

**CANADA'S COURT? CANADIAN DIPLOMACY AT THE ROME CONFERENCE AND THE
MAKING OF INTERNATIONAL CRIMINAL LAW**

by
Jacob Damstra

15 – 05 – 2015

Cognate Thesis
Master of Arts
Department of History
The University of Western Ontario

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ABBREVIATIONS

CanDel – Canadian Delegation
CF – Canadian Forces
CICC – Coalition for an International Criminal Court
CNICC – Canadian Network for an International Criminal Court
CW – Committee of the Whole
DFAIT – Department of Foreign Affairs and International Trade
DM – Domenic McAlea
DND – Department of National Defence
DOJ – Department of Justice
DR – Darryl Robinson
FW – Fergus Watt
HOD – Head of Delegation
ICC – International Criminal Court
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
ILC – International Law Commission
JH – John Holmes
KP – Kimberly Prost
LMG – Like-Minded Group of States
NGO – Non-Government Organization
PrepCom – Preparatory Committee
RCMP – Royal Canadian Mounted Police
UN – United Nations
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
US – United States
VO – Valerie Oosterveld

INTRODUCTION

*We stand poised at the edge of invention: a rare occasion to build a new institution to serve our need. An International Criminal Court is within our grasp. I wish to outline for you today why I believe that we must seize this opportunity in a spirit of hope and determination.*¹ – Lloyd Axworthy, 15 June 1998, at the opening of the Rome Conference

Delivering a speech to a crowded room, buzzing with excitement at the United Nations (UN) Food and Agriculture Organization headquarters building in Rome, Italy on a warm June evening in 1998, Canadian Foreign Minister Lloyd Axworthy proceeded to implore the international community to create an international criminal court (ICC) worth having. In so doing, Minister Axworthy's opening remarks contained two underlying assumptions: first, and more obviously, he, speaking for Canada, believed the ICC was a desirable – even necessary – institution; second, more discretely, his comments suggest that he saw Canada as a world leader that could, and would, champion that cause. Over the next five weeks, Canada, through its dozen or so delegates to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference), set out to realize its goals. Not only its goal of codifying international criminal law and creating an international institution to interpret and apply that law, but also its goal of finding a place for Canadian foreign policy and diplomacy in world affairs more broadly. Of course, all of this begs multiple questions: why did Minister Axworthy believe that it was desirable and necessary to establish the ICC and, further, why was Canada well positioned (if it was at all) to lead that charge? Answers to these questions are suggested herein, but they are only a preliminary focus of this thesis.

¹ Lloyd Axworthy, "Notes for an Address to the Diplomatic Conference to Establish an International Criminal Court" *Department of Foreign Affairs and International Trade* (15 June 1998).

Another preliminary question, one that necessitates a preliminary answer, is why is the Rome Conference important enough historically to justify research? For one thing, it has been said that the ICC “could well be the most important institutional innovation since the founding of the United Nations.”² When the *Rome Statute of the International Criminal Court*³ was adopted on the last day of the Rome Conference, UN Secretary General Kofi Annan called it “a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law.”⁴ Shortly after its conclusion, the Rome Conference was “generally seen as the most important international legal conference since the Law of the Sea Conference, which concluded in 1982.”⁵ More recently, Professor William Schabas has written that “the Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combines with a series of more political propositions that touch the very heart of State concerns with their own sovereignty.”⁶ Additionally, the sheer volume of contemporary and subsequent academic, political, and media analysis and debate about the politics, logistics, structure,

² Robert C Johansen, “A Turning Point in International Relations? Establishing a Permanent International Criminal Court” *Joan B Kroc Institute for International Peace Studies, Report No 13.1* (1997), 1 quoted in William A Schabas, *An Introduction to the International Criminal Court*, 4th ed (Cambridge: Cambridge University Press, 2011), x.

³ 2187 UNTS 90, entered into force 1 July 2002.

⁴ Kofi Annan, “Statement at the Ceremony held at Campidoglio, Celebrating the Adoption of the Statute of the International Criminal Court” (18 July 1998).

⁵ Philippe Kirsch and John T. Holmes, “The Birth of the International Criminal Court: The 1998 Rome Conference” *Canadian Yearbook International Law* 36.3 (1998), 36 [*Birth*].

⁶ Schabas, *Intro to the ICC*, 61.

composition, value, and effectiveness of the ICC speaks to its importance as a historical subject.⁷

Clearly, the Rome Conference is a historical event deserving of study in its own right. It also presents an intriguing opportunity to examine two dovetailing case studies. The first explores a general question, “How is international law made?” Here, international law has two senses: the creation of international institutions; and the codification of international criminal law. The second is a more specific case study about Canada’s role in post-Cold War world affairs. In particular, this later analysis concerns how and why, if at all, Canadian diplomacy was able to contribute to the making of this international law, before and at the Rome Conference?

In response to the former, more general question, a general hypothesis is sufficient. Based on the example of the Rome Conference and its culmination with the

⁷ Although, this thesis will not enter into the analysis or debates on these topics a representative selection of these works is listed here: Georg Nolte, “The United States and the International Criminal Court” in David Malone and Yuen Foong Khong, eds. *Unilateralism and U.S. Foreign Policy: International Perspectives* (Boulder CO: Lynne Rienner, 2003), 71-94; Michael J Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, 1st ed (New York: Palgrave Macmillan, 2008); Marlies Glassius, *The International Criminal Court: A Global Civil Society Achievement* (London: Routledge, 2006); David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: OUP, 2013); Benjamin N Schiff, *Building the International Criminal Court* (Cambridge, CUP, 2008); Karl Kaysen and Sarah B Sewall, eds., *The United States and the International Criminal Court: National Security and International Law* (Lanham MD: Rowan & Littlefield Publishers, 2000); Fanny Benedetti, Karine Bonneau, and John Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Leiden, The Netherlands: Koninklijke Brill NV, 2014); John R Bolton, *Surrender is Not an Option: Defending America at the United Nations* (New York: Threshold Editions, 2007); Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999); Yves Beigbeder, *International Criminal Tribunals - Justice and Politics* (London: Palgrave-MacMillan 2011); Kreb & Lattanzi, eds, *The Rome Statute and Domestic Legal Orders* (Baden-Baden: Nomos, 2000); Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos; 1999); Roy S Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publishers, 2001); Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsley, NY: Transnational Publishers, 2002); Antonio Cassese, Paola Gaeta, and John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press); Payam Akhavan, "Commentary on the Rome Statute of the International Criminal Court" *American Journal of International Law* 97.3 (2003), 712.

establishment of the ICC, the creation of international law has three necessary elements: an idea, advocacy, and an opportunity. First, the development of any law begins with an idea – a compelling need or a persuasive purpose for the development of the institution of justice. Second, relentless advocacy, in this case through diplomacy at an international conference, is required to bring the idea to fruition. Third, any development of this magnitude in international affairs will only be possible during a particular historical moment, under a constellation of factors that allow for the first two elements to combine and succeed. Although further study would be necessary to determine the applicability of this three-part model for the making of international law more broadly, in the context of the Rome Conference, this thesis will explore the idea, the advocacy, and the opportunity which together led to the Rome Statute and the foundation of the ICC.

The bulk of this thesis is spent engaging with the latter question. What follows is a more-or-less chronological analysis of the making of the ICC and Canada's place in developing the idea, advocating for it through diplomacy, and the historical backdrop that framed the negotiations. Myriad questions guide this study. They are: how does Canadian diplomacy before and at the Rome Conference fit into post-World War Two Canadian diplomacy as a whole?; what was the historical backdrop that framed the negotiations for the ICC?; why, how, and by whom was Canadian diplomacy configured prior to the Rome Conference?; what were the key policy ideas and goals for Canada's diplomatic efforts in pursuit of an international criminal court and how did the Canadian Delegation (CanDel) plan to achieve those goals and ideas?; what were the Delegations' expectations for the negotiations at the Rome Conference?; how did Canada present itself at the opening of the Rome Conference?; what were the internal and external politics of

CanDel's diplomacy in Rome?; how did the Canadian Delegation conduct itself and contribute at each phase of the Rome Conference?; and did the treaty that emerged from Conference satisfy the Canadian goals for the ICC and/or for Canadian diplomacy?

The long answer to each of these questions is discussed below, in turn.⁸ The short answer, this thesis suggests, is by virtue of a “decentralized and empowering” mandate the Canadian Delegation to the Rome Conference was able to organize and strategize successfully in pursuit of Canada's cornerstones for the *Rome Statute of the International Criminal Court*. Ultimately, CanDel's diplomacy was fundamental to advancing the idea of “human security” in Canadian foreign policy international law, achieving an “independent and effective” International Criminal Court, all while re-establishing Canada's place in post-Cold War world affairs as a middle power, a bridge builder, and a pragmatic internationalist. Before moving into the substantive discussion of this claim, it is necessary to briefly explain what this thesis is, and what it is not.

This work is not intended to be thorough, comprehensive account of the international politics or procedure of the conduct of the preparatory meetings and the Rome Conference. These works exist elsewhere.⁹ Nor is this thesis purporting to sit in judgment over the Rome Statute's provisions, the function of the ICC to date, or the desirability or effectiveness of international criminal law and the Court itself in the first

⁸ The answers to these questions are derived primarily from the first-hand accounts of the Canadian diplomats who represented Canada in the Preparatory Committee meetings and the Rome Conference itself. Some of the delegates were only able to give not-for-attribution comments about their involvement; these are used as background. Others gave full descriptions and are cited herein. Neither Lloyd Axworthy nor Philippe Kirsch was able to provide an interview. Instead, this thesis relies on their written accounts of their respective roles in the negotiations for the ICC.

⁹ To name a few: Schabas, *Intro to the ICC*; Kirsch and Holmes, *Birth*; Benedetti, Bonneau, and Washburn, *Negotiating the International Criminal Court*; Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute*; M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" *Cornell International Law Journal* 32 (1999), 443.

place. These discussions also exist elsewhere.¹⁰ Rather, this is a study of diplomacy as a historical subject. The *Oxford English Dictionary* defines ‘diplomacy’ as “the conduct of international relations by negotiation.” Diplomacy has been called “the engine room” of international relations, but has received strikingly little attention among international relations scholars.¹¹ Instead, Jonsson and Hall suggest that the study of diplomacy has been largely left to historians.¹² To make diplomacy the historical subject of this thesis, therefore, fits this general trend. Making it a historical subject necessitates further deconstruction of the broad understanding of diplomacy as ‘international relations through negotiations.’ Throughout the following, it will be shown that the diplomacy practiced by the Canadian Delegation in Rome was the product of internal and external political dynamics, not simply a policy that was executed in a vacuum.

Developing Canadian Diplomacy

The story of Canada’s contributions at the Rome Conference begins well before 1998. Canada’s position as a contributor to international law - through institutionalization and codification of law – and to international relations, has been percolating since its emergence as an independent and vocal actor on the global stage. The origins of Canada’s influence on international laws and institutions arguably coincided with the Allied powers planning and subsequent construction of a new world order during World

¹⁰ For example, Bosco, *Rough Justice*; Bolton, *Surrender is Not an Option*; Sadat, *The International Criminal Court and the Transformation of International Law*; Adam Smith, *After Genocide: Bringing the Devil to Justice* (New York: Prometheus Books, 2009); Yves Beigbeder, *International Justice Against Impunity: Progress and New Challenges* (Leiden: Martinus Nijhoff Publishers, 2005).

¹¹ Robert Cohen, “Putting Diplomatic Studies on the Map,” *Diplomatic Studies Programme Newsletter*, Leicester University, (4 May 1998), cited in Christer Jonsson and Martin Hall, *Essence of Diplomacy* (London: Palgrave Macmillan, 2005), 1.

¹² Jonsson and Hall, *Essence of Diplomacy*, 7; C Elman and MF Elman, eds., *Bridges and Boundaries: Historians, Political Scientists, and the Study of International Relations* (Cambridge, MA: MIT Press, 2001).

War Two (WWII) and in the war's immediate aftermath.¹³ Since that time, successive Canadian governments have continuously grappled with the problem of first defining, then actually delivering on, Canada's role in the world. In this sense, the history of Canadian diplomacy can be understood as a largely *introspective* process of discovering Canada's place in international affairs.

WWII and its aftermath was a critical opportunity to define Canada's role in the world. In *The Shaping of Peace*, Canadian diplomat turned historian, John Holmes, recalled that, from 1943 through 1945, Canada, through Prime Minister William Lyon Mackenzie King and the diplomats of the Department of External Affairs, decided to become a world power – a leader of the so-called middle powers, a champion of the functional approach to international organization, and an advocate for economic and social concerns as critical functions of international security.¹⁴ Historian Adam Chapnik has presented a slightly revised understanding of Canada's post-WWII position. “As a country that was relatively new to world affairs, Canada lacked the bureaucratic infrastructure and the resources necessary” to be a middle power leader or greatly influence great power politics, at the San Francisco Conference to establish the United Nations, Chapnik suggests.¹⁵ The theme throughout Chapnik's *The Middle Power Project* is one of Canada restraining idealism in favour of pragmatic concern for

¹³ Adam Chapnik, *The Middle Power Project: Canada and the Founding of the United Nations* (Vancouver: UBC Press, 2005); John Holmes, *The Shaping of Peace: Canada and the Search for World Order 1943-1957*, 2 vols (Toronto: University of Toronto Press, 1982).

¹⁴ *Ibid.* The functionalist approach to international organization, that is, representation and influence on international bodies and in Allied decision-making commensurate with a State's contributions to the war effort and its capacity to contribute to post-conflict reconstruction, was Canada's great contribution to the international relations of the war and immediate postwar period, according to Holmes. To that end, Holmes describes Canada's contributions to the post-war peace as being responsive and compromising, proposing constructive amendments and imaginative formulas, exploiting occasions, and insisting on certain basic principles at ix.

¹⁵ Chapnik, 5.

international stability. This pragmatic concern for international stability has remained constant in Canadian diplomacy and fostered a legacy of promoting such stability through strong international institutions and the codification of and respect for international law.

To varying degrees, Canada's participation in the post-WWII world reflects this desire for international stability through institutionalization and legalization. Although, as Holmes notes, "Canada took no part in the Nuremberg Trials" nor did it "adhere to the Charter set up by the International Conference on Military Trials in 1945 consisting of the four major powers",¹⁶ Canada did play a relatively active role in the retributive justice meted out by the victorious Allied Powers in Europe and Japan.¹⁷ Legal historian Patrick Brode has produced a comprehensive account of the actual conduct of war crimes trials by Canadian Military Tribunals against defeated Nazis and Imperial Japanese officers and soldiers.¹⁸ The Nuremberg and Tokyo Trials and their various national military tribunal counterparts would become the muse of proponents of greater institutionalization of international criminal law, specifically, the creation of a permanent international criminal court.¹⁹

¹⁶ Holmes, *The Shaping of Peace*, 133.

¹⁷ The most studied such incident is the *Abbaye d'Ardenne Case* in which a Canadian Military Tribunal prosecuted Nazi Brigadefuhrer Kurt Meyer for the execution of 20 Canadian Forces soldiers captured as prisoner's of war: See: Ian Campell, *Murder at the Abbaye: The Story of Twenty Canadian Soldiers Murdered at the Abbaye d'Ardenne* (Ottawa: Golden Dog, 1996); Howard Margolian, *Conduct Unbecoming: the Story of the Murder of Canadian Prisoners of War in Normandy* (Toronto: University of Toronto Press, 1998); P Whitney Lackenbauer, "Kurt Meyer, 12th SS Panzer Division, and the Murder of Canadian Prisoners of War in Normandy: An Historical and Historiographical Appraisal," *Gateway 3* (March 2001); P Whitney Lackenbauer and Chris Madsen, eds, *Kurt Meyer on Trial: A Documentary Record* (Kingston: Canadian Defence Academy Press, 2007); BJS Macdonald, *The Trial of Kurt Meyer* (Toronto: Clarke, Irwin & Co., 1954).

