The Role of NGOs in the Establishment of the International Criminal Court
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The International Criminal Court (ICC) is a significant development in the history of international law, as it is an ambitious and comprehensive multilateral security agreement. In addition, the creation and implementation of the ICC can be seen as a success for Non-Governmental Organisations (NGOs) working to bring about normative changes in relation to human rights and international law. NGOs, through a process of complementary and parallel diplomacy, were able to propel human rights issues onto the international security agenda, and have participated actively at all stages of the Court's evolution. This paper examines the role that NGOs have played in the conception, development and ongoing implementation of the Court, arguing that their involvement in this process was crucial to its success. Firstly, it is appropriate to examine briefly the ICC, including its features, origins, aims and significance.

History of the ICC
The end of the 19th and early 20th centuries saw concerted international efforts to create treaties and laws regarding the way in which wars were waged. Numerous agreements were envisaged regarding standards of conduct for participants in armed conflict, with the hope of reducing the devastation and impact of war. Yet despite these attempts to codify warfare, the 20th century proved to be the most war-ravaged and bloody in history, with wars becoming

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1 This is not to say that there were no rules of warfare prior to this time nor ideas of justice in times of war, as of course there are numerous ancient and medieval norms and standards for warfare. However, for the purposes of this paper, it is more relevant to concentrate on institutional reflections of these ideals. Bos (1999:41) identifies the 1474 trial and conviction of Peter von Hagenback in Breisach, Austria as the first instance of a multilateral attempt at a war crimes tribunal. The idea of using legal processes to punish the enemy after the end of a war is not a new concept. Bass (2000:5-6) points to numerous examples of war crime tribunals throughout history, such as the abortive treason trial of Bonapartists after 1815, the American war crime trials after Spanish-American war, and British after the Boer War. It was not however, until the 1990s with the tribunals for Yugoslavia and Rwanda (when there were no clear winners of these wars) that third parties became involved in the legal deliberations and the idea of universal responsibility for ensuring human rights was gaining momentum.

2 Some of the most important international treaties regarding these norms include the Universal Declaration on Human Rights (1948), Convention on the Prevention and Punishment of the Crime of Genocide (1948) Geneva Convention (1949) and the two supplementary protocols pertaining to the protection of any person affected by armed combat (1977), Convention against Torture and other Cruel, Inhumane or Degrading treatment or Punishment (1984) (Economides 2001: 115-116).
more frequent and more brutal, the weapons available increasingly more destructive, and the human costs calculated on a previously unimaginable scale (Kegley and Wittkopf 2000:408-412). Furthermore, despite efforts to establish norms and rules for conduct in wartime, the 20th century also saw the majority of the war crimes perpetrated against non-combatants and committed with impunity. Helen Brady (1998:59) states that contrary to international humanitarian law, in the 20th century civilians are no longer incidental casualties of war, but frequently its target. Ruth Wedgewood (1999:97) further describes "violation of human standards ... [as] a tactic of war".

NGOs often formed at the grassroots level as a reaction to these violations, and throughout the past century have been at the frontlines of such conflicts, making them expert and committed advocates for international efforts to ensure human rights standards. The first moves towards an International Criminal Court were, in fact, initiated by NGOs. In the late 19th century Gustav Moynier, president of the International Committee for the Red Cross, suggested an international tribunal to deal with the atrocities committed in the Franco-Prussian War 1870-71 (Albion 2001:3). Later efforts, such as in the negotiations for the Treaty of Versailles, which anticipated a war trial for the Kaiser, and the League of Nations, which negotiated a Convention for the Establishment of an International Criminal Court in 1937, were the result of multilateral treaties and pressure from both the general public and the private sector. However, it is generally recognised that the first step towards the ICC came in 1945 with the establishment of the International Military Tribunal at Nuremburg (closely followed by its twin tribunal in Tokyo 1946), where high ranking officials from the Axis powers were tried and punished for atrocities committed in WWII. Despite the controversy of these trials being seen as examples of 'victor's justice', they introduced several legal concepts, including crimes against humanity, into customary international law. In addition, these trials were noteworthy in that they prosecuted individuals for

3 In both these cases, the necessities of power politics took precedence over institutionalism, with nations refusing to cooperate and leaving little recourse for those seeking to hold individuals accountable. See von Hebel 1999:15-16.

