ICC. The ICC must also be extremely careful not to accept briefs of a potentially political nature to avoid questions raised in relation to the Court's credibility.

There is a unique opportunity for the ICC to harness the information technology 'revolution' by granting those with knowledge discretionary access to providing judges with information. A list of eminent academics in a range of fields as well as the major and most informed non-State actors, could be created and lodged with the
Registrar of the ICC. This, like the list proposed of organisations in the field, could be utilised when the Chambers ask for amicus curiae submissions as well as posting such requests via the Internet.

If the ICC is to successfully pursue international justice, it will be necessary to allow broad non-party input into matters of important public interest. The study of the ICJ in this thesis has provided some important lessons for the ICC. First, the study demonstrated that even if an international institution has the capacity to allow third party input into proceedings, such as Article 34, 50 and 66 of the ICJ Statute, unless there is political will to utilise these provisions they are of little practical use. Furthermore, the World Court project proved that even with mechanisms in place for non-State actors to gain access to international proceedings non-State actors need to be educated and informed before they will be in a position to utilise formal mechanisms. It is disturbing how rarely and unsuccessfully third parties have been able to present oral or written statements to proceedings before the ICJ. Even more disappointing is paucity of situations in which the ICJ has requested public international organisations to supply information. Bold suggestions for complex legal amendments to increase participation at the ICJ are nonsensical until existing provisions are tried and tested. As a new legal institution, the ICC should learn that failure to use moderate provisions can result in ‘radical’ proposals for substantive reform.

The World Court project also confirmed that civil society is vitally interested in international legal matters. Over 3 million people were prepared to contribute ‘citizens evidence’ to assist the judges in their deliberations. The innovation and
creativity of the World Court project, both in pushing for the request for an advisory opinion and in ensuring participation of non-State representatives during the proceedings, indicates that if 'we the people' are interested and concerned in a specific matter there are a range of ways to be involved. The ICC should heed the warning that it will not be able to isolate itself from the interest and scrutiny of international civil society. Finally the World Court project shows the benefit of NGOs and other groups in publicising the workings of international institutions. The booklets, articles, interviews, banners and range of other material on the 'Nuclear Weapons case' and the 'World Court' are plentiful. Newspapers presented stories on this case in a manner more accessible to the general public which resulted in people who would not usually be interested in Advisory Opinions of the ICJ learning about international law.

There are also limitations to the lessons to be learnt by the ICC from the ICJ. The biggest distinction of course is that the ICJ only deals with inter-State disputes or with requests for Advisory Opinions made by competent international institutions. The ICC will only be involved in prosecutions against individuals. Also, the ICC will deal with international criminal law rather than civil law and thus will have to consider a host of issues not relevant to the ICJ. Many of there have been dealt with throughout this thesis, particularly in the analysis of the domestic use of amicus curiae briefs. Yet, as outlined above, there are some basic issues relating to the ICJ that should be carefully considered by the ICC.
(c) Other Areas

The ICC will only be successful if it receives broad base support, in the same way domestic criminal legal proceedings need the respect of the population to operate effectively. Such support can only be created and sustained if the public understands why an ICC is necessary and the sort of work it will undertake. Non-State actors often have close relationships with members of the media, as well as their own newsletters, Web sites and other educational material, they will be critical in disseminating information about the ICC and its work. To capitalise upon such opportunities for international education, the ICC should provide all relevant non-State actors with updated information, whether this be in the form of kits or Web sites.

In relation to fundraising, NGOs could be extremely useful to the ICC. Article 116 of the Statute of the ICC in this context provides:

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Thus there is a capacity for the ICC to receive funds from a broad range of sources. In educating the international community about the important nature of the ICC, non-State actors and NGOs are likely to create awareness that will lead to donations, both large and small. There is also the potential for NGOs to run fundraising campaigns, NGOs tend to have excellent relations with philanthropic organisations and could assist in advocating for funds from States and UN bodies. Once again the ICC should not ignore this potential and should create a dialogue with interested NGOs and non-State actors early in its establishment. However, the issue of funds and the directing
of certain resources to investigate specific events must be carefully monitored to avoid bias and accusations of a lack of independence of the ICC.

The provision of technical assistance has been a major contribution by the NGO community to the *ad hoc* Tribunals and should be encouraged for the ICC. Research on legal matters, the provision of quality *pro bono* personnel as well as improving resources, such as the library of the ICC, are all important areas that NGOs should be encouraged to become involved in. The debates surrounding the creation of the ICC have stirred considerable interest in this area of international law in organisations all around the world, from academic institutions to small and large NGOs. Thus there is rich intellectual property, on a range of relevant topics, that the ICC could harness.