See also, John Stanton, "Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal," *Journal of American and Canadian Studies* 17 (1999): 61-87.

¹⁸ Patrick Brode, *Casual Slaughters and Accidental Judgments: Canadian War Crimes Prosecutions, 1944-1948* (Toronto: Osgoode Society for Canadian Legal History, 1977).

¹⁹ See *infra*, Part One.

Meanwhile, Canadian diplomats were engaged in pivotal processes of creating international law at national and international levels. On one hand, Canada's efforts at a national level can be seen in history Professor John Price's description of Canada's contributions to Japan's postwar Constitution.²⁰ On the other, Canadian John Humphrey was the Director of the UN's Human Rights Division, he was one of nine individuals on the Drafting Committee of the *Universal Declaration of Human Rights*²¹ (UDHR).²² Humphrey is credited with having prepared the Declaration's blueprint.²³ However, as William Schabas, a leading Canadian scholar on international law, points out, the Canadian government's position regarding the UDHR was skeptical, even hostile.²⁴ Again, concerns cited primarily focused on the threat posed by the UDHR to international stability, which was again at risk as tensions rose towards the eventual emergence of the Cold War.

Despite the chilling effect of the Cold War on the development of international institutions and international criminal law, was a formational period for Canadian foreign policy and Canada's role in international relations.²⁵ Prime Minister Lester Pearson took Canada onto the world stage in the 1950s and 1960s, crafting a distinct Canadian foreign

²⁰ John Price, "E.H. Norman, Canada and Japan's Postwar Constitutions," *International Affairs* 74 (Fall 2001): 383-405.

²¹ GA Res 217 A (III).

²² For complete discussion, see: Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001); Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

²³ "The Universal Declaration of Human Rights – History of the Document" online: UN, <<http://www.un.org/en/documents/udhr/history.shtml>>.

²⁴ William Schabas, "Canada and the Adoption of the Universal Declaration of Human Rights" (1998) 43 *McGill Law Journal* 403 at 406.

²⁵ For a discussion of the early Cold War years, see Greg Donaghy, ed., *Canada and the Early Cold War* (Ottawa: DFAIT, 1998); H Basil Robinson describes Canada's position on the world stage during Deifenbaker's administration from 1957-1963 in *Deifenbaker's World: A Populist in Foreign Affairs* (Toronto: Toronto University Press, 1989).

policy and utilized the newly emerging postwar multilateral infrastructure to promote an agenda for international peace, security, and development.²⁶ Pearson's Nobel Peace Prize awarded for the Prime Minister's work on resolving the Suez Crisis is often held as a defining moment in Canadian foreign policy and the emergence of Canada's role as a peacekeeper in world affairs.²⁷ Throughout the Cold War, Canada was steadfast supporter of the UN, contributing to operations, paying its bills, and "playing a vital and innovative role in shaping UN action."²⁸

On the whole, Canada's foreign policy and diplomacy post-WWII is a story of pragmatism rather than idealism. Still, throughout this period Canada's position in international affairs has been variously described as a helpful fixer,²⁹ an honest broker,³⁰ a middle power,³¹ a peacekeeper,³² a functional contributor,³³ a multilateralist,³⁴ a nation that punches above its weight.³⁵ Above all, internationalism – i.e. preference for taking action within a multilateral framework – was the dominant theme in Canada's foreign policy.

²⁶ Lloyd Axworthy, "Introduction" to Rob McRae and Don Hubert, eds., *Human Security and the New Diplomacy: Protecting People, Promoting Peace* (Montreal & Kingston: McGill-Queens University Press, 2001), 8-9.

²⁷ John Melady, *Pearson's Prize: Canada and the Suez Crisis* (Toronto: Dundurn Press, 2006).

²⁸ Lloyd Axworthy, *Navigating a New World: Canada's Global Future* (Toronto: Vintage Canada, 2004), 236 [*New World*].

²⁹ Akira Ichikawa, *The helpful fixer: Canada's persistent international image* (Toronto: Canadian Institute of International Affairs, 1979).

³⁰ Jack L Granatstein, *Twentieth Century Canada* (Toronto: McGraw-Hill Ryerson, 1983).

³¹ Chapnik, *The Middle Power Project*.

³² Melady, *Pearson's Peace Prize*; Joseph T Jockel, *Canada and international peacekeeping* (Toronto: Canadian Institute for Strategic Studies, 1994).

³³ Holmes, *The Shaping of Peace*.

³⁴ Tom Keating, *Canada and World Order: The Multilateralist Tradition in Canadian Foreign Policy* (Don Mills: Oxford University Press, 2002); Robert Bothwell, *Alliance and illusion: Canada and the world, 1945-1984* (Vancouver: UBC Press, 2007).

³⁵ DFAITD, "'Punching above its weight': 1939-68" online: Government of Canada, <http://www.international.gc.ca/history-histoire/photos/punching-jouer.aspx?menu_id=39&lang=eng>.

This trademark internationalism is especially stark in considering the overwhelming influence of Canada's southern neighbour, the United States (US), on Canadian self-conceptions and international relations.³⁶ Not only does the geographical and geo-political placement of the US lead Canadian's to concern themselves with being "more than a junior partner to the United States"³⁷ but it has also created an opportunity for Canada to become much more. Specifically, from 1943 onward Canada has been able to add to its diplomatic legacy the role of bridge-builder between the US and the world - being responsive and compromising, proposing constructive amendments and imaginative formulas, exploiting occasions, and insisting on certain basic principles.³⁸

Canada's preparation for and participation at the Rome Conference in 1998 should not be seen as a stand alone diplomatic event, or even a pursuit unique to the particular Foreign Minister who directed and oversaw the process. Rather, Canadian diplomacy before and at Rome can and should be viewed as a continuation of Canada's perpetual effort to position itself on the world stage. From San Francisco in 1945 to Rome in 1998, Canada's diplomatic course has been charted by concern for international stability – through institutions and law. The remainder of this thesis will explore the degree to which Canada's diplomacy towards an International Criminal Court fits within this larger trend of Canadian diplomacy as a whole.

³⁶ Richard Gwynn, *The 49th Paradox: Canada in North America* (Toronto: McClelland and Stewart, 1985); Norman Hillmer, ed., *Partner's Nevertheless: Canadian-American relations in the twentieth century* (Toronto: Copp Clark Pittman Ltd., 1989).

³⁷ Axworthy, "Introduction", 8.

³⁸ Holmes, *The Shaping of Peace*, ix.

PART ONE PREPARATIONS FOR ROME

The time leading up to the Rome Conference saw a new optimism for international law and internationalist ideas. But, as will be shown below, this optimism did not translate into a unanimous and easy acceptance of an international criminal court. Rather, the temperament of international relations and the contemporaneous conduct of the ICTY and the ICTR simply provided a stage on which the main actors in the drive for the ICC could play their role. For Canada, such a role was not limited to the Rome Conference. As Minister Axworthy advocates in *Navigating a New World*, this was an important cause for Canadians, a *raison d'être* in light of the new world order: “If Canadians can get this global role right, if we can maintain and strengthen our capacity and will for creative independent action, we will fulfill our duty as global citizens and define our own place in the contemporary firmament.”³⁹ This thesis assessed the extent to which the Canadian Delegation’s performance leading up to and at the Rome Conference contributed to Canada’s place in the new world order.

Part One of the current work examines several questions about Canada’s diplomacy in advance of the Rome Conference. What was the historical backdrop in Canada and globally that framed the pre-Rome negotiations and the 1998 Conference? Why, how, and by whom was Canadian foreign policy and diplomacy in relation to the creation of the ICC and codification of international criminal law configured; and who was assigned to practice this diplomacy? What were the policy ideas and goals

³⁹ Axworthy, *New World*, 7.

motivating Canadian diplomacy in this pursuit? How did the Canadian Delegation operate at the Preparatory Committee (PrepCom) meetings leading up to the Rome Conference, and how did the Delegation plan to achieve its goals for the Court? Finally, what did the delegates assigned to exercise Canada's foreign policy expect going into the Rome Conference? Before endeavoring to answer these questions, it is important to understand how the international community arrived at the decision to organize the Rome Conference and the meetings preceding it.

A Long Road to the Rome Conference

The establishment of *ad hoc* tribunals at Nuremburg and Tokyo inspired serious efforts to establish a permanent body to administer international criminal justice. The UN International Law Commission (ILC) and a special committee of the UN General Assembly (UNGA) separately undertook to elaborate an international criminal court in the period from 1948 until 1954.⁴⁰ On 9 December 1948, the UNGA also called upon the ILC to draft a statute for a permanent international tribunal to punish genocide and other such crimes and to develop a 'Code of Crimes Against the Peace and Security of Mankind'.⁴¹ The ILC submitted a proposal in 1954, following the UNGA special committee report and draft statute in 1952⁴² both of which were received and ultimately put on hold by the UNGA.⁴³ Further work on the draft statute and code of crimes progressed in fits and starts until the end of the Cold War, and ultimately, the preparatory work for the Rome Conference in the 1990s.

⁴⁰ Kirsch and Holmes, *Birth*, 4.

⁴¹ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 216 B (III). See for discussion, Schabas, *Intro to the ICC*, 8-11.

⁴² Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952).

⁴³ Kirsch and Holmes, *Birth*, 4; Schabas, *Intro to the ICC*, 9.

Despite some initial movement towards an international criminal court, it was not until the tensions of the Cold War dissipated that the idea gained any serious traction.⁴⁴ Inspired by a desire to prosecute international drug trafficking, Trinidad and Tobago renewed the call on the international community to establish an international criminal court in 1989. The proposal was met with widespread interest and enthusiasm.⁴⁵ As requested by the UNGA,⁴⁶ the ILC prepared a Draft Statute in 1993,⁴⁷ which was revised in 1994.⁴⁸ Two years later, in 1996, the ILC finalized its draft ‘Code of Crimes Against the Peace and Security of Mankind.’⁴⁹ With its 1994 draft and the 1996 code, the ILC poured the foundation, on which the subsequent work towards an ICC would be done.

Meanwhile, the atrocities that unfolded in the former Yugoslavia and Rwanda demanded an immediate, ad hoc response. In 1993, the United Nations Security Council (UNSC) established an International Criminal Tribunal for the former Yugoslavia (ICTY) mandated to prosecute “persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.”⁵⁰ The following year, International Criminal Tribunal for Rwanda (ICTR) was created to prosecute

⁴⁴ Fergus Watt, Skype interview with author, 12 September 2014, 2 [FW interview]; Kirsch and Holmes, *Birth*, 5: The imminent end of the Cold War was a major factor in the emergence of a consensus on the establishment of an international criminal court for two reasons. First, it allowed discussions to proceed on the merits of the court without previous ideological baggage. Second, the end of the Cold War unleashed ethnic tensions in central and eastern Europe that resulted in an increase in the types of crimes that might be adjudicated by an international court.)

⁴⁵ Schabas, *Intro to the ICC*, 10; Kirsch and Holmes, *Birth*, 5.

⁴⁶ UN Doc. A/C.6/44/L.18 (1989); UNGA Resolution 44/39 (4 December 1989).

⁴⁷ Schabas, *Intro to the ICC*, 10.

⁴⁸ James Crawford, “The ILC’s Draft Statute for an International Criminal Tribunal” *American Journal of International Law* 88 (1994), 40; James Crawford, “The ILC Adopts a Statute for an International Criminal Court” *American Journal of International Law* 89 (1995), 404; UN Doc. A/49/10, ch 2, paras 23-41.

⁴⁹ John Allain and John RWD Jones, “A Patchwork of Norms: A commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind” (1997) 8 EJIL 100; Schabas, Introduction to the ICC, 11.

⁵⁰ UN Doc. S/RES/808 (1993).

genocide and other such serious crimes committed in Rwanda and neighbouring countries during 1994.⁵¹ The UNSC's ad hoc tribunals were based largely on the work already underway within the ILC.⁵² Professor Schabas notes that not only did the jurisprudence of the *ad hoc* tribunals fuel debates about various provisions of the still-to-be-written statute of a permanent tribunal, but the ICTY and ICTR also set a legal precedent to guide the drafters and offered "a reassuring model of what an international criminal court might look like."⁵³

It was also evident, though, that the *ad hoc* approach was not enough. Former Canadian diplomat Darryl Robinson comments: "this ad hoc approach suffered from major weaknesses [including] the substantial delays in getting a tribunal running, and the need for Security Council agreement to create a tribunal, leading to selective justice. A permanent independent institution was still required."⁵⁴ Kirsch and Holmes describe how the conflicts in the former Yugoslavia and Rwanda redoubled the ILC's preference for a permanent body, independent of the UNSC, to create an effective deterrent against the most heinous crimes.⁵⁵

By 1995 it was clear that the work of the ILC was not going to be sufficient to be accepted by the UNGA by declaration or provide an adequate starting point for an international conference.⁵⁶ Thus, at the UNGA 1995 session it was determined that a

⁵¹ UN Doc. S/RES/955 (1994).

⁵² UN Doc. S/RES/827 (1993); Schabas, *Intro to the ICC*, 12; UN Doc. S/RES/955 (1994); For a general overview of the two tribunals, see William A. Schabas, *The UN International Criminal Tribunals, Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006).

⁵³ Schabas, *Intro to the ICC*, 13-14.

⁵⁴ Darryl Robinson, "Case Study: The International Criminal Court" in McRae and Hubert, eds., *Human Security and the New Diplomacy*, 171 ["The ICC"].

⁵⁵ Kirsch and Holmes, *Birth*, 5.

⁵⁶ FW interview, 2.

Preparatory Committee (PrepCom) would be set up for Member States, NGOs, and international organization to work out the debates and disagreements surrounding the drafts.⁵⁷ The PrepCom held two three-week sessions in 1996 and produced a comprehensive report to the UNGA with a number of proposed amendments to the ILC draft.⁵⁸ By resolution in 1996 and another in 1997, the UNGA determined that a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court would be held in Rome beginning on 15 June 1998.⁵⁹ Four more PrepCom meetings were held, three in 1997, and one in March 1998, as well as multiple informal intercessional meetings.⁶⁰ The PrepCom would become a proving ground for Canadian leadership on the issue.⁶¹

The Opportunity: A Particular Historical Backdrop

The Rome Conference represents a major landmark in the history of international institutions and international criminal law. It is suggested that such a momentous event in the development of international law requires a compelling idea or need, persuasive advocacy through diplomacy, and a particular moment in the history of international relations. One cannot therefore overlook the significance of the historical circumstances

⁵⁷ Schabas, *Intro to the ICC*, 17.

⁵⁸ *Ibid*; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc. A/51/22 (1996).

⁵⁹ UN Doc. A/RES/51/207 (1996); UN Doc. A/RES/52/160 (1997).

⁶⁰ Schabas, *Intro to the ICC*, 17. The informal inter-sessional meetings, especially the meeting held in Zutphen, The Netherlands in January 1998, were especially important for pushing along the draft statute: see e.g., *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, UN Doc. A/AC.249/1998/L.13.