4 There has been much controversy about the Nuremburg and Tokyo Trials as examples of progress in international humanitarian law. Initiated by the US, both trials were highly politicised and had dubious standing in customary international law. It has been argued that these trials were merely show trials eliminating political enemies, instead of any concerted attempt at creating or holding perpetrators accountable to humanitarian law. See Economides (2001:114), Eser (2001:4-5). These trials however, were said to violate two fundamental principles of criminal law: *nullum crimen sine lege* and *nulle poena sine lege*, basically meaning that there can be no crime without previously existing legislation, and thus no punishment without legislation. From Bos 1999:41 (my translation). Other useful sources for the trials at Nuremberg and Tokyo include von Hebel (1999:18-22) and Bass (2000:147-205).
crimes according to the customary laws of war, rather than states. Following these post-WWII trials, the UN General Assembly established the "Committee on the Progressive Development of International Law and its Codification" to continue the general principles set out in the charter of the Nuremberg Tribunal\(^5\). In December 1950, the General Assembly appointed officials to prepare a draft statute, but due to Cold War bi-polar political divisions within the UN, for the next 30 years attempts to develop the ICC were stymied.

World events at the end of the Cold War once again brought the idea of international humanitarian law onto the international agenda. By this time, international NGOs were becoming progressively stronger and more vigilant and, due to the technological advancements, networks of NGOs pursuing human rights justice are made possible\(^6\). NGOs were especially active in pressuring states to move to create a means for bringing violators of human rights and war crimes to justice. In this post-Cold War environment where human rights were brought squarely onto the international agenda, the Security Council established the tribunals for Yugoslavia (1993) and Rwanda (1994). These tribunals were an important step in legitimating the idea of punishment for war crimes, as the tribunals were not the biased products of military victory, but established by the Security Council\(^7\). However, there remained a lack of cohesive legislation to complete this norm. Again, human rights commanded international attention, and further accelerated the need for a less arbitrary, permanent and independent judiciary body to try war crimes.

Consequently, the ICC is an important step in the protection of human rights standards, as it provides a permanent and impartial seat for the pursuit of justice, without the sense of 'victor's justice' or selectiveness linked to \textit{ad hoc} war crimes trials. From the time of the Nuremburg and Tokyo trials up to the tribunals for Yugoslavia and Rwanda (1993/1994), Cold War divisions meant states made little attempt to bring the perpetrators of genocide and war crimes to justice, and

\(^5\) The Judgment of the Nuremberg Tribunal stated that "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" establishing the principle of individual criminal accountability for all who commit such acts as a cornerstone of international criminal law (UN overview of ICC).

\(^6\) See Keck and Sikkink (1998:79-120) for the development of NGOs and network over this course of the 20\textsuperscript{th} century.

\(^7\) These \textit{ad hoc} tribunals however, were temporary in both theory and practice. They were selective in their cases, limited in their time frame and geographical scope, hundred by certain political and social circumstances, and the substantial costs of setting up these tribunals ensured it was unpredictable as to their regularity (Bos 1999:42).
these instances were selective and politically motivated, and temporary or *ad hoc* tribunals have proved to be ineffectual and limited. There is a general reluctance of the UN Security Council to request *ad hoc* committees, and the politicisation of such decisions means that both the financial burden and the political will to following through with consistent approach to international justice are obstacles.