The victims of atrocities tend not to be government officials but most often ‘ordinary people’—foot soldiers, women refugees, elderly people, students or children. The ICC is the last major international institution to be created on the eve of the most bloody century in history. Tasked with dealing with future tragedies, with attempting to change the current culture of impunity, with giving victims a voice and assisting to build international peace and security, it will need as much help as it can get. Many members of the general public are interested in international criminal law – interested enough to have pushed for the creation of the ICC, to have raised funds to send NGOs to the negotiations, to have signed letters and lobbied their own governments on this topic. Many people have participated in the presenting of evidence to the *ad hoc* Tribunals, housewives have worked alongside professional lawyers gathering resources to enable witnesses to ‘have their say’. Millions of people declared their passion about the need to rid the world of nuclear weapons. Many academics and
other concerned individuals have written briefs in the hope of encouraging judges to more broadly consider the impact of international law on the suffering of individuals. If the ICC is to even hope to fulfil any element of its lofty mandate, it must carefully welcome contributions from non-State actors.
APPENDIX 1

LIST OF NGO PARTICIPANTS
NGO COALITION FOR AN INTERNATIONAL CRIMINAL COURT (CICC)

LIST OF PARTICIPATING ORGANIZATIONS *

For more information contact:

CICC, c/o WFM, 777 UN Plaza, 12th floor
New York, NY 10017, USA
1-212-687-2176 • 1-212-599-1332 (fax)
cicc@igc.apc.org (email)
http://www.igc.apc.org/icc (web)

* It is possible that some of the participating organizations may be inadvertently omitted. The total list of organizations involved is considerably higher - the Women’s Caucus for Gender Justice in the ICC, for instance, reaches out to over 300 organizations. For contact information on a listed organization, please contact the CICC in New York at the above address or during the Treaty Conference in Rome at the following number: 5783179.
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APPENDIX 2

MSF IMAGES OF CHILD VICTIMS OF INTERNAL ARMED CONFLICT
CHILDREN AS VICTIMS OF ARMED INTERNAL CONFLICT

Note that the posterior ankle tendons have been slashed to prevent the children from running away. They were then shot in the face.

DO THEY DESERVE JUSTICE?

Picture taken on the field by doctor Rony ZACHARIAH
Médecins sans Frontières - Doctors without Borders
CHILDREN OF AN ENTIRE VILLAGE AS VICTIMS OF A NATIONAL CONFLICT

Children tortured. Then burned alive in their huts.

DO WE NEED JUSTICE?

Picture taken on the field by doctor Rony ZACHARIAH
Médecins sans Frontières - Doctors without Borders
APPENDIX 3

ACIWC SCREENING KIT
Australian Committee of Investigation Into War Crimes
P.O. Box 4309
Parkville, Victoria 3052
AUSTRALIA
Phone: (61)(3) 696-5317; Fax: (61)(3) 818-8852

The Australian Committee of Investigation Into War Crimes was established in 1994 to continue in Australia the work of the Commission of Experts. The Commission of Experts was created by the United Nations Security Council in October 1992, to carry out an in-depth investigation into allegations of sexual assault, execution, torture, and other violations of international humanitarian law committed in connection with hostilities in the Yugoslavian conflict. In March 1993, the U.N. Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. The Tribunal will be held at The Hague, located in Europe, and prosecutions are scheduled to begin in 1995.

The Advisory Committee includes Dr. Hilary Charlesworth, Dr. Tim McCormack, Ms. Pene Mathew, Professor Philip Alston, and Justice Elizabeth Evatt, as Patron.

The Australian Committee of Investigations Into War Crimes intends to identify victims or witnesses of war crimes committed in the territory of the former Yugoslavia from the refugee population in Australia. Our primary goal is to assist the Tribunal in obtaining specific evidence which may be used for prosecution. Thus, the identification of victims and key-witnesses is absolutely essential. In this endeavor, we are working with the Deputy Prosecutor for the International Tribunal, Mr. Graham Blewitt.

Throughout these investigations, the interest of the victims and witnesses is paramount. Particular attention will be paid to their physical and psychological well-being, including their personal security. Confidentiality will be respected and protected. Our primary efforts will be to screen victims and potential witnesses for the International Tribunal. Actual affidavits will be taken by the Tribunal. It is important to note that ACIWC is assisting war victims in Australia, but is neither hunting nor investigating war criminals. That task is left solely to the Prosecution. Interpreters and follow-up counselling will be made available.