⁶¹ Minister Axworthy makes the point unequivocally: “Canada immediately took a leading role in the preparatory meetings.” Axworthy, *New World*, 202

underlying the timing of the Conference. Darryl Robinson, a lawyer with DFAIT and a member of CanDel, recalled “It was just the right time for getting things done.”⁶²

As the components of a draft statute for an international criminal court were being hashed out by the ILC and considered by the UNGA, and while the ICTY and ICTR were creating international criminal law precedent, the world was reshaping dramatically.

Writing in 2001, Minister Axworthy recalled the devastating impacts of these dramatic changes. He noted:

In the past decade, more than 80 percent of casualties of conflict have been civilian. The figures are shocking. Worldwide, more than 30 million people have been displaced from their homes, countless others have been denied access to basic necessities, and millions of men, women, and children have been killed. Many of these defenseless individuals were targeted with intent: they rarely have adequate protection, and they certainly have little recourse to justice after their rights have been violated.⁶³

In this context, Axworthy described Canada’s foreign policy during this tumultuous decade as an attempt “to deal with new and newly transformed threats to the lives and safety of individuals, both at home and abroad. This agenda is crucial not only for the security of individuals, but also to maintain Canada’s role as a leading voice on the world stage.”⁶⁴

Additionally, Robinson pointed to a number of overlapping factors that made it appear that “a lot of the stars lined up.”⁶⁵ Fergus Watt, Executive Director of the World Federalists’ Canadian Chapter and the head of the Canadian Coalition for an International

⁶² Darryl Robinson, telephone interview with author, 20 October 2014, 7 [DR interview].

⁶³ Axworthy, “Introduction,” 4.

⁶⁴ *Ibid*, 9

⁶⁵ DR interview, 7.

Criminal Court, referred to the ICC as an “anomaly” and a “perfect storm.”⁶⁶ President Bill Clinton and his administration in the Whitehouse were quite progressive and internationally focused. The European Union was active in global affairs and Russia, still reeling from the collapse of its Soviet empire, was relatively less problematic in the 1990s than any other decade before on since. Critically, for Robinson, “Lloyd Axworthy was the Foreign Minister of Canada and he was doing all sorts of human security things, including child soldiers, land mines, ICC, responsibility to protect; all these big soft power, middle power ideas were percolating.⁶⁷ Watt was less sure about Minister Axworthy’s import. Although Axworthy does deserve a lot of credit, Watt argued, the idea for an international criminal court was “something that was supported through the legal bureau and foreign affairs, and there’s a lot of good work that diplomats can do autonomously at the UN and so that’s how it moved ahead.”⁶⁸ Either way, as political scientist Andrew Cooper observed, the international stage was set for a new type of leadership.⁶⁹

Directing Canadian Diplomacy towards the Rome Conference

It was against this backdrop that the world entered into negotiations about the creation of an international criminal court before and at the Rome Conference. It was also in this setting that Canadian diplomacy in support of the Court coalesced. This section asks the interrelated questions of “why, how, and by whom was Canadian foreign

⁶⁶ FW interview, 10.

⁶⁷ DR interview, 7.

⁶⁸ FW interview, 3.

⁶⁹ Andrew F Cooper, “Like-minded nations, NGOs, and the changing pattern of diplomacy within the UN system: An introductory perspective” in Andrew F Cooper, John English, and Ramesh Thakur, eds., *Enhancing global governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002), 1-18.

policy in relation to the ICC configured and why, how, and by whom was the diplomatic team assigned with executing that policy selected?" In answering these questions it becomes clear Canada pre-Rome Conference diplomacy was motivated in large part by Foreign Minister Lloyd Axworthy's concern with the perpetual problem of defining Canada's role in world affairs.

Writing in 1997, amidst a flurry of domestic and international speeches, Minister Axworthy identified an opening and a need for "continuing Canadian leadership."⁷⁰ At that time, Axworthy strongly believed "that Canada has the potential to be one of a group of influential countries which will steer the course of future events."⁷¹ What this meant for Axworthy was effectively cultivating and wielding Canada's soft power centered around what he termed, 'the human security agenda.'⁷² Observers termed this approach as "The Axworthy Doctrine" and the efforts and successes flowing from it, including Canada's role in the push for the ICC, "Axworthy's legacy."⁷³ The 'Axworthy doctrine'

⁷⁰ Lloyd Axworthy, "Canada and Human Security/ The Need for Leadership" *International Journal* 52.2 (1997), 183, 192.

⁷¹ *Ibid.*

⁷² *Ibid.*; Lloyd Axworthy, "Human Security and Global Governance: Putting People First" *Global Governance* 7.1 (2001), 19; Lloyd Axworthy, "NATO's New Security Vocation" *NATO Review* 47.4 (1999), 8; "We can play a role that is distinct and independent," says foreign affairs minister Lloyd Axworthy [Canada-US policy briefing] *The Hill Times* 538 (2000), 11.

⁷³ Prosper Bernard Jr. "Canada and Human Security: From the Axworthy Doctrine to Middle Power Internationalism" *American Review of Canadian Studies* (2006), 233; Steve Lee, "The Axworthy Years: Humanist Activism and Public Diplomacy" *Canadian Foreign Policy* 8.1 (2000), 1; Jennifer Ross, "Is Canada's Human Security Policy Really the 'Axworthy' Doctrine" *Canadian Foreign Policy* 8.2 (2001), 75; Joe Jockel and Joel Sokolsky, "Lloyd Axworthy's Legacy: Human Security and the Rescue of Canadian Defence Policy" *International Journal* 56.1 (2000/2001), 1; Barbara Amiel, "Lloyd Axworthy: A profile in stubbornness" *Maclean's* 112.3 (1999), 11; Fen Osler Hampson and Dean F. Oliver, "Pulpit Diplomacy: A Critical Assessment of the Axworthy Doctrine" *International Journal* 53.3 (1998), 379.

Fen Osler Hampson and Dean Oliver summarize the Axworthy doctrine's core principles as follows:

The end of the cold war has fundamentally changed the nature of international politics; security goals should be focused around human security and not state security; soft power is the new currency of international politics; military force is of declining utility in international politics; public diplomacy is increasingly effective in a wired world; non-governmental organizations (NGOs) are in the vanguard of the 'new diplomacy'; Canada

provided a set of guiding principles for Canadian foreign policy and for those Canadians charged with executing that policy. Fundamental among these prescriptions was the realignment of security priorities from state security to human security. It was this realignment which led Minister Axworthy to conclude that Canada was “a natural and obvious choice” to lead the push for an international criminal court.

“A Natural and Obvious Choice”

True to national form, the end of the Cold War forced Canada to redefine its position in a new geo-political environment. Under Foreign Minister Lloyd Axworthy Canada shifted towards a new role rooted in the human security agenda: “Canada began using the language of human security when it became clear that, in the aftermath of the cold war, a new foreign policy paradigm was needed.”⁷⁴ He describes human security as “a choice for the future—that all people, regardless of who they are or where they live, have a right to feel secure against war, violence, disease, disaster and terror.”⁷⁵

Human security thus became a lens through which Canadian foreign policy under Minister Axworthy viewed international affairs. From that starting point, DFAIT “developed a strategy for working towards new standards of international behaviour,

can lead 'coalitions of the willing'; and international change will come through the promulgation of new norms of which the key priorities for Canada are small arms, children's rights, international human rights, and peacebuilding. Hampson and Oliver, “Pulpit Diplomacy,” 380, citing Axworthy’s policy documents and speeches from the time, including: “The University of Ottawa Gordon Henderson Distinguished Lecture,” 6 November 1997; “Canada and Human Security: The Need or Leadership,” “Between Globalization and Multipolarity: The Case for a Global, Humane Canadian Foreign Policy,” and “We’re doing things nobody else can do,” an interview with Axworthy by Christina Spencer, *Ottawa Citizen* (5 April 1998).

⁷⁴ Axworthy, “Introduction”, 3-13. At 4, Axworthy admits to borrowing the term from the United Nations Development Programme (UNDP). Specifically, the 1994 UNDP Human Development Report first expressed the new concept of human security as having seven interdependent and universal dimensions: economic, food, health, environment, personal, community, and political: UNDP, *Human Development Report 1994* (New York: Oxford University Press, 1994), 22-33.

⁷⁵ Axworthy, *New World*, 24.

using the soft-power tools of communication and persuasion.”⁷⁶ At its heart, Axworthy suggests, “The human security agenda is an attempt to respond to a new global reality. ... It is, in essence, an effort to construct a global society where the safety of the individual is the central priority.”⁷⁷ From there, Axworthy and DFAIT advocated a new way of dealing with global issues, focusing on individual needs, in “a form of global governance that operates under global rules, works through global institutions and will require a form of global democratic politics to make decisions.”⁷⁸

The human security agenda was also fundamentally linked to developing creative global partnerships not just with similarly minded countries and international institutions, but also NGOs. Axworthy argues “Such coalitions between government and civil society are harbingers of the future, demonstrating the power of noble intent, good ideas, and pooled resources.”⁷⁹ Beyond building these networks for the effective exercise of soft power to achieve human security, such partnerships had the effect of Canada becoming approachable to take on international advocacy for many a *cause celebre*. One of the most compelling, according to Axworthy, and the focus of this paper, “was the case for [Canada] to become an active champion for the International Criminal Court.”⁸⁰

With the proclivity for the protection of individual rights against threats to human security, Canadian support and leadership in the movement for the ICC was, in Lloyd Axworthy’s words, “a natural and obvious choice.”⁸¹ Darryl Robinson captures the point

⁷⁶ Axworthy, *New World*, 4-5.

⁷⁷ Axworthy, “Introduction”, 12.

⁷⁸ Axworthy, *New World*, 5.

⁷⁹ Axworthy, “Introduction,” 12-13.

⁸⁰ Axworthy, *New World*, 156.

⁸¹ Axworthy, *New World*, 202. Not only was the human security approach a natural fit for Canada’s desired activist role in the UN system, but it was also mutually complementary with the push for the ICC: at 237.

succinctly: “If human security is to be safeguarded, this culture of impunity must be replaced by a culture of accountability.”⁸² Human security thus provided the compelling idea and the need for new international law in the form of an international criminal court to apply international criminal law. A focus on human security also provided the tools, techniques, and language of a new diplomacy through which to advocate for “a global system of security based on protecting social, political, and economic rights”⁸³ and build an institution capable of apprehending those responsible for serious crimes and bringing them to justice.⁸⁴

All ideas, of course, need a birthplace. And while the foregoing suggests that Minister Axworthy was receptive to the idea of Canadian leadership on the establishment of the ICC, he did not take the decision absent consistent consultation and prodding.⁸⁵ As Fergus Watt recalls, while Axworthy deserves a lot of the credit for the Canadian position and work on the Court, there were many others, in and out of government, that were working diligently on the issue long before Axworthy took up the torch.⁸⁶ It was in his 10th floor office of 125 Sussex Drive, the External Affairs Building, where Axworthy was approached personally and received mail requesting Canadian support and leadership on the push for an international criminal court.

As the Preparatory Committee meetings moved forward and the Conference in Rome drew nearer, Canada was increasingly viewed as friendly to the cause of establishing an independent and effective court. Axworthy recalls being approached by

⁸² Robinson, “The ICC,” 170.

⁸³ Axworthy, *New World*, 6.

⁸⁴ *Ibid.*, 7.

⁸⁵ Watt describes how representatives from all of the interested NGOs wrote to Axworthy and communicated the importance of a strong Canadian role in the push for the ICC: FW interview, 2.

⁸⁶ FW interview, 3.

William Pace, Executive Director of the World Federalist Movement-Institute for Global Policy and Convener for the Coalition for an International Criminal Court (CICC)⁸⁷ and asked to take a firm, leading position:

In early March of 1998, a delegation led by Bill came to my tenth-floor office to make a pitch. Concerned that pre-Rome negotiations were bogging down over technicalities, they asked if the Canadian government would take on the role of catalysts. It seemed to me a natural and obvious choice.⁸⁸

This strategy adopted by the CICC arose from a recognition, as Robinson writes, “[h]igh level political support was also essential in building momentum” and critical to “galvanize support for the ICC.”⁸⁹

In response to this request, which Minister Axworthy considered a ‘natural and obvious choice’, Axworthy did indeed take action to galvanize support for the Court.

Axworthy recounts that at the outset, he

enlisted the support of the prime minister and other ministers to set the subject as a diplomatic priority. The PM, especially, could be of real value by advancing the court during his various summit encounters. Using our own diplomatic net, and employing special envoys and members of Parliament, we made representations in many national capitals, supported regional seminars and sought endorsements at international gatherings.⁹⁰

⁸⁷ In February 1995, a couple dozen NGOs committed to the establishment of an international criminal court, met in New York to form an international Coalition for an International Criminal Court (CICC). The CICC brought together a diverse group of NGOs with various interests and goals, enabling them to work together, under the direction of an informal steering committee. See Kristie Barrow, “The Role of NGOs in the Establishment of the International Criminal Court” (2004) 2:1 Dialogue 16 at fn 13: “The Steering Committee for the CICC includes the following NGOs: Amnesty International, Arab League for Human Rights, Asociación por los Derechos Humanos, Canadian International Centre for Human Rights and Democratic Development, European Law Students Association, Fédération Internationale des Ligues des Droits de l’Homme, Human Rights Watch, Inter-African Union for Human Rights, International Commission of Jurists, Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, Women’s Caucus for Gender Justice in the ICC, World Federalist Movement.”

⁸⁸ Axworthy, *New World*, 202.

⁸⁹ Robinson, “The ICC”, 172.

⁹⁰ Axworthy, *New World*, 202.

Specifically, Robinson recalls a number of actions taken by Minister Axworthy and other DFAIT officials. Axworthy intensified his efforts at bilateral and multilateral meetings and through public statements and speeches.⁹¹ Meanwhile, other officials “at all levels lobbied in relevant for a and carried out demarches in capitals.”⁹²

Axworthy and his team’s most important actions in advance of the Rome Conference were those taken at the Preparatory Committee meetings (PrepCom). Those meetings were important generally because they set the tone going into the Rome Conference and framed the discussion and debate on various issues.⁹³ The PrepCom was also fundamental in establishing the Canadian Delegation that would represent Canada at Rome as well as developing strong Canadian leadership as a ‘friend of the court’.

Creating CanDel

The PrepCom was crucial to determining who would represent Canada at the Rome Conference. A number of members of the Canadian Delegation (CanDel) recall that their position was secured by virtue of their participation during PrepCom.⁹⁴ By virtue of his vested interest in the success of the process, be it because of his stake in the

⁹¹ Axworthy’s initial actions were geared toward consensus-building. He called on parliamentarians in Canada and other countries to work together and independently and urge their governments to engage constructively in the negotiations. Further, to encourage universal participation, “Canada contributed to a trust fund enabling least-developed countries to participate in the negotiations and also contributed to participation by NGOs of least-developed countries.” Robinson, “The ICC”, 172.

⁹² *Ibid.*

⁹³ See Kirsch and Holmes, *Birth*, 6. Without allocating any credit, the authors describe that “a great deal was accomplished in the PrepCom”:

First and foremost, the structure of the draft statute was developed and generally agreed on by states. Second, the framework for an innovative system of international criminal justice was developed, merging elements from different legal systems, in particular those of civil and common law. Third, there was agreement on some substantive issues including that of complementarity and on the general principles of criminal law that should be included in the statute. Finally, and perhaps most importantly, Chairman Bos put together a team of coordinators, representing all regions, who became respected leaders and experts in their different areas.