**Features of the ICC**

The ICC is a permanent independent judicial body exercising jurisdiction over the most serious violations of international human rights and humanitarian law. These violations are grouped within the categories of genocide, crimes against humanity and war crimes[^8]. The ICC will have jurisdiction in civil conflicts and international engagements, as well as cases of genocide. In legal, academic and political spheres, the Court's creation has been widely acclaimed as a benchmark for international justice and human rights law, emerging from a gradual process of evolving humanitarian norms that has spanned three centuries.

The purpose of the ICC is to try individuals for their behaviour in war[^9]. Prescient of the Pinochet case[^10], the ICC will try individual perpetrators of systematic and gross violations of human rights, including heads of state, regardless of their military or civilian status. It is important to note that the Court focuses on war crimes that are "part of a plan or policy" or can be described as "systematic" or by "large-scale commission" (Rome Statute Article 8 (1) ICC website [http://www.icc-cpi.int/php/show.php?id=basicdocuments; Wedgewood 1999:94, Economides 2001:120]), making an appropriate distinction between common incidents in the uncertainty of war and truly remarkable cases of deliberate human rights violations that merit international attention.

An important feature of the ICC is not that it has the ability to introduce new legislation or revolutionalise customary international law, but rather that it codifies existing norms into an effective enforcement mechanism. The Court will

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[^8]: The crime of aggression is another of the Court's areas of jurisdiction. It was felt to be an important addition to the ICC Statute, but delegates could not agree on a satisfactory definition. It continues to be negotiated at the ICC's Preparatory Commission and, assuming that agreement is reached, the definition will be included within the ICC Statute when it is reviewed in seven years. ICC website - [http://www.icc-cpi.int/php/show.php?id=faq#4](http://www.icc-cpi.int/php/show.php?id=faq#4)

[^9]: The ICC differs from the International Court of Justice in that the ICJ, established in 1946, deals with interstate disputes and only member nations of the United Nations may petition it. More information can be found on the ICJ website - [http://www.icj-cij.org/](http://www.icj-cij.org/)

[^10]: The Pinochet case questioned the custom of sovereign immunity and served as an important step in the normative process towards accountability in international law. See Weller 1999:599-617.
make international standards of conduct more clearly delineated and will provide a mechanism for implementation of these standards. There already exists domestic legislation and multilateral treaties dealing with most of the crimes included within the jurisdiction of the ICC (such as genocide, torture, war crimes and crimes against humanity). Yet there has never existed at an international level an effective means of imposing legal standards or permanent enforcement mechanism with jurisdiction over individuals who commit these crimes. For this reason, the ICC represents a commitment from states and organisations to participate in ensuring that these standards for human rights are met11.

The ICC is not intended to supersede domestic law, or hold jurisdiction over domestic legal structures; rather it works with a focus on complementarity, including cooperation with the United Nations. This principle emphasises that enforcing the laws of armed conflict is still primarily the responsibility of national courts, making the ICC a court of last resort. Kenneth Roth has stated that ruthless leaders have committed atrocities and "have reasoned, quite accurately, that a bit of violence and intimidation is all it takes to shut down any possibility of national prosecution" (Human Rights Watch website - http://hrw.org/campaigns/icc/docs/ken-icc0909.htm). Thus, an important aspect of the ICC is that it will only act to prosecute when national courts are unwilling or unable to do so12. Kuwait, Cambodia, Yugoslavia, Somalia, the Congo, East Timor have all been sites of gross human rights abuse committed with impunity, and much of the appeal of the ICC lies in its capacity to deter repeated incidents of human rights violations.

**NGO involvement in the ICC**

11 The ICC has no direct powers for enforcement, and relies on state members to perform usual law enforcement duties such as arresting and detaining accused, compelling witnesses to attend court, attaining and executing search warrants and, to a certain extent, gathering evidence. Therefore it is imperative that member states cooperate with the ICC, and Article 88 in part 9 of the Rome statute obliges states to collaborate with the ICC (http://www.icc-cpi.int/php/show.php?id=basicdocuments). This means eliminating obstacles to cooperation and creating domestic legislation to ensure national courts and authorities cooperate with the ICC. In the case of Australia, Bellamy and Hanson (2002) give a detailed overview of the domestic obstacles that had to be overcome in the lead up to Australia’s ratification of the Rome statute. Also Flitton 2003:42-44, and Mason 2002:528-538, briefly look at the ratification process in Australia.