The Committee believes that the identification of individuals who could assist the Tribunal is vitally important, not only for the resettlement process of refugees from the Yugoslavian region into Australia, but also for the future of international peace and security. If you seek justice, we urge you to participate. It is impossible to prosecute alleged war criminals without testimony and evidence against them.
GUIDE TO PHASE ONE - SCREENING

In 1993, the United Nations established a Tribunal to prosecute persons responsible for war crimes committed in the territory of the former Yugoslavia, after January 1991. The Australian Committee of Investigation into War Crimes (ACIWC) was set up to assist the Tribunal in locating victims or witnesses to these war crimes, who are now living in Australia. ACIWC will provide a screening service for the Tribunal. We will make the initial contact with victims or witnesses to war crimes. The screening sheet attached is seeking very basic information; we simply need to verify that the crimes asserted by the victim or witness are crimes which the Tribunal is prosecuting against.

War crimes which will be prosecuted in the Tribunal, include (but are not necessarily limited to) the following acts: Murder (including execution), Torture (including beating unarmed persons), Rape (or any form of sexual assault), and Forced Displacement.

ACIWC is interested in giving victims a voice. The victim or witness may cease to participate at any time. No one will be forced to participate in giving testimony. ACIWC is interested solely in the victims, not the criminals. ACIWC has no intention whatsoever in seeking war criminals - that job is left completely to the Prosecution. ACIWC will merely identify to the Tribunal, persons who were victims or witnesses of war crimes that wish to give oral, written or statistical testimony.

On the attached sheet, there is no information regarding your name or address. Victims and witnesses will be identified by a random identification number only, assigned at the time of the screening interview. All screening sheets and interviews will be kept confidential. Screening sheets will be placed in a safety deposit box. ID numbers will be kept in a separate safety deposit box. Screenings will be conducted in any of three ways, decided by the person being screened. Once you have completed or reviewed the screening sheet:

1. Ring ACIWC at 696-5317 to make an appointment for a screening interview at a mutually agreed upon time and location. From ________________, a Committee member (English speaking) will be at this phone number every Wednesday, Thursday, and Friday morning, from 9:30am-12noon.

   OR

2. Contact a local community worker, who will contact the Committee to arrange for us to meet with you, along with an interpreter, if necessary.

   OR

3. Mail a request for a meeting to: ACIWC, PO Box 4309, Parkville, Victoria 3052. We will then contact you by phone to set up a mutually agreed upon time and location.

At the screening process, after assigning an identification code, we will simply review the screening sheet with you, to verify the information with you personally. At a later date, the screening sheets will be sent to the prosecutor's office at the Tribunal, so that they can determine which persons they need to receive affidavits or other information from. However, the prosecutor's office may request ACIWC to get additional information from victims or witnesses.

Screenings will begin in May, 1995. The Committee Members conducting these screening sessions are trained lawyers and human rights activists who have no connection with any ethnic group. Victims or witnesses may bring along a friend or family member for support, but these persons may not actively participate in the process.

PLEASE DO NOT RETURN THE SCREENING SHEET BY MAIL! NO SCREENING SHEET WILL BE VALID WITHOUT AN IDENTIFICATION CODE ASSIGNED BY A COMMITTEE MEMBER DURING THE SCREENING PROCESS!!
PLEASE DO NOT ADD YOUR NAME OR OTHER IDENTIFYING INFORMATION TO THIS SHEET! YOU WILL BE ASSIGNED AN ID NUMBER AT THE SCREENING INTERVIEW.

DATE OF BIRTH: __________________________
GENDER: MALE _____ OR FEMALE _____
ETHNIC GROUP: ____________________________________________________
PROFESSION/OCCUPATION: __________________________________________
EDUCATION LEVEL: _________________________________________________
LANGUAGE(S): _______________________________________________________

PLEASE KEEP ANSWERS TO A MINIMUM: ONLY AN OVERVIEW IS NEEDED

1. In which town/district/area(s) in the former Yugoslavia were you living between 1991-1995? ____________________________________________________________

2. During what dates were you in those regions during the conflict? ________________________________________________________________