⁹⁴ John Holmes, email to author, 2 October 2014 [JH email response]; Kimberly Prost, telephone interview with author, 30 September 2014, 1 [KP interview]; Valerie Oosterveld, interview with author, Western University Canada, Faculty of Law, 1 October 2014, 3 [VO interview, 1].

human security agenda or his commitment to the CICC, somewhat unorthodoxly, Minister Axworthy took direct control of the vetting and selection process of the governmental and non-governmental members of the team he would send to Rome to build the Court he envisaged.

CanDel was comprised of government negotiators from the Departments of Justice, National Defence, and the Foreign Affairs, two NGO members, and one academic advisor, William Schabas.⁹⁵ Because of the content of the upcoming negotiations, Axworthy ensured that all but one of this core were trained lawyers. A few Canadian Ambassadors and diplomats in and around Rome, joined CanDel in Rome to play largely a logistical and support role.⁹⁶

DFAIT was in the lead as the Rome Conference was a diplomatic negotiation. As a standard practice for Canada in such multilateral negotiations, Foreign Affairs would include experts from whatever government Department was most relevant to the issues at bar. In the case of negotiations on a statute for an international criminal court, it was necessary of course to enlist the expertise of the Department of Justice (DOJ). Don Piragoff was from the Criminal Law Policy Section at the DOJ and was selected by Axworthy for CanDel because of his deep familiarity with all of Canada's criminal law policies.⁹⁷ Kimberly Prost was, at the time, the head of the DOJ's International System Group, which dealt with extraterritorial assistance, surrenders, and extradition requests on a state-to-state basis. Hence, Axworthy asked Prost to advocate for Canada's position on

⁹⁵ JH email response.

⁹⁶ VO interview, 1, 9: Fernard Tanguay, Ambassador, Embassy to the Holy Sea; Jeremy Kinsman, Ambassador, Embassy to Italy; and Gilbert Laurin, Counselor, Embassy to Italy.

⁹⁷ KP interview, 1): Piragoff was essential to the delegations background understanding and played a crucial role in 'reality-checking' various options – that is, assessing how they would work in a practical sense as it related to Canada's criminal law.

Part IX of the statute, which dealt broadly with State cooperation with the Court relating to requests for evidence, assistance, arrests, surrenders, and other similar items.⁹⁸

The prospect of an international criminal court that would prosecute genocide, crimes against humanity, and war crimes raised complicated questions about military law, the law of armed conflict, and the laws of war. Lieutenant-Colonel Domenic McAlea, a Legal Officer in the Canadian Forces (CF), had extensive training in each of these areas and was at the time the Director of International Law for the CF, and therefore “in a good position to advise the Canadian delegation” on these issues.⁹⁹ He was brought on by Axworthy as the military advisor to CanDel for expertise in: “Command Responsibility (Article 28), Defence of Superior Orders (Article 33) ... National Security, War Crimes (Article 8), Elements of Crimes (Article 9), and Immunities (Article 98).”¹⁰⁰ More pragmatically and importantly, LCol McAlea suggests, he was required to explain the “importance of defence of superior orders to NGOs [and Delegation representatives] who wanted no defences; didn’t understand command and control; and tried to superimpose an entirely unworkable Human Rights perspective onto the reality of armed conflict.”¹⁰¹

The NGO representatives were selected for similar reasons – expertise in a particular area that would become important throughout the negotiations. Oosterveld had attended the PrepCom representing the Women’s Caucus for Gender Justice and, in that

⁹⁸ KP interview, 1.

⁹⁹ Colonel Domenic McAlea, telephone interview with author, 4 October 2014, 1-4 [DM interview]: additionally, LCol McAlea had previously been deployed as an advisor to a UN Commission of Experts, which preceded the ICTY, and subsequently worked at the ICTY assisting the prosecutor. Thus, in addition to his training, LCol McAlea had practical experience in the exercise of international criminal law.

¹⁰⁰ Colonel Domenic McAlea, email to author, 3 October 2014 [DM email response].

¹⁰¹ *Ibid.*

role, had relentlessly lobbied the Canadian diplomats in New York on specific and general gender issues in the statute.¹⁰² After the final PrepCom in March 1998, when the Canadian government turned its mind to forming its Delegation for Rome, Oosterveld recalls “the Minister of Foreign Affairs decided that he wanted to have a gender expert on [CanDel] because gender issues had become such an important part of the Canadian identity – the Human Security Paradigm – he wanted it reflected on the actual delegation.”¹⁰³ As a young lawyer, passionate about human rights and gender issues, she saw the offer as an opportunity of a lifetime, accepted, and thus became CanDel’s gender expert for the Rome Conference.¹⁰⁴

David Matas was a preeminent Winnipeg human rights lawyer with academic and practical experience dealing with war crimes, crimes against humanity, and human rights abuses. In the mid-1990s he was affiliated with International Centre for Human Rights and Democratic Development and a prominent scholar on issues relating to penalties – and a staunch advocate against the capital punishment.¹⁰⁵ He was also a resident in Lloyd Axworthy’s constituency in Winnipeg and a friend and supporter of his Member of Parliament.¹⁰⁶ Matas recalls being approached by Axworthy and asked if he would represent CanDel on all matters relating to penalties at the Rome Conference, with specific emphasis on opposing the inclusion of any option for a death penalty. In addition to this narrow purpose, Matas (and Oosterveld) were tasked with relaying

¹⁰² VO interview, 1, 4. During the PrepCom, Oosterveld developed a very good working relationship with the Canadians and recalls that Canada in particular was very receptive to the ideas and proposals that she brought, on behalf of the Women’s Caucus, related to creating a gender sensitive Court.

¹⁰³ *Ibid*, 3.

¹⁰⁴ *Ibid*, 4.

¹⁰⁵ David Matas, telephone interview with author, 27 August 2014, 1 [Matas interview].

¹⁰⁶ *Ibid*.

information from NGOs to CanDel and vice versa, within certain limits of confidentiality, discussed further below.

While the Justice, Defence, and NGO delegates brought special expertise, the DFAIT lawyers brought a wealth of experience in international negotiations and international law. In 1998, Philippe Kirsch was Senior Legal Counsel to DFAIT and had already chaired drafting committees at a number of international conferences dealing with war victims and humanitarian law. Alan Kessel was a lawyer with DFAIT and joined CanDel from his position as Director of DFAIT's UN Criminal and Treaty Law Division. Kessel brought a similar experience to that of Kirsch, handling myriad bilateral and multilateral negotiations throughout the course of his career. John Holmes was similarly positioned as a member of DFAIT's Legal Bureau having led Canadian delegations at on the UN Convention on the Rights of the Child and the UN Convention on Migrant Workers as well as negotiating OSCE instruments such as the Copenhagen document.¹⁰⁷ In 1996, Axworthy appointed Holmes Counselor to Canada's Permanent Mission to the UN in New York. When he arrived in New York, the PrepCom meetings were underway and Holmes joined those negotiations, and positioned himself to become a part of CanDel at Rome. Finally, Darryl Robinson was the newest member of DFAIT to be assigned to CanDel. From 1994 to 1996, he had worked with Amnesty International Canada as a law student, advocating for an international criminal court. When Robinson was hired by DFAIT in 1997 as a Legal Officer in the UN Criminal and Treaty Law Division he was immediately tasked by the Foreign Minister to the PrepCom

¹⁰⁷ JH email response.

negotiations and assigned to CanDel for the Rome Conference.¹⁰⁸ Despite the broad range of perspectives and backgrounds coexisting in the delegation, Holmes reminisces that “CanDel was outstanding and we got along extremely well.”¹⁰⁹

Organizationally, Minister Axworthy was the formal Head of Delegation (HOD), but served that role in a largely figurehead fashion. Practically, Alan Kessel served as Deputy Head of Delegation, handling the day-to-day organization and strategy of the Canadian contingent at the PrepCom meetings in New York. But, “in 1997, the HOD changed unexpectedly.”¹¹⁰ From an outsider’s perspective, Fergus Watt credits this unexpected change to a level of abrasiveness that Kessel portrayed, threatening a rift between Canada and other like-minded countries and many NGOs. Watt remembers that Bill Pace and other NGO leaders sensed an imminent fissure and went to Minister Axworthy to request the change.¹¹¹ No member of CanDel shared this view;¹¹² John Holmes credited the change to Kirsch’s arrival in New York following the boundary arbitration case with France over St. Pierre and Miquelon. As Kirsch was DFAIT’s Senior Legal Advisor, he assumed the Deputy HOD role and Kessel became the Alternate HOD, effectively Kirsch’s number two. Holmes and, to a lesser extent, Robinson were charged with supporting the HOD and organizing CanDel and LMG meetings, while still participating in some negotiations.¹¹³

¹⁰⁸ DR interview, 1.

¹⁰⁹ JH email response.

¹¹⁰ *Ibid.*

¹¹¹ FW interview, 11.

¹¹² DR interview, 3.

¹¹³ JH email response.

Below this, the delegates from Justice, Defence, and the NGOs were given a broad discretion to pursue CanDel's mandate. Though chain of command was clearly established, it was a flexible and open delegation. Ideas and issues passed just as freely upwards as they were passed downwards. Oosterveld describes it as "a Canadian way: [CanDel] was hierarchy but it was broad at the base, with all these people [working diligently and independently] along the bottom."¹¹⁴ This flexibility and breadth of skills and perspectives within the Delegation left open possibilities for creativity and success, but also invited conflict and dysfunction. It was therefore crucial to this particular case study in the practice of Canadian diplomacy that these individuals assembled together as CanDel were sufficiently united in pursuit of the policy ideas that brought them together and had a clear understanding of the goals they were instructed to pursue.

A Simple Idea, Simply Instructed

Upon the creation of CanDel, each member was given a confidential brief – a thick, bound package – containing background information about the state of negotiations heading to Rome, general logistical instructions (i.e. flights and accommodations, contact lists, etc.), and a specific directive from the Minister of Foreign Affairs.¹¹⁵ Crucially, this directive underscored the foundational motive of Canadian Delegations actions in the negotiations should be guided by the human security agenda, described above. CanDel's brief also included its mandate – that is, the parameters or bounds within the delegates could maneuver and negotiate – as well as instruction Canada foreign policy goals in relation to the creation of the Statute for the International Criminal Court.

¹¹⁴ VO interview, 1, 9.

¹¹⁵ As the specific contents of the brief remain confidential, this general description is distilled from conversations between the author and several of the delegates.

CanDel's goal, in broad strokes, was fairly simple. The goal, as John Holmes puts it,

was a statute that was strong enough to be effective (and therefore enjoy public support) but with sufficient protections for States so as to secure widespread ratifications. We planned and hoped for a consensus at the Conference, as we wanted the statute to have global support. But we also realistically planned for possible votes.¹¹⁶

Darryl Robinson recalls that the mantra describing this goal was “strong on paper, strong in support.”¹¹⁷ Each member of CanDel similarly articulated that overarching goal – a widely (if not universally) accepted, but still effective Court.

Within that broad goal, the CanDel brief also included a number of discrete objectives. These objectives were later set out in a circular frequently distributed to the LMG. CanDel, eventually along with the entire LMG, was to commit itself to four key goals: first, the ICC should have “inherent jurisdiction over the crimes of genocide, crimes against humanity, and war crimes (in international and non-international armed conflict)”; second, the ICC must have “an independent prosecutor with an *ex officio* role”;¹¹⁸ third, “the Statute must impose an obligation on States parties to cooperate fully with the ICC”; and fourth, all “questions of jurisdiction and admissibility should ultimately be decided by the Court.”¹¹⁹

CanDel's instructions on how to achieve these goals were limited. Holmes also explains that beyond the broad underlying pursuit of human security, the broad goal of a

¹¹⁶ JH email response.

¹¹⁷ DR interview, 2.

¹¹⁸ As a corollary to the need for an independent prosecutor, the LMG circular held that “Article 23(3) of the ILC draft Statute unacceptably subordinates the ICC to the Security Council.” Article 23(3) of the draft Statute stated “No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.”

¹¹⁹ LMG Circular.

strong, widely supported Court, and the specific objectives it shared with the LMG, the Delegation “had a lot of negotiating latitude since the subject matter was so complex and interlinked.”¹²⁰ It was largely left up to the delegates to determine how best to achieve these goals. CanDel met routinely in the months before the mid-June 1998 opening of the Rome Conference to discuss what had worked at the PrepCom and decide the course of action it would take in pursuit of the mission it was given by Minister Axworthy.¹²¹

Planning to Persuade: CanDel at the PrepCom

Although the PrepCom process was not optimal due to a lack of urgency,¹²² for that reason it provided an ideal testing ground for CanDel’s various strategies to achieve its policy goals. Soft power diplomacy techniques were at the heart of these strategies. Robinson later wrote that the push to make an effective ICC was “soft power in action” as it required piercing “a pervasive atmosphere of skepticism that State’s could ever agree on an effective ICC.”¹²³ Beginning during the PrepCom, “the building of support for a strong ICC was a cardinal example of the effectiveness of “soft power.” A coalition of supportive states, in tandem with interested nongovernmental organizations (NGOs), worked assiduously to promote an “idea whose time had come.”¹²⁴ Canada was at the centre of this coalition building from early on in the PrepCom, diligently working to have Court-friendly, effective diplomats placed in important roles within the PrepCom and the Rome Conference.

¹²⁰ JH email response.

¹²¹ KP interview, 2.

¹²² DM interview, 1-2.

¹²³ Robinson, “The ICC”, 171.

¹²⁴ *Ibid*, 172.

“Soft Power in Action”

During his time at the head of DFAIT, Minister Axworthy recalls being preoccupied with defining “a distinctive international place for Canada.”¹²⁵ Axworthy and his team’s first steps were to determine “the utility of soft power.”¹²⁶ Joseph Nye, a leading political scientist, historian, and international relations scholar on ‘power’ in global affairs, defines soft power as a “country’s cultural and ideological appeal.”¹²⁷ Nye expands on this definition: “It is the ability to get desired outcomes through attraction instead of force. It works by convincing others that they should follow you or getting them to agree to norms and institutions that produce behavior you want.”¹²⁸ Axworthy adopts this definition, refuting claims by some that soft power is simply weakness, or lack of hard power.¹²⁹ In 1997, he suggested, “Canada is well-placed to succeed as a leader in a world where soft power is increasingly important.”¹³⁰

The Canadian brand of soft power under Axworthy emphasized international teamwork and interdependence beyond the “old paradigm of nation-state supremacy.”¹³¹ This soft power collaboration also envisioned going beyond State-to-State relations. Watt identifies the benefits of expanding beyond government alone, as “often you get more results, better results by involving civil society and other stakeholders, not just

¹²⁵ Axworthy, *New World*, 2.

¹²⁶ Axworthy, “Introduction”, 9.

¹²⁷ Joseph Nye, “The Challenge of Soft Power,” *The International*, 153.7 (1999), 30.

¹²⁸ *Ibid*: Additionally, Nye writes, “Soft power depends largely on the persuasiveness of information. If a country can make its position attractive in the eyes of others and strengthen international institutions that encourage others to define their interests in compatible ways, it may not need to expend as many traditional economic or military resources. In today’s global information age, soft power is becoming increasingly important.”

¹²⁹ Axworthy, “Introduction”, 9.