12 For example, a government may not be willing to prosecute its own citizens, especially if they are high ranking, or else if the national criminal justice system has collapsed due to internal strife and there is no court capable of trying such crimes (ICC http://iccnow.org/documents.html). See also Economides (2001:122).
NGOs participated in the ICC process in a variety of ways. These can be broadly grouped into three areas:

- International agenda setting
- Facilitating the ratification process and bringing organisational expertise
- On-going development and support of the Court.

In the late 80s and early 90s, only a small group of NGOs had active programs supporting the establishment of an ICC; and fewer still were monitoring the deliberations at the United Nations. In February 1995, about 25 of these groups met in New York, formed the NGO Coalition for an International Criminal Court (CICC) and established an informal steering committee\(^\text{13}\). This was significant as it brought together diverse NGOs with different goals and focus areas, enabling them to act in a cohesive manner to achieve set ends, and created a network to observe the ICC process, which involved NGOs from the outset.

From 1992-94, at the request of the General Assembly, the International Law Commission (ILC) drafted a statute, beginning a seven-year process for the establishment of a permanent International Criminal Court to try war crimes\(^\text{14}\). A Preparatory Committee (Prepcom) was established for preliminary negotiations, and a coalition of NGOs participated actively in formulating the various elements of the draft statute. At Prepcom, the CICC outlined the issues they felt should be included in the draft statute, and identified the primary goals they would hope to see achieved in the creation of the Court. They enlisted the support of states such as Canada and Denmark, with a history of support for international human rights issues who would eventually form the group of Like-Minded States. They set about constructing networks of activists and experts who would help their cause, especially in regard to international law and human rights advocacy. They anticipated potential obstacles and constructed a workable model as a starting point for the draft statute. Thus through their early involvement in the Court, NGOs were able to have a significant voice in setting the terms of the debate.


On 17 July 1998 the most significant step towards ending impunity for perpetrators of war crimes came with the adoption of the Rome Statute for the ICC. The Statute set out the Court's jurisdiction, structure and functions, and essentially represents the blueprint for what the ICC hopes to achieve. For the NGOs involved, the statute was the culmination of three and a half years of intense advocacy and unprecedented levels of co-operation between NGOs themselves, as well as between NGOs and the UN Secretariat. After several years of preliminary negotiations, 160 counties participated in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" working on developing and finalising the Statute. But most significantly, it was not just governments that came to the negotiating table, but also numerous NGOs acting in support, educational, lobbying and advocacy roles. The CICC grew to 800 members, and 235 NGOs were accredited by the UN General Assembly to participate in the Rome Conference. William R. Pace, as the Convenor of the CICC and executive director for the World Federalist Movement, estimates 450 representatives of these 235 NGOs were in attendance at the Rome Conference. Some larger NGOs such as Amnesty International and Human Rights Watch sent larger delegations than most countries, with the World Federalist Movement's delegation of 60 experts exceeding even the largest government delegation. Despite this sheer size, Pace noted that in all his experience, he had never seen NGOs cooperate and coordinate their activities more effectively and cohesively than at the Rome Conference. Thus Pace commented "time and time again the NGO coalition demonstrated that it was not only the largest delegation at the ICC Statute Conference, but also one of the most important" (Pace 1999 and Pace and Mark Thieroff 1999). It is remarkable that given the diverse backgrounds of the many NGO participants, cohesion rather than discord was the dominant theme of their activities.