3. When did you come to Australia? __________________________________________

4. Did you come directly to Australia from the conflict? ______________________________

5. Were you either a victim of a crime or a witness to a crime or both? __________________________
   A. Were you personally the victim of a crime? ____________________________
      IF YES: (please answer all that apply)
      Was it a crime committed against your property/possessions? __________
      Was it a crime committed against your body/person? __________
      Was the crime of a sexual nature? __________
   B. Did you personally witness a crime? __________________________
      IF YES: (please answer all that apply)
      Was it a crime against a family member? __________
      Was it a crime against a friend? __________
      Was it a crime against an acquaintance? __________
      Was it a crime against a stranger? __________
      Were the crimes against property/possessions? __________
      Were the crimes against the person physically? __________
      Were the crimes of a sexual nature? __________

6. In what region/town was the crime(s) committed? __________________________________________

7. Do you know the identity _____, ethnicity, _____ or other information about the person(s) committing the crime? __________ If YES, was the person(s) military _____ civilian _____, unknown _____? Would you recognize this person(s) if seen again ________?

8. Would you be willing to discuss these crimes with a member of the Prosecutor's Office of the International War Crimes Tribunal? ______ Would you be willing to discuss these crimes with a member of the Australian Committee of Investigation Into War Crimes? ______

9. If asked, would you be willing to testify about these crimes? ______________________________

10. Would you like to be provided with confidential counseling services in relation to crimes you have witnessed or suffered? __________

11. Do you have a preference as to the gender of the person who will conduct the screening? IF YES. would you prefer a male ____ or female ____?
APPENDIX 4

DISPOSITIF
Dispositif.

For these reasons,
THE COURT
(1) By thirteen votes to one,
Decides to comply with the request for an Advisory opinion;
In Favour: President Bedjaoui (Algeria); Vice-President Schwebel (US), Judges Guillaume (France), Shahabuddeen, Weeramantry, Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Koroma, Vereshchetin (Russia), Ferrari Bravo (Italy), Higgins (UK);
Against: Judge Oda (Japan),

(2) Replies in the following manner to the question put by the General Assembly;
A. Unanimously
There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,
There is in neither customary nor conventional law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;
In Favour: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;
Against: Judges Shahabuddeen, Weeramantry, Koroma.

C. Unanimously
A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously
A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven votes, (by the President’s casting vote), It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;
In Favour: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;
Against: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F. Unanimously,
There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.¹

¹ UNGA Opinion, above n 78, Dispositif.
APPENDIX 5

INFORMATION CONCERNING

THE SUBMISSION OF

AMICUS CURIAE BRIEFS TO THE ICTY
INFORMATION CONCERNING
THE SUBMISSION OF AMICUS CURIAE BRIEFS

NOTE D'INFORMATION CONCERNANT
LA SOUMISSION DE MEMOIRES D'AMICI CURIAE

(IT/122)
INFORMATION ON THE SUBMISSION OF AMICUS CURIAE BRIEFS

March 1997

1. Pursuant to Rule 74 of the ICTY Rules of Procedure and Evidence, "A Chamber may, if it considers it desirable for the proper determination of a case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber."

2. Requests for leave to file amicus briefs may be submitted unsolicited or in response to a general invitation from a Trial Chamber. At its discretion, a Chamber may solicit an amicus submission from a particular State, organization or person. Amici may be invited to participate in oral argument at the Chamber's sole discretion.

3. States, organizations or persons wishing to submit an amicus brief, or to appear as amicus curiae, must file an application specifying the following:

   a) the applicant's name, address, and interest in the case;
   b) the issue or issues the applicant seeks to address, and the nature of the information or analysis the applicant proposes to submit;
   c) the applicant's qualifications;
   d) whether the applicant makes application for leave to submit an amicus brief, or to appear as amicus curiae:
      i) in response to a general invitation for applications by the Chamber;
      ii) at the applicant's own initiative
   e) the applicant's reasons for believing his submission will aid in the proper determination of the case or issue;
   f) a statement identifying and explaining any contact or relationship the applicant had, or has, with any party to the case.

4. The application is to be sent to the Registry (see Item 5, below) which will then forward the application to the Trial Chamber for decision pursuant to Rule 74 of the Rules of Procedure and Evidence. The application may be accompanied by the written amicus brief which the applicant seeks to have the Chamber accept.