¹³⁰ Axworthy, “The Need for Leadership”, 183.

¹³¹ Axworthy, *New World*, 3-4; also, Lloyd Axworthy, “Why “soft-power” is the right policy for Canada” *Ottawa Citizen* (25 April 1998), B6.

governments in a diplomatic process.”¹³² Specifically beneficial for Canada, Axworthy suggests that a soft power approach “means maximizing our talent for coalition building, developing ideas, and making use of the multilateral system.... It means enhancing Canada’s ability to promote its interests and pursue the human security agenda.”¹³³

Canada was most effective at the PrepCom as well as in Rome when it would propose ideas on the negotiation floor as the lead state and lobby effectively to build consensus around key issues. The Canadian delegates also effectively utilized the networks and resources of NGOs to garner support. As a member of the Women’s Caucus, prior to joining CanDel, Oosterveld remembers being involved in such a strategy time after time during the PrepCom. She explains

I would pose something, explain why, and explain the law behind it and more often than not the Canadian delegate would say, ‘Well I have to talk about that with the Head of Delegation, but it sounds good.’ Then they would go and propose [those ideas] – maybe not exactly as the caucus had asked, but something similar – on the floor and be the lead state. Then every other state afterwards would agree with Canada or disagree with Canada and then it would be to Canada to keep pushing that issue forward.¹³⁴

By taking such an approach on a number of points, Canada quickly became seen as a progressive leader on many of the critical issues, including, inter alia, gender sensitivity, the independence of the prosecutor, definitions of crimes, and complementarity.¹³⁵ The Canadian representatives adopted a similar approach in taking ideas to the Like-Minded Group, pushing the envelope and soliciting support of the LMG on a number of

¹³² FW interview, 10: Watt points to a number of UN Conventions adopted throughout the 1990s as “landmark legal precedent setting” events that, while “more cumbersome,” were ultimately more successful because of the participation of NGOs and civil society stakeholders.

¹³³ Axworthy, “Introduction”, 9; Avery Plaw, “Lloyd Axworthy says Canadians can make a difference” *The Gazette* (4 October 2003); Bruce Wallace, “Axworthy’s ‘soft power’” *Maclean’s* 111.28 (1998) 29.

¹³⁴ VO interview, 1, 3.

¹³⁵ *Ibid.* DM interview, 4.

“cornerstone positions.”¹³⁶

Getting “Top Quality People Put in Charge”

Another aspect of exercising soft power beginning at the PrepCom and continuing to the Rome Conference involved, in John Holmes’ words, getting “top quality people put in charge.”¹³⁷ For Canada, the first and most essential level of this strategy was its Chairmanship of the Like-Minded Group during the PrepCom.¹³⁸ Discussed further below, the LMG was a geographically, economically, and ideologically heterogeneous “friends of the Court” group which eventually grew to a membership of over 60 States.¹³⁹

The general organization of both the PrepCom and the Rome Conference was to break down issues into sections and sub-sections so that particular issues could receive adequate focus without getting bogged down by the Statute as a whole. “To best do this,” Holmes recalls,

an inner core of the LMG worked closely with the PrepCom Chair, Adriaan Bos of The Netherlands, to get top quality people put in charge of these negotiating sections. We also had to ensure geographical balance in assigning these roles. Many of the key roles were assigned going into Rome and these coordinators along with Bos formed the PrepCom steering committee. It met regularly to discuss the negotiations, plan strategy to advance negotiations and address both substantive and practical matters.¹⁴⁰

The ‘inner core of the LMG’ included Kessel and Kirsch, of course, as Canada was the Chair of the LMG at the time. As an example of the ‘top quality people put in charge’, Chairman Bos appointed Holmes as Chair of the negotiations on the issue of

¹³⁶ VO interview, 1, 3.

¹³⁷ JH email response.

¹³⁸ Axworthy, *New World*, 202.

¹³⁹ *Ibid.*

¹⁴⁰ JH email response.

‘complementarity’, “which was critical for many States.”¹⁴¹ Thereafter, Holmes joined the PrepCom Steering Group and continued the Canadian presence in the directing mind of the negotiations’ organization.¹⁴²

Holmes’ work on the complementarity issue certainly earned him the label of a ‘top quality’ person. The complementarity provision of the Statute provides that the Court will not seek or assume jurisdiction so long as the crimes are being investigated and prosecuted by a State – or, in other words, cases would only be admissible before the Court when national justice systems were *unwilling* or *unable* to try them.¹⁴³ The principle is not without controversy, but Holmes states “its inclusion in the Statute was key to getting states to include an expanded list of crimes, and to limiting the role of the Security Council.”¹⁴⁴ Writing about the birth of the ICC, Kirsch and Holmes purport that “[s]ubstantively, the major achievement of the PrepCom was probably the resolution of the issue of complementarity” which, “was a significant milestone in the establishment of the court.”¹⁴⁵

Holmes recalls that he recognized early on the significance of complementarity as a potential roadblock to the entire Conference’s progress. Thus, as Chair, he “deliberately took a different approach than other coordinators.” Holmes completely rejected the standard practice of the PrepCom sub-section negotiations, which was including options in the text of provisions and, where no agreement could be reached,

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid*; Schabas, *Intro to the ICC; Rome Statute*, art 17.

¹⁴⁴ JH email response.

¹⁴⁵ Kirsch and Holmes, *Birth*, 6-7: With the relationship between the court and national systems firmly entrenched, States increasingly accepted the concept of the international court, and became less fearful that the court would be an intrusive instrument overriding and interfering with national judicial systems.

placing square brackets around the entire provision. “I simply refused to allow them,”

Holmes comments of options and brackets:

I kept the pen on the complementarity text as we negotiated and would produce a new clean text everyday. I used sub-groups to negotiate specific issues and cajoled difficult [delegations] into accepting solutions. I included a chapeau and a footnote stating that the proposal was not fully agreed but this was only to assuage a few delegations.¹⁴⁶

Ultimately, the proposal that arose out of the PrepCom held and was the only major issue resolved before Rome. Holmes’ work on complementarity is representative of the Canadian Delegation’s principled and determined approach, as well as an interesting application of soft power diplomatic techniques.

Making Friends – LMG States and NGOs

The specific issues resolved at the PrepCom were not nearly as important for Canada’s soft power strategy as the networks it developed throughout the process.

Minister Axworthy’s opening address to the Rome Conference encapsulated his emphasis on openness and participation:

Canada has worked hard to ensure that negotiations towards a Court are as open and inclusive as possible. We welcome the participation of as many delegations as possible... particularly from the least developed countries. It is essential that all voices be heard during the negotiations if we are to create an ICC that is truly universal.¹⁴⁷

Crucially, this exercise of soft power – to invite and encourage participation from potentially like-minded States, was also self-interested. In so doing, Canada continued to position itself as a friend of the Court, a leader of the Like-Minded Group, a darling of the pro-Court NGOs.

¹⁴⁶ JH email response.

¹⁴⁷ Axworthy, “Address to Conference”. Axworthy continued, stating: “Canada has contributed a total of \$125 000 to enable delegations from the least developed countries to participate in all phases of this process.”

The Like-Minded Group (“aptly called *pays pilotes* in French”¹⁴⁸ – literally ‘leading nations’) is credited as one of two new constituencies¹⁴⁹ that drove the dynamism and enthusiasm of the PrepCom and the Rome Conference.¹⁵⁰ Under Canadian chairmanship, the LMG expanded its membership to over sixty States from all regions of the world;¹⁵¹ the LMG “was composed of middle powers and developing countries, a number of which had directly suffered from some of the crimes described in the draft statute.”¹⁵² Axworthy writes that Canadian chairmanship of the LMG was especially important to Canada’s leading role at the PrepCom.¹⁵³

Robinson explains, “Canada urged the group not only to move beyond its original focus on process and to identify shared “cornerstone” positions on issues of substance,

¹⁴⁸ Kirsch and Holmes, *Birth*, 37.

¹⁴⁹ The other being and organized coalition of NGOs, discussed *infra*.

¹⁵⁰ See, e.g. Schabas, *Intro to the ICC*, 18; Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” *American Journal of International Law* 93.1 (1999), 2 [*Process*]; Kirsch and Holmes, *Birth*, 37; John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and Lawmaking in the 21st Century” *Pace International Law Review* 11.2 (1999), 361; M. Cherif Bassiouni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court” *Cornell International Law Journal* 32 (1999), 443; Fanny Benedetti and John L Washburn, “Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference” *Global Governance* 5.1 (1999), 1–39.

¹⁵¹ By the end of the Conference, the Like-Minded Group consisted of 63 States committed to the same Cornerstones or Fundamental Issues. These States were: Andorra, Argentina, Australia, Austria, Belgium, Benin, Bosnia-Herzegovina, Brunei, Burkina Faso, Bulgaria, Burundi, Canada, Congo (Brazzaville), Costa Rica, Chile, Croatia, Czech Republic, Denmark, Estonia, Egypt, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela, Zambia. (Circular distributed to LMG during Rome Conference)

¹⁵² Kirsch and Holmes, *Process*, 4; Kirsch and Holmes, *Birth*, 8.

¹⁵³ Axworthy, *New World*, 202. Within the LMG, Canada was especially close with certain States. LCol McAlea lists “a couple of core groups with whom [Canada] had high congruence of attitude.” The non-US members of the Five Eyes, that is, the United Kingdom, Australia, and New Zealand were very close on most issues; even the US was amenable on a number of points. LCol McAlea also pointed to the Dutch and Germans as key States that Canada worked closely and effectively with towards the ICC. LCol McAlea was less fond of working with some of the Non-Aligned Movement, especially those delegations that were represented by proxy NGOs – in his assessment “these proxy NGOs were just substituting their own opinions for that of a sovereign state.” DM interview, 5-6.

but also to coordinate on substance and strategy, making it a more effective force in negotiations.”¹⁵⁴ Regarding the cornerstones, Axworthy describes how he and the Canadian delegates “prodded [the LMGs] to take a substantive role and to establish “cornerstone positions,” such as having an independent prosecutor, ensuring the court was not subordinated to the Security Council, and establishing inherent jurisdiction over crimes against humanity, war crimes and genocide.”¹⁵⁵ Schabas comments that although the LMG operated mostly informally, it quickly came to dominate the structure of the negotiations at the PrepCom and in Rome; LMG members filled most of the working group chairs and positions in the PrepCom and Conference’s organizational bodies.¹⁵⁶

Those outside of the LMG found it difficult to keep track of which States belonged to the group and to what extent they supported the cornerstone positions. Watt describes that from the NGO perspective “who was like-minded was a very fluid thing, and country positions were changing very rapidly, and that’s what we wanted of course. Nobody ever kept scorecards. That does not mean it was not a powerful process it just was not clear.”¹⁵⁷ This confusion is understandable. Kirsch and Holmes write that the LMG “rarely spoke with one voice and proposals were never made on behalf of the LMG. While adhering to the agreed “cornerstone” principles, on other issues, its membership often took different positions.”¹⁵⁸ It was this heterogeneity, claims Schabas,

¹⁵⁴ Robinson, “The ICC,” 172.

¹⁵⁵ Axworthy, *New World*, 202.

¹⁵⁶ Schabas, *Intro to the ICC*, 19.

¹⁵⁷ FW interview, 12.

¹⁵⁸ Kirsch and Holmes, *Birth*, 37. Additionally, at 8, Kirsch and Holmes write, “the role of the LMG would change with time, moving to a degree of co-ordination on substantive issues. Yet, the states of the LMG never publicly spoke as a group because of the increasing diversity of its membership and differences on specific issues. A number of developing countries became either full members of the LMG or at least enthusiastic supporters of a strong court.”

that allowed the LMG to be so successful by giving the group the “ability to cut across traditional regionalist lines.”¹⁵⁹

Despite this apparent uncertainty, a list of LMG members was revised and distributed on a regular basis to all of the affirmed members.¹⁶⁰ “There were, of course, differences between and among delegations,” Holmes recalls, “But generally, there was a broad consensus on objectives.”¹⁶¹ The LMG met regularly during the PrepCom and between sessions. Holmes often chaired the intersessional meetings when neither Kessel nor Kirsch were available. He explains that the focus was mostly on sharing views to build consensus and on negotiation tactics to achieve the LMG cornerstones.¹⁶² Throughout the PrepCom, the LMG worked very closely with the Coalition for the ICC; its head, Bill Pace, worked very closely with core LMG States, especially Canada.

The CICC was a major factor at the PrepCom and the Rome Conference. Indeed, Kirsch and Holmes write that the entire ICC negotiating process was “unique as a result of the involvement of “civil society” represented by NGOs.”¹⁶³ They note:

NGOs not only lobbied for certain positions, but also made available the expertise they had built up over years of focusing on this subject. While their positions varied, in general the NGOs pressed for a strong court with automatic jurisdiction, an independent prosecutor, sensitivity to gender concerns and jurisdiction over internal armed conflict.¹⁶⁴

¹⁵⁹ Schabas, *Intro to the ICC*, 19.

¹⁶⁰ VO interview, 1, 6.

¹⁶¹ JH email response.

¹⁶² *Ibid.*

¹⁶³ Kirsch and Holmes, *Birth*, 36.

¹⁶⁴ Kirsch and Holmes, *Process*, 4-5.

NGOs provided substantive advice and analysis to delegations, which “contributed significantly to the level of comprehension and, therefore, to the acceptance of the statute by States, especially those with small delegations in Rome.”¹⁶⁵

NGOs, especially those organized in the CICC, were significant in raising public and political awareness and support for an international criminal court. Robinson writes “NGOs influenced negotiations through well-written research papers and through lobbying efforts, urging states to adhere to the “benchmarks” necessary for an effective court.”¹⁶⁶ Kirsch and Holmes note NGOs on the ground provided daily reminders to delegations of the gravity and urgency of the matters and the need for effective and immediate action to combat impunity.¹⁶⁷

Fergus Watt further describes how civil society organizations worked closely, especially with smaller States, which led to various proposals, including some considered progressive or radical, made it into the draft produced by the PrepCom.¹⁶⁸ Watt also notes the influence of NGOs was not restricted to small States, but that Bill Pace and other civil society leaders were able to circumvent delegations by going directly to foreign ministers, including and especially Lloyd Axworthy, to exercise influence.¹⁶⁹ Again, enlisting civil society and NGOs in the policy-making process was an important strategic step. Robinson writes “[t]hese organizations usually have greater leeway than states to speak out and take action, and are, therefore, more able to push specific agendas.

¹⁶⁵ Kirsch and Holmes, *Birth*, 36.

¹⁶⁶ Robinson, “The ICC”, 172.

¹⁶⁷ Kirsch and Holmes, *Birth*, 36.

¹⁶⁸ FW interview, 3.

¹⁶⁹ *Ibid*, 11.