15 The Statute provides for the entry into force of the ICC 60 days after 60 States have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11 April 2002, when 10 countries simultaneously deposited their instruments of ratification. Accordingly, the Statute entered into force on 1 July 2002.
16 In the end, 120 nations voted in favour of the adoption of the Rome Statute, 7 voted against it (including the US, China and Iraq), and 21 abstained. See Brady 2000; Eser (2001).
17 The role of the Coalition Secretariat is to coordinate, facilitate and support the work of its global membership. This is done through regional coordinators around the world, with staff posted in New York and The Hague, including information services coordinators for English, French and Spanish, a media liaison, a legal team, technical staff and others. http://iccnow.org/publications.html
While the official government delegations divided into 13 working groups and negotiated compromises, more than a thousand representatives of the CICC worked to facilitate negotiations over five weeks. They observed meetings, wrote analyses, position papers, and reaction papers, and summarised proceedings for both NGO and government delegations. Other tasks fulfilled by NGOs included providing legal expertise to many national delegations, supplying translating and interpreting services, holding briefings for the international media, providing the press teams to publish the conference’s daily newspaper and on-line bulletin, coordinating participation of diverse NGO groups, holding regional and sectoral (such as gender justice, victims, children) caucuses, and convening meetings with government and non-government groups, especially the group of Like-Minded Countries (HRW - www.hrw.org/campaigns/icc Pace 1999:202). As the Coalition has an industry-wide reputation for high-quality expertise, governments were keen to utilise these documents and services (Estes 2003:3). This strategy of support and education promoted access for the NGOs; in turn, the facilitative role played by the NGOs made it possible for government delegates to be adequately informed. Often the national delegates attending these sessions had not attended the Prepcom sessions, had little experience or understanding of the complicated mass of legal concepts and different legal systems involved, and were grappling with large amounts of information. They thus relied on the extensive legal expertise provided by NGO groups. Carol Estes reflects that in many cases, "NGOs helped broker compromises and find ways out of impasses" (Estes 2003:3). Although the official chronology of the International Criminal Court is well documented, from the NGO perspective, most of the existing evidence is anecdotal in nature. The issue remains largely unexplored by academic literature, and thus the aim of this research is to redress the deficiency.

Since Rome, the CICC has been recognised as a tightly organized, politically savvy group consisting of an assembly of 1,000 NGOs from all regions of the world, involved with the establishment and running of the ICC. The Coalition has grown to include many sectors of interest and global civil society, including human rights, arms control, the rights of women and children, peace, international law, humanitarian assistance, the rights of victims, and religion.

With entry into force of the Rome Statute for the ICC on July 1, 2002, the primary thrust of NGOs activities is over, and their new roles have taken on two distinct directions: i) working towards further entrenching the Court and ii)
monitoring human rights abuses to "trigger" prosecutions. The CICC is primarily concerned with continuing its work in a support role for the ICC, most specifically working towards universal ratification. To date, 92 countries have ratified the Statute. NGOs such as Human Rights Watch are conducting ongoing ratification campaigns, in which they regularly travel to different parts of the world to meet with and offer technical assistance to parliamentarians, government members, senior officials and local groups to raise awareness of the ICC and to assist with the process of domestic ratification and implementation of the Rome Statute.

Another ongoing goal of NGOs is to bring about more effective and complementary domestic legal agendas. The Lawyers Committee for Human Rights believes that justice is best carried out at the national level wherever possible, and their priority is to enable national systems to administer justice effectively. Another legal human rights advocacy group, the International Commission of Jurists (International Commission of Jurists website - http://www.icj.org/sommaire.php3?lang=en), believes that the most pressing concern is the inadequate incorporation of international human rights standards into national legislation and case-law, which they address through direct monitoring and the provision of expert technical assistance.