5. Applicants should note the following:

   a) In all cases, amicus submissions shall be made in writing. Again, amici may be invited to participate in oral argument at the Chamber's sole discretion.
b) In general, *amicus* submissions shall be limited to questions of law, and in any event may not include factual evidence relating to elements of a crime charged;

c) If the Chamber solicits or invites *amicus curiae* briefs, the Chamber shall give each party the opportunity to oppose the *amicus* submission, and in any event shall retain the power to reject the offered submission;

d) The Chamber shall determine the timing of *amicus* submissions, and may set page limits on the length of such submissions;

e) The parties will be given an opportunity to comment on such amicus briefs as have been accepted, but amici will not be subject to cross-examination, nor will they be allowed to call witnesses;

f) In general, *amicus curiae* shall bear their own expenses, but the Chamber may authorize the Registry to reimburse the reasonable expenses incurred in connection with participation in the Tribunal’s proceedings, if the *amicus* has been specifically invited to apply or to appear by the Chamber.

6. Applications should be addressed to:

   *Amicus Curiae* Officer  
   Registry  
   International Criminal Tribunal for the former Yugoslavia  
   Churchillplein 1  
   2517 JW, The Hague  
   The Netherlands.

Applications, **not** including the *amicus* brief itself, may be faxed by the deadline, if any, set by the Chamber to: 31-70-416-5345, to the attention of the *Amicus Curiae* Officer.
Note d’information concernant la soumission de mémoires d’amici curiae

Mars 1997

1. Aux termes de l’article 74 du Règlement de procédure et de preuve du TPIY, “Une Chambre peut, si elle le juge souhaitable dans l’intérêt d’une bonne administration de la justice, inviter ou autoriser tout État, toute organisation ou toute personne à faire un exposé sur toute question qu’elle juge utile.”

2. Les demandes d’autorisation de déposer des mémoires d’amici curiae peuvent être introduites spontanément ou sur invitation générale d’une Chambre de première instance. La Chambre a toute liberté pour inviter un État, une organisation ou une personne à présenter un exposé en qualité d’amicus curiae. Elle a également toute latitude pour inviter des amici à participer à des débats oraux.

3. Les États, organisations ou personnes désireux de déposer un mémoire d’amicus curiae ou de comparaître en tant que tels doivent introduire une demande mentionnant les éléments suivants :

a) le nom et l’adresse du demandeur et l’intérêt qui le porte à vouloir intervenir dans l’affaire;

b) la ou les question(s) que le demandeur souhaite examiner et la nature des informations ou de l’analyse qu’il se propose de présenter;

c) les qualifications du demandeur;

d) si le demandeur introduit sa demande d’autorisation de soumettre un mémoire au titre d’amicus curiae ou de comparaître en cette qualité :

i) en réponse à une invitation générale de la Chambre à soumettre des demandes;

ou

ii) de sa propre initiative;

e) les motifs incitant le demandeur à penser que son intervention aidera la Chambre à statuer correctement dans l’affaire ou sur la question;

f) une déclaration citant et décrivant tout contact ponctuel ou suivi, présent ou passé, entre le demandeur et toute partie au procès.

4. La demande doit être envoyée au Greffe (cf. point 5 ci-dessous), qui la transmettra ensuite à la Chambre de première instance, laquelle statuera conformément à l’article 74 du Règlement de procédure et de preuve. Le demandeur peut joindre à sa demande le mémoire écrit soumis à la Chambre pour approbation.
5. Les demandeurs sont priés de tenir compte de ce qui suit :

a) Dans tous les cas, les amici doivent soumettre leurs exposés par écrit. La Chambre a toute liberté pour inviter les amici à participer aux débats oraux.

b) En règle générale, les amici doivent se contenter d’examiner des points de droit dans leurs exposés. Ils ne peuvent en aucun cas étendre leur analyse à des preuves factuelles ayant trait à des éléments constitutifs d’un crime mis à charge;

c) Si les amici déposent leur mémoire suite à une invitation générale ou à une injonction spécifique de la Chambre, celle-ci donnera à chaque partie la possibilité de soulever des objections par rapport à l’exposé et se réservera de toute manière le pouvoir de rejeter celui-ci;

d) La Chambre détermine le moment où les amici pourront soumettre leurs exposés et peut fixer un nombre de pages à ne pas dépasser dans le document;

e) Les parties peuvent présenter des commentaires relatifs aux exposés acceptés, mais les amici ne peuvent ni être soumis à un contre-interrogatoire, ni citer des témoins à comparaître;

f) En règle générale, les amici supportent eux-mêmes les frais inhérents à leur intervention, mais la Chambre peut autoriser le Greffe à rembourser toutes dépenses raisonnablement encourues du fait de leur participation au procès devant le Tribunal, pour autant que l’amicus concerné ait été explicitement invité par la Chambre à présenter un mémoire ou à comparaître.