The *internationalization of conscience* by these new actors has been and instrumental tool in the development and promotion of the human security agenda.”¹⁷⁰

While the CICC was the fundamental organizing body of NGOs internationally, there was also a Canadian equivalent that operated both within and independently of the CICC. Shortly after the CICC was formed, Bill Pace reached out to Fergus Watt, the Executive Director of the World Federalists’ Canadian chapter, and asked Watt to organize Canadian NGOs. Watt explains:

[Pace] told me that Canada was really pushing [the ICC] and so it made sense for us to do the same thing here in Canada on a smaller scale with Canadian civil society so that’s how we created the Canadian Network for the International Criminal Court.¹⁷¹

John Holmes describes how the CNICC was a pivotal player in productive public consultations on the matter of an international criminal court in Canada. He also notes that the Canadian representatives at the PrepCom “met and communicated with [the CNICC] frequently” and that CNICC was “part of the international coalition with whom [CanDel] and the LMG worked closely.”¹⁷²

These consultations were a valuable mechanism for both the Canadian officials involved and the CNICC. Prior to each PrepCom, representatives from the CNICC met with Canadian officials to discuss the agenda for the upcoming session. At these discussions, Watt remembers, both sides would explain what they saw as the key issues coming up, and what their initial thoughts on those issues were. There was also an element of information sharing on developments that had occurred between sessions –

¹⁷⁰ Robinson, “The ICC”, 173.

¹⁷¹ FW interview, 3.

¹⁷² JH email response.

government updates to the CNICC about inter-governmental developments as well as NGO updates to government officials regarding movements in civil society. Watt also describes how he would assign NGO members of the CNICC to smaller working groups that would produce discussion papers on various issues relating to substance and process. “We tried to have meetings before and after each preparatory conference,” remembers Watt, “We didn’t always stick to that but in general there was an ongoing dialogue between Canadian civil society and Canadian officials.”¹⁷³

In New York at the PrepCom, the CNICC “joined the larger coalition and observed, tracked, did [its] lobbying on whatever interests [it] had.”¹⁷⁴ NGOs, organized by the CNICC and more broadly the CICC, observed the interactions between delegates outside of the formal sessions and began tracking the various caucuses of interests that were developing among States. The NGOs at the PrepCom similarly organized into sub-groups to lobby specific States or groups of States on specific interests and issues.¹⁷⁵ Both the CNICC and the CICC continued, and indeed redoubled, their observation, tracking, and lobbying at Rome, becoming an influential driving force behind the process of the negotiations.

This combination of soft power tactics characterized CanDel’s actions at the PrepCom and a continuing application of this approach was adopted as the Delegation’s strategy to achieve its goals in Rome. In the briefing meetings before the Rome Conference, CanDel was instructed to continue to build partnerships with States and NGOs alike, creating a coalition of support for an independent and effective Court. The

¹⁷³ FW interview, 4.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

delegates discussed specific strategies for building consensus around different sections of the Statute that would satisfy the Delegation's fundamental positions. CanDel's brief included a list of the LMG and its accepted cornerstones. The brief also identified particular NGOs that might be helpful on certain issues and indicated a means of contacting representatives on the ground to coordinate. To this point, the internal politics of the Delegation were not contentious. CanDel was hand picked by the Foreign Minister and specifically instructed to execute Canada's foreign policy, utilizing soft power diplomacy, in pursuit of an independent and effective ICC that supported the human security agenda. At the same time, though the PrepCom was not without international disagreement, the lack of urgency surrounding the process allowed States to set aside quarrelsome issues, leading to a generally cooperative environment.

What to Expect When You're Expecting (A New Court)

By April 1998, CanDel was set and prepared for the Rome Conference in June. This final section of Part I discusses what the Canadian delegates expected of the Rome Conference. Holmes put it bluntly: "I expected an intense, extremely complex negotiations and that is what we got."¹⁷⁶ LCol McAlea was also clear about what he expected, and specifically, what he and the delegation wanted to protect against. He notes that "there were a lot of participants who wanted to create law and/or politicize the court" and that CanDel was expecting to work hard against those agendas – that is, avoiding politicization and ensuring the statute was a codification of international criminal law, not a fabrication.¹⁷⁷

¹⁷⁶ JH email response.

¹⁷⁷ DM email response.

Some younger members of CanDel were less sure about what to expect. Robinson assumed that the Rome Conference would be similar in style and substance to the PrepCom. Specifically, he said “I think we had a sense of what the positions were and what the stakes were, what the big plans were. I feel like that was sort of known going in actually.”¹⁷⁸ Apparently, as an uninitiated officer of DFAIT, Robinson did not have the same appreciation as Holmes for the probable intensity of multilateral negotiations as important as those for a statute of an international criminal court. Prost, an experienced official in the Justice Department was similarly unsure about what to expect at multilateral negotiations:

my multilaterals started with Rome. I had done a lot of bilaterals by then so I was familiar with bilateral policies but it was subsequently some other criminal law treaties, but that was subsequent to the Rome statute. So I really didn't have a sense, as compared to a bilateral where your objectives are really clear, this was a much broader undertaking.¹⁷⁹

Oosterveld and Matas were also inexperienced in the way of multilateral negotiations. Oosterveld explained that outside of the PrepCom, she lacked any real knowledge about how international conventions operated or what to expect as a government delegate. Thus, the expectations, while varied, were also somewhat influenced by what Holmes, Kessel, and Kirsch advised about the nature of multilateral conferences – intense, extremely complex negotiations, in process and substance.

Aside from their practical expectations about the Conference, CanDel also realized that they were going to be involved in something very special in Rome. Holmes remembers his initial skepticism regarding the proposals for the ICC: “Based on my

¹⁷⁸ DR interview, 1.

¹⁷⁹ KP interview, 2.

human rights experience, I believed that there were too many powerful states opposed to the concept of the Court and they would prevent the creation of a viable institution. The idea for a court was on the agenda of the UN from the outset in the late 1940s, but was blocked for decades.” Kirsch continuously urged both his own delegation and others to consider the Rome Conference as a “now or never” opportunity¹⁸⁰ for, in Robinson’s words, “an idea whose time had come.”¹⁸¹

Oosterveld recalls that the Rome Conference “was meant to be the final negotiation and it is do or die; if it doesn’t happen we won’t ever have [an ICC], and if it does happen then we can change history.”¹⁸² With that mindset, CanDel set out to protect everything that had been gained during the PrepCom negotiations and to continue to chip away at the 1400 options and square brackets to achieve a statute that would support the human security agenda. There was “some pressure obviously” on CanDel, whether self-imposed or external, to be successful at the Rome Conference. Holmes implies that the pressure may have been self-imposed, considering the gravity of the matter at hand: “I thought that there was an opportunity to create something historic.”¹⁸³

“All that changed in May 1998”

As the last PrepCom meeting drew to a close, and delegations received various translated versions of the draft statute and all of its options in April 1998,¹⁸⁴ CanDel was set and preparing to continue its leadership of the LMG at Rome. Philippe Kirsch was slated to head CanDel and the LMG, but had no other specific role going into the

¹⁸⁰ Valerie Oosterveld, interview with author, Western University Canada, Faculty of Law, 17 October 2014, 7 [VO interview, 2].

¹⁸¹ Robinson, “The ICC”, 172.

¹⁸² VO interview, 1, 4.

¹⁸³ JH email response.

¹⁸⁴ Bassiouni, “Negotiating the Treaty of Rome”, 443.

Conference. Adriaan Bos, who was to be Chair of the key Committee of the Whole (CW), stated that he would find a role for Kirsch but nothing was decided. “All that changed in May 1998,” Holmes said, “Bos was diagnosed with cancer and had to undergo immediate treatment.”¹⁸⁵

Bos and the core of the LMG nominated Kirsch as Bos’s replacement, and Holmes subsequently negotiated against some non-Western States’ opposition to have him confirmed as Chairman of the CW. John Washburn, an American diplomat at the Rome Conference recalls that Kirsch “was easily chosen as the replacement because he was so well known in the U.N. community from his long service in many international bodies and conferences, particularly as the chairman of challenging conferences on terrorism and international humanitarian law.”¹⁸⁶ Oosterveld remembers from an “outside point of view” that she, as a Canadian NGO representative, “was really proud that a Canadian was appointed to the Committee of the Whole” and that the NGO community saw Kirsch as very skilled at bringing people together towards compromise and he had earned the trust of the NGOs.¹⁸⁷

Minister Axworthy was also enthused at the change. Axworthy later wrote that Kirsch’s appointment “was a fortuitous choice.”¹⁸⁸ Axworthy praises Kirsch as being “a sophisticated international lawyer who had spent most of his diplomatic career at the UN. He was savvy in the ways of multilateral negotiation and well versed in the subtleties of

¹⁸⁵ JH email response; DR interview, 1-2; VO interview, 1, 4-5.

¹⁸⁶ Washburn, “Lawmaking in the 21st Century”, 361.

¹⁸⁷ VO interview, 2, 5.

¹⁸⁸ Axworthy, *New World*, 203.

treaty language.”¹⁸⁹ In retrospect, Axworthy argues that Kirsch’s role as CW Chairman “and that of his legal team at DFAIT in forging compromises on language without giving in on principle was an essential ingredient in bringing the diverse views of different countries into line behind a common text.”¹⁹⁰

As a result of Kirsch becoming Chairman, two major changes were necessary – the first within CanDel, the second within the LMG. Holmes describes the former: “While Kirsch remained the HOD, the number two, Alan Kessel, effectively took over the management of CanDel, including chairing regular meetings, establishing the mechanisms for briefing Ottawa and consulting Ministers.”¹⁹¹ Robinson explains how the change “constrained” CanDel, as the delegation was no longer able to play the “strident champions of the Like-Minded Group, rather [became] slightly more interested in facilitating a good result. Philippe Kirsch taking on the role changed our dynamics a little bit towards trying to reach consensus on good tune.”¹⁹² Furthermore, Canada was therefore unable to be the champion of the LMG because, as Oosterveld explains, “it was viewed as not a good optic to also have Canada chair of the LMG because people could accuse Kirsch of being, as head of our delegation, biased towards the like-minded.”¹⁹³

Despite the fact that Canada, in turn, relinquished the Chair of the LMG to Australia, Robinson later wrote that “Canada’s role became even more central at the outset of the Rome Diplomatic Conference in June 1998 [when] Kirsch was chosen by

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ JH email response.

¹⁹² DR interview, 1-2.

¹⁹³ VO interview, 1, 4-5.

acclimation to chair the pivotal negotiating body of the conference.”¹⁹⁴ Kirsch and Holmes wrote of their positions at Rome, that they were placed “*ex officio* at the center of negotiations, as members of the Bureau of the Committee of the Whole (CW).”¹⁹⁵ Kirsch’s appointment to head the CW would prove to make CanDel’s role at Rome slightly more delicate than it otherwise might have been. But, to speculate on what might have been would be to engage in counter-factual. The fact remains that Kirsch, a Canadian lawyer and diplomat, was named to the most strategically paramount position of the entire Conference – this, it was presumed, could only benefit CanDel’s mandate. The mission remained the same: the goals, the cornerstone positions, and the desired end-state of an independent and effective International Criminal Court never waived. CanDel would simply need to find more diplomatically creative ways, utilizing soft power tools, to meet its mandate.

¹⁹⁴ Robinson, “The ICC”, 173.

¹⁹⁵ Kirsch and Holmes, *Process*, 2.

PART TWO

ALL ROADS LEAD TO ROME

There is an idiom that says, “all roads lead to Rome” – meaning all paths or activities lead to the centre of things or the same result. In the case of Canada’s Delegation to the negotiations for an international criminal court, this adage became true figuratively as well as literally. CanDel was comprised of a number of representatives from varied backgrounds, perspectives, and levels of experience; still, CanDel arrived with a common goal in Rome, where five weeks of intense negotiations were slated to begin. United Nations Secretary General Kofi Annan made similar comments about the old adage, invoking it to remark on the long, tedious road to the Conference: “It is said all roads lead to Rome, but not all lead there directly.”¹⁹⁶

Kirsch and Holmes recall “the task awaiting the negotiators was daunting. Despite the work accomplished by the Preparatory Committee (PrepCom), the draft statute that ultimately emerged from the PrepCom was riddled with some fourteen hundred square brackets, i.e., points of disagreement, surrounding partial and complete provisions, with any number of alternate texts.”¹⁹⁷ This section describes how Canadian negotiators handled this daunting task. As the Conference progressed certain challenges to the human security doctrine were raised, and the effectiveness of soft power was called into question. As will be seen, a measure of forcefulness and directness needed to be adopted in order to break through a stalemate in the negotiations.

¹⁹⁶ “Annan throws down gauntlet” *Terra Viva* (16 June 1998).

¹⁹⁷ Kirsch and Holmes, *Process*, 3; see the *Draft Statute of an International Criminal Court*, UN Doc. A/CONF.183/2/Add.1 (2013).

How, then, did the Canadian Delegation conduct itself in pursuit of Canada's goals, and what steps were undertaken in the face of these challenges? This section will attempt to explain how CanDel reconciled its mandate and direction from Minister Axworthy with the realities on the ground in Rome. In particular the following questions will be addressed: how did Canada initially conduct its external diplomacy, presenting its goals to the international community at Rome; in general, how did CanDel plan, strategize, and organize internally; how did the Delegation work with external groups and individual States; to what extent did these internal and external politics of diplomacy change over the course of the Conference; and what was the result, and the Canadian delegation's perception of the result of the negotiations? What follows is an analysis of these major questions as they fall within subsequent 'phases' of the Conference and a consideration of the overall effectiveness and success of the CanDel.

Canada Comes Out Swinging

Before any of the real work of negotiations could begin, the Plenary of the Rome Conference would hear opening remarks and statements from heads of State, heads of delegations, and even the head of the United Nations itself. The opening speeches to the plenary took a few days to complete. Still, the statements made by delegations at the outset of negotiations were important indicators of their relative positions heading into the negotiations. The opening of the Rome Conference also provides an answer to the question: "how did Canada initially conduct the external politics of diplomacy?" During Lloyd Axworthy's opening remarks, speaking for Canada, it became evident that the Foreign Minister perceived himself as a champion of the Court and expected that his carefully selected Delegation would be a driving force in the negotiations.

Calling all Like-Minded: Axworthy's Opening Address

Minister Axworthy's opening remarks at the Rome Conference rang out as a rallying cry to the like-minded group.¹⁹⁸ Oosterveld recalls that Axworthy's remarks on the first day were "helpful to just remind the like-minded group 'even though Canada is not chair anymore, we are watching what the like-minded group is doing and we need to stay together'."¹⁹⁹ On this point, Robinson writes "Minister Axworthy attended the [opening of] Rome Conference to lobby states to hold fast on fundamental principles necessary for a "court worth having."²⁰⁰

Minister Axworthy's opening remarks were tailored to advocate for this notion of his perception of a court worth having. He stated:

the more pressing priority of international relations today is no longer the security of states, but of individual citizens. Yet, international institutions, practices and codes of humanitarian law were designed in an earlier era, when this was not the case. The time has come for us to build new institutions that respond to new needs.

An independent and effective International Criminal Court will help to deter some of the most serious violations of international humanitarian law. It will help give new meaning and global reach to protecting the vulnerable and innocent... it will help to end cycles of impunity and retribution. Without justice, there is no reconciliation, and without reconciliation, no peace.

To achieve this end, we must work together, not simply to establish a court, but to ensure it is one worth having.²⁰¹

¹⁹⁸ VO interview, 2, 9-10.

¹⁹⁹ *Ibid.*

²⁰⁰ Robinson, "The ICC", 173.

²⁰¹ Axworthy, "Address to Conference".