Other activities of NGOs include providing administrative support and lobbying particular decisions on the appointments of the Court, as well as other logistical aspects of its operations, such as the Immunity and Privileges legislation for Judges and Court officials currently being negotiated. The CICC has also been active in the election of the judicial bench, and elected officials for the Court. In

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18 The CICC has developed the following goals for its work at this time:
1. Obtaining worldwide ratification of the Rome Statute
2. Ensuring the development of implementing legislation in all ratifying countries.
3. Ensuring that the appropriate mechanisms are in place for the Court to begin functioning effectively as early as possible.
4. Monitoring and supporting the work of the Assembly of States Parties.
5. Generating international public support for the Court.
6. Providing information to key stakeholders at the national and international level about the Court, the Rome Statute & supporting documents.
7. Monitoring and supporting the work of the functioning Court.
19 The best available list of these countries, information on the ratification process in different legal systems, the status of current ratification efforts, can be found on the CICC website http://www.iccnow.org/countryinfo.html. Other lists are on HRW website http://www.hrw.org/campaigns/icc/ratifications.htm.
20 HRW - http://www.hrw.org/campaigns/icc/implementation.htm. This page also has information about various ratification and implementation strategies of various counties, including those from the Like-Minded Group.
February 2003, the Court's Assembly of States Parties (the ICC's governing body) elected the court's first 18 judges. The result was a diverse judicial bench (the judges include 7 women and representatives from all regions of the world).

An innovative aspect of NGO involvement in the ICC is that they are able to bring issues of systematic human rights abuse to the attention of the prosecutor, as well as gather information and provide credible evidence (Rome Statute, Article 15). NGOs can also speak on behalf of victims who for various reasons cannot come forward. This ongoing role gives NGOs a key responsibility in the ICC, and allows the Court to utilise networks of NGOs and their expertise and contacts with personnel with working experience in the field to monitor emerging issues for the Court.

Another key development of the Court was the appointment of an independent prosecutor \((\textit{proprio motu})\). Argentine Luis Moreno Ocampo was sworn in as the first chief prosecutor of the Court\(^{21}\). The inclusion of an independent Prosecutor is an interesting attempt to bring about impartiality and avoid politically motivated prosecutions or protection. As the Prosecutor can evaluate evidence from any source, the Court will not have to wait for states to find it politically expedient to refer cases. With the independent Prosecutor, victims themselves or NGOs that work with victims can submit testimony and information directly to the Court\(^{22}\).

**Conclusion**

The campaign by NGOs for the establishment of the Court has significant implications for human rights campaigners, but also should be understood in a broader context. The establishment of the Court could potentially affect some of the most contemporary issues in international relations, such as recruitment of child soldiers, the use of crimes of sexual violence as a tool of war, ethnic and civil war, the trafficking of small arms, and a range of broader human security concerns.

\(^{21}\) Moreno Ocampo is an experienced international law expert best known for his successful prosecution of members of the Argentine Military Junta in the 1980s, and has good relationships with the US and UN. Washington Working Group for the ICC - [http://www.wfa.org/issues/wicc/wicc.html](http://www.wfa.org/issues/wicc/wicc.html).

\(^{22}\) In July 2003, Moreno Ocampo identified the situation in Ituri, Democratic Republic of the Congo, as his highest priority. At the time of writing this paper, the Prosecutor and his staff are currently examining reports from various NGOs they have received regarding the Congo and crimes such as murder, mass rape, the use of child soldiers, and large-scale displacement of civilians. WICC - [http://www.wfa.org/issues/wicc/factsheets/nextsteps.html](http://www.wfa.org/issues/wicc/factsheets/nextsteps.html). The next step would be for the office of the Prosecutor to seek approval from a pre-trial chamber to start an investigation.
The ICC should not be seen as the final chapter in attempts to secure human rights internationally, but rather as a multilateral mechanism for concerted international human security efforts from both public and private sectors. Jody Williams (2003:1), awarded a Nobel prize for her work in establishing the Ottawa Convention to Ban Landmines, describes the ICC as an example of the "increasing strength of global grassroots movements to promote peace, human rights protection and the rule of law by seeking effective cooperation at the international level... structured around a diverse global network of NGOs [in] collaboration with governments and the UN".

The participation of NGOs throughout the ICC's development demonstrates their increasing significance in international politics and ability to initiate and propel issues onto the international political agenda.

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