6. Les demandes doivent être envoyées à l’adresse suivante :

Responsable des Amici Curiae
Greffe
Tribunal pénal international pour l’ex-Yougoslavie
Churchillplein 1
NL-2517 JW Den Haag
Pays-Bas

Les demandes, à l’exclusion du mémoire lui-même, peuvent être envoyées par télécopieur, avant la date d’échéance éventuellement fixée par la Chambre, au numéro suivant : +31 70 416 5345, à l’attention du Responsable des Amici Curiae.
APPENDIX 6

QUESTIONNAIRE FOR THE ICTY
QUESTIONNAIRE FOR THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA
(ICTY)

The International Criminal Tribunal for the Former Yugoslavia was established to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

This questionnaire is designed to assist the Tribunal in assessing the nature of the evidence you can provide concerning matters within the Tribunal’s jurisdiction. It is not a formal statement.

Name of Interviewer: __________________________ Place & Date: __________________________
Name of Interpreter: __________________________

PLEASE ANSWER THE QUESTIONS IN THE SPACE PROVIDED. IF YOU NEED ADDITIONAL SPACE TO ANSWER THE QUESTIONS, IT IS PROVIDED AT THE END OF THE QUESTIONNAIRE

I. BACKGROUND

A. Name: __________________________ Surname: __________________________
   Nickname: __________________________ Maiden Name: __________________________
   Mother’s first name: __________________________ Father’s first name: __________________________

B. Gender: Female ___ Male ___

C. Date of birth: Day ______ Month ______ Year ______
   Place of birth: __________________________

D. Nationality: __________________________

E. Religion: __________________________

F. Citizenship: __________________________

G. Marital status: __________________________
   Name of spouse/companion, date of birth __________________________
   Name of children, date(s) of birth: __________________________
   Whereabouts of family members: __________________________
I. Education: __________________________________________

Occupation: Current: __________________________________________

Past: __________________________________________

J. Military or Police Service: details should include dates of service, military speciality or job, rank or grade attained, units served with and location, identity of commanding officers, specific battles or campaigns involved in:

a. Compulsory Service before January 1991:

b. Military or Police service since January 1991 (including compulsory service):

c. Service in any other organised unit (militia, territorial defence, guards, volunteers etc.) since January 1991:

K. Current address and phone number (until):    Contact Person:

                          __________________________________________

                          __________________________________________

Address(es) at the time of the specific crime(s) reported:

                          __________________________________________

L. Current status (i.e. refugee, displaced person or permanent resident):

M. Have you made statements about the crime reported to the Police/Media/Any other organisation:

If YES, when & to whom:

                          __________________________________________

Did proceedings in a national court take place regarding the crime reported:
II. SINCE JANUARY OF 1991 HAVE YOU BEEN THE VICTIM OR A WITNESS OF A CRIME COMMITTED IN THE CONTEXT OF THE CONFLICT IN THE FORMER YUGOSLAVIA?

Yes ___ No ___

If you checked yes, please answer the following questions:
Type of Crime: if you were the victim or witness to multiple crimes, identify each crime separately and provide the date of the crime, where it happened, and the identity of the victim(s) and perpetrator(s), including military association if known or description of the uniform. A further questionnaire will be provided if space is insufficient.

Description of Crime:

Date of Crime:

Location of Crime:

Identity of the victim(s) (name / address / description):

Identity of the perpetrator(s)
(If the perpetrator was in uniform but the military or police unit unknown, please describe any distinctive marks or patches or other identifying information on the perpetrator's uniform)

Name (or nickname) of perpetrator:

Date and Place of Birth or place of residence

Current Location:

Military/Police/ Paramilitary unit:

Rank and or position of the perpetrator(s):

Any other information about the crimes or perpetrators you think we should know:
Names, addresses and telephone numbers of other witnesses to the crime(s) reported: 

_________________________________________________________________

_________________________________________________________________

FOR YOUR INFORMATION YOU SHOULD KNOW -

- that the ICTY does not intervene with Emigration Authorities,

- that witness protection is determined on a case by case basis by the Victim and Witness Unit, ICTY,

-and that this confidential questionnaire will be sent to the ICTY, and that you may be contacted for an interview, at a future date.

WOULD YOU BE WILLING TO GIVE A MORE DETAILED STATEMENT TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA?

Yes_____ No_____
CONVENIENT DATES & PLACE:

WOULD YOU BE WILLING TO TESTIFY IN COURT? Yes_____ No_____

Additional space to answer questions (Please attach additional sheets):
SELECT BIBLIOGRAPHY

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