Clearly, the court worth having, envisaged by Axworthy, emphasized human security. This particular image of the Court was delineated by Canada's cornerstones positions, which were shared with the LMG.²⁰²

Axworthy's address to the Conference advocated for openness, cooperation, and flexibility. The principle of complementarity, on which John Holmes had managed to secure agreement at the PrepCom, ensured that States could collectively build a strong international criminal court "without fear of intrusion by the ICC on their sovereignty."²⁰³ With that safeguard, Axworthy preached to the Plenary:

All the players are present. The stage is set, thanks to the hard work undertaken by you and many others during the preparatory phase. To succeed now, we need only two things: clear-headed resolve, and political will. Resolve to cleave to fundamental principles, without getting bogged down in details, and the will to start forging a new set of tools and institutions to respond to the needs of a new era.²⁰⁴ This new era, indeed the twenty-first century, would be well-served by the International Criminal Court, according to Axworthy. He implored the Conference to act: "Let us seize the opportunity to create a legacy for peace – to make the global village a human, humane place."²⁰⁵ Implicit in his statements was the notion that Canada would be a leader in the negotiations, aligning under the principles espoused by Axworthy as the righteous champions of the effort for an "independent and effective" Court.

"Keep your eye on Kirsch"

Axworthy's implied perception of Canada as a driving force at Rome became explicit regarding the formal leadership of the Conference. If the Rome Conference was

²⁰² *Ibid.*; VO interview 2, 9.

²⁰³ Axworthy, "Address to Conference".

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

going to be successful, it was clear that strong, creative leadership was necessary to foster the openness, cooperation, and flexibility for which Axworthy advocated. It was a point of pride for Axworthy and the Canadian delegation that Philippe Kirsch was selected to fill this role. Axworthy declared to the Conference “I am honoured that you have chosen a Canadian to help shepherd this process to fruition.”²⁰⁶ Fergus Watt spoke to Axworthy immediately following those opening remarks and recalls inviting Axworthy to speak with the NGO coalition. The Foreign Minister agreed and insisted that the CICC work closely with Kirsch – “keep your eye on Kirsch,” he said, it would be in the NGOs’ best interest.²⁰⁷

Kirsch’s appointment as Chairman of the CW inspired confidence in NGOs and delegates alike. Describing his hybrid role as an NGO member of CanDel, David Matas that the NGOs “had more confidence in the process; that it would lead to the ultimate result, because we knew Kirsch and we had confidence in him.”²⁰⁸ To that end, LCol McAlea described Kirsch as a “highly effective diplomat, extremely knowledgeable and networked (he seemed to know everyone) and not afraid to impose deadlines and to hold other diplomats accountable.”²⁰⁹ An American NGO delegate to the Conference, John Washburn, credits Kirsch’s “deft and thoughtful aggressiveness” in explaining the final result of the Rome Conference.²¹⁰

Throughout the course of the Conference, Kirsch was frequently called upon to exercise this skillful diplomacy to put out fires that might otherwise have derailed the

²⁰⁶ *Ibid.*

²⁰⁷ FW interview, 9-10.

²⁰⁸ Matas interview, 6.

²⁰⁹ DM email response.

²¹⁰ Washburn, “Lawmaking in the 21st Century”, 370.

progress of the negotiation. John Holmes explains how Kirsch adopted a strategic approach to let Coordinators of various working groups do their work, but surgically intervene with delegations to get them to calm down and compromise.²¹¹ “Even seemingly minor issues caused problems,” Holmes recalls, “There were literally ten crises like this a day which Kirsch or I or a group of colleagues had to fix or address.”²¹²

The opening of the negotiations was pivotal in setting the tone that Kirsch wanted to carry throughout the Conference. Valerie Oosterveld remembers Kirsch emphasizing and maintaining a positive tone for the Committee of the Whole and the Rome Conference generally. Kirsch’s opening comments to the Conference, according to Oosterveld, were along the line of “we’re here to get a statute; we have 5 weeks; we can do it.”²¹³ Kirsch maintained this strategic optimism as Chairman, imploring “we are finishing in the 5 weeks. Now is the window. Now is the time. We might not ever get another time like this, so we are going to try really hard to get there.”²¹⁴ For Kirsch, and for CanDel more generally, failure was not an option, it was “now or never.”²¹⁵ Kirsch and Holmes recall the enormity of the task they were faced with in such a short period of time:

The statute itself was adopted in an exceptionally short time - five weeks - which in retrospect may not have been sufficient, given the magnitude and difficulty of the task. It is a matter of speculation whether a longer conference would have led to significantly different results, given the nature of the objections to the statute put forward at the end.²¹⁶

²¹¹ JH email response.

²¹² *Ibid.*

²¹³ VO interview, 2, 9.

²¹⁴ VO interview, 2, 6-7.

²¹⁵ *Ibid.*

²¹⁶ Kirsch and Holmes, *Birth*, at 35; Schabas, *Intro to the ICC*.

Such a feat would not have been possible without a strong measure of central direction and encouragement from Kirsch and the Bureau to resolve the easy issues early on and save time and energy for the more contentious battles.²¹⁷

While Kirsch's role as Chairman of the CW was one of pride for CanDel, it also created strategic restraints. Kirsch had to clearly delimit the borders of his role as Chairman and his role as head of the Canadian delegation. He was often careful to say "no, I can't do that because that would convey that I have a Canadian hat on." When Kirsch was lobbied or approached about Canada's point of view he would say "I suggest you talk to Allen Kessel" or someone else depending on what topic area it was. Oosterveld explains that Kirsch "was very careful. He did not want anyone to sort of accuse Canada of double-hatting and using the position of the Chair of the Committee of the Whole to only press for Canada's positions."²¹⁸ Kirsch's position as Chairman similarly required tactical maneuvers as well to maintain good optics. Oosterveld recalls how Kirsch "would always make sure that someone was sitting in the Canadian seat when he was sitting [as Chairman of the CW] so that no one would ever mistake the fact of him speaking for Canada also speaking; so it was absolutely physically clear to everyone in the room - that is the Canadian rep, and that is the Chairman of the Committee of the Whole which is something totally separate."²¹⁹

These constraints affected CanDel as well. The specific modifications to CanDel's diplomacy as a result of Kirsch's Chairmanship will be discussed below. First though, what follows is a description of Canada's goals – its 'cornerstone' positions –

²¹⁷ *Ibid*; VO interview, 1, 7.

²¹⁸ VO interview, 2, 5.

²¹⁹ *Ibid*.

then a general description of the internal and external politics of CanDel's diplomacy in Rome.

Canada's Cornerstones

Minister Axworthy's opening address at the Rome Conference was not just a rallying cry to the like-minded group of States, but also a restatement of the principles that Canada considered fundamental to "a court worth having." These principles, shared between Canada and the LMG, were known as the "Cornerstones" on which an international criminal court should be built. Actual adherence to and pursuit of these cornerstones varied from like-minded State to like-minded State, yet the underlying commitment of the LMG never wavered. A circular distributed frequently to LMG States before and during the Rome Conference stated clearly as a top-priority: "Like-minded States are committed to a successful Diplomatic Conference in 1998 and the prompt creation of an independent and effective International Criminal Court."²²⁰

What exactly this 'independent and effective' ICC would look like was described by Minister Axworthy in his opening remarks as "a court worth having" and mirrored in the LMG circulars throughout the Conference. Axworthy articulated:

A Court worth having is one with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes. We must not create a regime that would allow states to gain the prestige of ratifying the ICC Statute without ever accepting the Court's jurisdiction over a particular crime.

A Court worth having is one with a constructive relationship with the United Nations, in which the independence and impartiality of the Court

²²⁰ LMG Circular.

are preserved. The Security Council has a useful role to play in referring matters to the ICC, as this will increase the effectiveness of the Court. We must not, however, allow the Court to be paralyzed simply because a matter is on the Security Council agenda.

...

A Court worth having is one with an independent, highly professional Prosecutor. He or she should be able to initiate a proceeding *ex officio*, rather than having ICC jurisdiction ‘triggered’ only by a state complaint or Security Council referral.

Above all, a Court worth having is one that addresses the real problems on the ground. That means focusing not only on rebuilding peace through reconciliation, but also on responding to the needs of the victims of conflict – victims who are disproportionately women and children. The Court should be sensitive to gender issues emerging from the experience of women in armed conflict, and incorporate them into the mainstream of its functions. This requires both the Statute and the day-to-day functioning of the Court to integrate a gender perspective.

...

Finally, the mandate of the Court to deal with war crimes must extend not only to conflicts between states, but also to those within states. This century has seen a dramatic escalation in the prevalence and brutality of internal armed conflicts, of which civilians increasingly bear the brunt.²²¹

These half-dozen or so fundamental components of Axworthy’s ‘Court worth having’ constituted the basic essence of the ‘independent and effective’ ICC sought by the LMG. CanDel set out at the Rome Conference to achieve those discrete goals and the broader goal of an ‘independent and effective’ ‘Court worth having’.

Practicing Diplomacy in Rome

Having answered preliminary historical questions about Canada’s goals for the Rome Conference and Minister Axworthy’s initial approach to the external politics of CanDel’s diplomacy this section elaborates on how the delegates intended to bring the ‘Court worth having’ to fruition. This section asks, generally, how was diplomacy practiced in this case study to create international law through codification of international criminal law

²²¹ Axworthy, “Address to Conference.”

and the establishment of an institution to interpret and apply that law. This larger question about the practice of diplomacy is divided into two parts: first, what were the internal politics of the Canadian Delegation in Rome; and second, how did CanDel conduct its external politics – that is, its interactions with other States, NGOs, and in particular, its close ally and sometimes adversary, the United States.

CanDel's Internal Political Dynamics

Members of the Canadian Delegation independently and unanimously described the working relationship within CanDel as one of cooperation and support, with relatively few disputes internally. This particular environment can be credited to the broad mandate given to the Delegation, which allowed the delegates to plan and strategize flexibly.

However, considering the diverse backgrounds and experiences of CanDel, some kinks were bound to arise. For the most part, disagreements were minor within the Delegation, usually related to growing pains involved in incorporating civil society into the mix or to criticisms from the home front. None of these internal differences were fatal though, and throughout the Rome Conference, CanDel was able to maintain strategic optimism.

CanDel's "Decentralized and Empowered" Mandate

In any diplomatic endeavour, whether bilateral or multilateral, where delegates of a State are sent to negotiate the terms of some international agreement, those delegates need a mandate from their respective governments.²²² In Canada at the time of the Rome Conference, standard operating procedure was for the Minister of Foreign Affairs to grant certain powers and direction to the delegation selected to represent Canada.²²³ With

²²² Jonnson and Hall, *Essence of Diplomacy*.

²²³ VO interview 1, 9.

respect to the Rome Conference itself, CanDel was given “very broad powers and very broad direction” to resolve issues, “so long as they were resolved in a way that promoted human security values.”²²⁴

The Canadian Delegation was given a “decentralized and empowered mandate” within which to conduct its diplomacy, according to Darryl Robinson.²²⁵ LCol McAlea recalls that CanDel was “given a lot of autonomy to go ahead and solve problems ... Basically my orders were to build a consensus and the only limitation was to make sure [the Statute] didn’t flout customary international law.”²²⁶ This flexibility was different than many other States that came to the Conference with rigid hierarchies and a strict policy to seek approvals on every possible diplomatic move.²²⁷ Valerie Oosterveld describes that a common line utilized by these delegations was, “We have now gone outside the parameters of what [our delegation] has been told to do and now I have to check with the capital again before I can say anything.”²²⁸ On the contrary, CanDel’s decentralized and empowered mandate made it possible for the delegates “to respond as things arose right away”²²⁹ in pursuit of its specific and general goals.

Planning at the Residenza di Ripetta

Aside from the flexibility afforded to CanDel by its mandate, the logistics of the operation were crucial to its ability to plan effectively. Minister Axworthy had approved

²²⁴ *Ibid.* Kimberly Prost made similar comments: “No one gave me very specific instructions ... but I had the general conveyed instructions about the court, that we’re court friendly, we’re consistent with the like-minded group, and we’re aiming to develop the statute so that it’s workable in practice ... the foreign affairs ministry and ministers were very pragmatic on how this delegation was directed in that there were general goals achievable but the expertise was left with the experts, if I can put it that way.” KP interview, 3.

²²⁵ DR interview, 3.

²²⁶ DM interview, 3.

²²⁷ KP interview, 2.

²²⁸ VO interview, 1, 9.

²²⁹ *Ibid.*

funding for his Delegation's accommodations, transportation, and meals. Oosterveld remembers DFAIT "paid for us to be in the same hotel [the *Residenza di Ripetta*, a short distance from the Food and Agricultural Organization building] ... which was great because if we had impromptu meetings it just was door-knocking."²³⁰ CanDel also rented a flat about 2 blocks away from the FAO, where the delegates could regroup for meetings, printing, or to resupply.²³¹ Regarding meetings, Robinson explains CanDel had "A big one every Sunday and a small one more periodically where we would update each other on what the big issues we were dealing with were."²³² LCol McAlea elaborates that at the almost nightly meetings at the *Residenza di Ripetta*, Canada's delegates "would exchange intel on progress of certain things and we would either assign or divvy up who would continue to work on certain things and who would continue to work on others."²³³ Because these logistical issues were taken care of, CanDel was able to meet and strategize "almost daily in Rome."²³⁴

Strategizing for "a Canadian in Every Room"

The structure of the Rome Conference necessarily impacted the strategy adopted by CanDel. Kirsch and Holmes describe the Conference's structure, consisting of numerous informal working groups and consultations were arranged throughout the conference, all reporting directly or indirectly to the Committee of the Whole. These occurred concurrently with the formal meetings and during lunch hours, evenings, weekends, and occasionally most of the night.

²³⁰ VO interview, 1, 13. Oosterveld also recalls that "to get to the negotiations they paid for the taxis for the other people on the Canadian delegations, so David and I rarely had to pay out of pocket and then at any rate we had a *per dium*, a treasury board mandated *per dium* which covered our expenses."

²³¹ *Ibid.*

²³² DR interview, 4.

²³³ DM interview, 6.

²³⁴ KP interview, 3.

Managing this process was the responsibility of the Bureau of the Committee of the Whole, composed of representatives of Canada, Argentina, Romania, Lesotho, and Japan. To assist the Bureau, the Chairman [Kirsch] maintained the practice begun during the PrepCom of using an enlarged Bureau.²³⁵

To cope with this hectic structure, at CanDel's nightly meetings the delegates would look at the next day's schedule and assign each member to a negotiation. Oosterveld explains that the Delegation "*made sure that there was a Canadian in every room... we wanted to make sure that the Canadian point of view was going to at least be expressed if not hold the day in any given room.*"²³⁶

Meanwhile, because Kirsch was the Chairman of the CW, charged with the responsibility of managing the entire process, CanDel had to be discreet in consulting with its formal Head of Delegation. Behind the scenes, CanDel still required advice and guidance from Kirsch, who was the Delegation's most seasoned diplomat.²³⁷ LCol McAlea describes "When he was chairing the like-minded group we could openly discuss things with him. When he became the chair of the CW, we did it back in the hotel room each night. ... Our relationship did not change in substance, just in perception."²³⁸

Kirsch's role as Chairman did not therefore limit CanDel's ability to operate, it merely altered the form of the Delegations operations.

John Holmes and Darryl Robinson were most affected by Kirsch's paramount position at the Rome Conference. To varying extents, Holmes and Robinson carried on the dual roles of supporting Kirsch and the Bureau of the CW on one hand, and representing the Canadian position in negotiations on the other. Holmes and Robinson

²³⁵ Kirsch and Holmes, *Birth*, 12-13.

²³⁶ VO interview, 1, 6.

²³⁷ VO interview, 2, 6.

²³⁸ DM interview, 8.

were especially careful of clarifying exactly what hat they were wearing at any given time. It was important for them to distinguish when they were speaking to delegates or other States on behalf of the Bureau or the Chairman and when they were speaking on behalf of Canada, advancing the Canadian position.²³⁹ For the rest of the delegation though, they were always clearly Canadians, advocating for the Canadian position.²⁴⁰ David Matas explains that Kirsch's position as Chairman did not inhibit CanDel's ability to negotiate freely and openly for the 'Court worth having' they were directed to achieve: "I don't think we were inactive, but what I would say was it increased our level of confidence that things would work out alright, at the center we had our own person there."²⁴¹

Specific tactics employed by CanDel throughout the course of the Conference varied over time, by issue, and by individual delegate. Oosterveld explains that the delegates were not given a written or formally directed strategy; rather, the prudent course of action was "just getting a feel on the ground."²⁴² For example, in negotiating issues with US delegates, Prost describes using American respect for military points of view to manufacture consensus by referencing what LCol McAlea had advised her, or what LCol McAlea would or would not accept from a military standpoint.²⁴³ Meanwhile, as a general practice in formal and informal meetings, Canada's delegates would tactically determine whether to speak first on an issue or to sit back and hear the room before submitting a compromise on a particular point. Oosterveld explains that on issues

²³⁹ JH email response; VO interview, 2, 6.

²⁴⁰ *Ibid.*

²⁴¹ Matas interview, 6.

²⁴² VO interview, 1, 6.

²⁴³ KP interview, 5.

about which CanDel had strong views or instructions, the delegates would attempt to propose Canada's position at the opening and lobby for support around that position.²⁴⁴ Where the point in issue was less fundamental to CanDel's goals, the delegates had more flexibility to listen to other States then seek to craft a response in the form of a compromised solution to diverging opinions in the room.²⁴⁵ Ultimately, once the Chair of the meeting recognized a certain, unwritten threshold level of support for a position, the Chair would move on to the next issue. CanDel's tactical strategy, in broad strokes, was to solidify as many gains favouring its goals as possible in this manner.²⁴⁶

Working out the kinks

The internal politics of Canada's diplomacy at the Rome Conference was not monotonous. For the most part, the Canadian Delegation cooperated very well, but some kinks needed to be smoothed out along the way. On CanDel's overall mission, the Delegation was carefully selected because of each individual member's support for Canada's goals. On broader strategy, the delegates unanimously agreed that the flexibility granted to CanDel obviated any major disagreement between the delegates from varying backgrounds and perspectives.²⁴⁷ Even when the Canadian delegates discussed issues with differing views on things, Prost explains "there was never disagreement per se, it was ... more [of a] constructive discussion of the challenges we were facing."²⁴⁸

Meanwhile, the enlistment of civil society representatives presented opportunities

²⁴⁴ VO interview, 2, 4.

²⁴⁵ *Ibid.*

²⁴⁶ VO interview, 1, 6.

²⁴⁷ VO interview, 1, 12; KP interview, 4; DR interview, 4; JH email response.

²⁴⁸ KP interview, 4.

and challenges to the Canadian Delegation. Oosterveld explains that it was “common at that time for certain governments to have on their delegation either academic representatives or non-governmental civil society representatives to make sure that all the different views were being reflected in the discussions in the delegations.”²⁴⁹ Minister Axworthy’s opening speech at the conference emphasized this point:

Canada has pressed for the participation of non-governmental organizations in this Conference. Civil society has played an important, constructive role in getting us to this stage, and in building support for an ICC. In recognition of this partnership, Canada has funded the attendance of six NGO representatives at the Conference. In addition, two NGO advisors are here as part of the Canadian delegation.²⁵⁰

For Canada, Oosterveld and Matas both recall the open and positive acceptance of their views and ideas by the government delegates. Neither had the sense that they were treated any differently because they were NGO members as compared to the other, governmental members of the delegation.²⁵¹ In subtle ways, Oosterveld and Matas were treated differently. Because of their background and civil society networks within the NGO world, Oosterveld and Matas played an important role, especially at the Rome Conference, discussed below, as an informational conduit between NGOs and CanDel.²⁵²

Having NGO representatives on CanDel did lead to some minor disagreements and at least one major dissent. Oosterveld describes how as a delegate with a vested interest in gender-related matters she was sometimes more committed to a particular outcome while her government counterparts, usually Don Piragoff, were more concerned

²⁴⁹ VO interview, 1, 3.

²⁵⁰ Axworthy, “Address to Conference.”

²⁵¹ VO interview, 1, 6; Matas interview, 1.

²⁵² Matas interview, 4.

with resolving each issue in a generally acceptable way.²⁵³ At the end of the day, the government delegates would have the final say, despite Oosterveld's protests that a chosen course was not "the absolute best way."²⁵⁴ Still, these 'disagreements', described by Oosterveld and Prost as 'conversations', were not disruptive of the Delegation's function.²⁵⁵

On the other hand, David Matas was not merely in disagreement on minor issues but actually in dissent with respect to the result. After the Conference, Matas wrote a report to Minister Axworthy, subsequently published in *Peace Magazine*, called "The Hard Realities of Soft Power."²⁵⁶ Matas later explained that the Statute "didn't achieve the ideal that [he] would have like to have seen."²⁵⁷ In his report, Matas credited (or rather discredited) the use of soft power with allowing a number of compromises to be made which ultimately made the Statute of the ICC defective.²⁵⁸ Whatever the validity of Matas' argument, the fact of making it made him less useful and helpful to CanDel. A Canadian delegate later explained that Matas

never mixed with the delegation. He monitored some of the negotiations but mostly sat in remote corners typing away on his computer. His opus turned out to be a lengthy, rambling letter to Minister Axworthy complaining about the delegation, for being too active or not active enough, too supportive of NGO positions or not supportive enough, etc. Fortunately, the letter

²⁵³ VO interview, 1, 12. In one instance, Oosterveld describes working with Don Piragoff at an informal meeting late into the night. After a long day of negotiations, Piragoff concurred with language proposed by a Syrian representative regarding perpetrator protections in rape cases, without consulting Oosterveld on the gendered aspects of the proposal. Piragoff was primarily concerned with resolving the issue, while Oosterveld was upset that the language Piragoff accepted was contrary to the Women's Caucus's specific goals – though, not Canada's general gender goals.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.* KP interview, 4.

²⁵⁶ David Matas, "The Hard Realities of Soft Power: Canada and the International Criminal Court" *Peace Magazine* 14.5 (1998), 24.

²⁵⁷ Matas interview, 5.

²⁵⁸ Matas, "Hard Realities", 28.

undermined whatever credibility Matas had in the Minister's office and he and the letter were ignored.²⁵⁹

Thus, there was some internal dissension within CanDel, despite a generally cooperative and cohesive delegation. These examples of disagreement and dissent suggest that no matter how carefully selected might be how or like-minded a delegation might appear, there are likely cracks beneath the surface that must be filled internally while still effectively practicing diplomacy externally.

While CanDel was in Rome playing the primary negotiating role, there was still some measure of diplomacy occurring on the home front in the form of support and criticism. Holmes recalls that the Delegation "had good relations with Minister Axworthy's political advisers. [The advisers] focused on getting a deal done, ensuring that the Court was strong enough to secure civil society support and securing US support."²⁶⁰ The key liaison in this process was the Acting Legal Advisor in Ottawa, who communicated between CanDel and "key people in Defence, Justice, the then Solicitor General, the Privy Council office and in the Minister's Office. The mechanism worked very well. We had the instructions we needed, HQ had the info it needed to make timely decisions and the Minister was well briefed when he arrived in Rome for the final decisions."²⁶¹ To this end, support from the home front was an important element in the internal politics of Canada's diplomacy in pursuit of an international criminal court.

Not every Canadian back home supported the efforts of CanDel though, nor even the idea of the ICC generally. The most vocal critics of Canada's position on the ICC

²⁵⁹ These comments were made on a not-for-attribution basis.

²⁶⁰ JH email response.

²⁶¹ *Ibid.*

were radical Western Canadian conservatives, epitomized by Member of Parliament Lorne Gunter, and journalist Tom McFeely. Gunter was especially critical of CanDel's relationship with the Women's Caucus for Gender Justice, claiming that Canada's "soft power image was at risk", and a highly coercive, frequently duplicitous, radical feminist perspective had hijacked the Delegation's agenda.²⁶² McFeely forwarded a more general criticism that Canada's support for the ICC was just bad policy.²⁶³ McFeely argued that Canada had adopted a radical, ideologized position that put national sovereignty and family unity at risk, while threatening Canada's relationship with the United States.²⁶⁴ Holmes gave assurance that all of these criticisms were accounted for during broad and deep consultations with the Canadian public prior to the Rome Conference where such views were raised, discussed, and ultimately dismissed by Foreign Affairs as not being in alignment with Canadian values on the issue.²⁶⁵

Even within the Delegation, a more neutral iteration of the sovereignty criticism was expressed. LCol McAlea explained how "the problem with the human security doctrine is that, in my view, it too readily dismisses the importance of States sovereignty and too readily contemplates intervention in States' domestic activities."²⁶⁶ However, the difference between LCol McAlea's critique and the more vehement criticisms expressed by Gunter and McFeely is that McAlea did not suggest that the Canadian position was

²⁶² Lorne Gunter, "Canada's 'soft-power' image at risk" *Calgary Herald* (2 August 1998), A15; Lorne Gunter, "Canada losing 'soft power' image" *Guardian* (23 July 1998), A6; Lorne Gunter, "Manipulation seems part of 'soft power'" *Edmonton Journal* (19 July 1998), F8.

²⁶³ Tom McFeely, "The ultimate activist court collapses - Canadian efforts to create an ideologized International Criminal Court founder in Rome" *Alberta Report* (27 July 1998), 6-7.

²⁶⁴ Tom McFeely, "Courting Trouble - Ottawa backs an international criminal court at any cost" *British Columbia Report* (29 June 1998), 8; Tom McFeely, "Hamstrung by a radical agenda - Canada's drive for an ideological international Criminal Court" *British Columbia Report* (27 July 1998), 14.

²⁶⁵ JH email response.

²⁶⁶ DM interview, 9.

radical or coercive, only that the emphasis on human security might have been misguided. Rather, McAlea explains that the concept of State responsibility,²⁶⁷ not necessarily human security, is the underlying imperative on which the ICC was founded. Still, LCol McAlea notes that despite this observation, his commitment to the Canadian Delegation's mission at Rome never wavered.

Maintaining Strategic Optimism

The internal politics of Canada's diplomacy at the Rome Conference can be summarized as being driven by strategic optimism. In "Hard Realities of Soft Power", Matas reported "[t]he Canadian delegation had an attitude, one of optimism. That attitude was partly strategic and partly real. It was felt that an optimistic attitude was most likely to lead to a successful result."²⁶⁸ At the end of the day, CanDel realized, it was a realistic possibility that the Conference could terminate without establishing a Court. It was therefore important to the Canadian strategy to maintain a strong conviction that the States of the world would be able to use the Rome Conference to negotiate a universally acceptable, independent and effective, international criminal court. There was a feeling within CanDel that if the Delegation was convinced enough, committed enough to a result favouring human security, then it would be possible to convince enough other States of the merits of the human security idea.²⁶⁹ Strategic optimism defined the advocacy through diplomacy by which CanDel pursued the creation of the ICC and the codification of international criminal law.

²⁶⁷ For further discussion of the concept of State Responsibility see: International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Center, 2001).

²⁶⁸ Matas, "Hard Realities", 27.

²⁶⁹ Matas interview, 7.

The External Political Dynamics of CanDel's Diplomacy

The extent to which the Canadians were able to carry this strategic optimism into their interactions with other government and NGO delegates would ultimately influence the effectiveness of the soft power approach that Axworthy insisted CanDel utilize. Unlike the flexible and cooperative internal politics of the specially engineered Canadian Delegation, wherein disagreements were few and far between, the external politics of diplomacy at the Rome Conference were far more rigid and contentious. Canada was fortunate that its position aligned closely with the goals of the like-minded group of States (indeed, the Cornerstone positions for the ICC were a shared product of all of the LMGs, originally fashioned by Canada during its chairmanship of the group) and the objectives of a majority of the NGOs. Still, neither the LMG nor the NGOs attending the Conference were monolithic, and certain issues arose in CanDel's dealings with these groupings. Of course, Canada's 'special relationship' with the United States led CanDel to see itself as a bridge-builder between the US and the LMG, NGOs, or sometimes the entire Conference.

Like-Minded Group of States

Operating within the like-minded group of States at the Rome Conference was probably the most crucial element of the external politics of CanDel's diplomacy. The LMG, described in Part I, grew larger as the Conference proceeded. This made it increasingly difficult, and simultaneously more important to coordinate and discuss issues among the LMG. To that end, like-minded States would meet frequently to discuss priorities for the coming days and how those priorities aligned with the

Cornerstones.²⁷⁰ Oosterveld explains how Richard Roe, Chair of the LMG from Australia, “would send a diplomatic memo around to all of the like-minded group States saying ‘We are meeting on this day, at this time, in a specific location.’”²⁷¹

Contingent upon the overlapping commitments during LMG meetings, every member of CanDel (aside from Kirsch) would attend the LMG meetings if possible. This was important, according to Prost, because Canada was working hard to ensure that all of the like-minded States were as unified as possible on the various issues.²⁷² As time went on, it wasn’t always possible for CanDel to attend LMG meetings en masse as the team became busier with the negotiations. Still, in their nightly planning meetings the Delegation would coordinate who would attend and strived to send at least two or three delegates to each LMG meeting.²⁷³ Whoever was chosen to attend would be briefed by the entire delegation on what CanDel wanted to accomplish at the various LMG meetings. This was done to ensure that CanDel capitalized on each opportunity to exercise soft power in support of human security.

Non-Governmental Organizations

Meanwhile, Canada’s diplomacy in Rome was influenced, along with the entire negotiating process, by the overwhelming presence of non-governmental organizations at the Conference.²⁷⁴ UN documents show that about 250 NGOs officially register and attended the Rome Conference,²⁷⁵ while many others informally attended and or

²⁷⁰ VO interview, 2, 1.

²⁷¹ *Ibid*, 2.

²⁷² KP interview, 4.

²⁷³ VO interview, 2, 2.

²⁷⁴ Kirsch and Holmes, *Birth*, 11.

²⁷⁵ UN Doc. A/Conf.83/INF/3 (June 5, 1998).

influenced the negotiations in other ways. “Not only did they lobby for certain positions, broad or specific,” Kirsch and Holmes write, “but, having focused on the subject for years, they possessed for the most part a level of expertise that they were happy to make available and was often welcome, particularly among small delegations.”²⁷⁶ An especially important factor was the CICC, which set up teams of NGO representatives to monitor and report on all of the discussions throughout the entire Conference.²⁷⁷

Due to the elevated position of NGOs at the Rome Conference, Canada’s NGO delegates played a uniquely important role. Oosterveld recalls that part of what she was tasked to do, utilizing her close ties in the NGO world, was “keep the information flowing” between CanDel and the NGOs.²⁷⁸ Matas explains that he and Oosterveld “were able to convey to the government what the NGOs wanted.”²⁷⁹ Oosterveld would speak daily to her NGO contacts from the Women’s Caucus, Amnesty International, Human Rights Watch, as well as Fergus Watt about any concerns the NGOs had or positions they wanted shared with the Canadian Delegation.²⁸⁰

This information sharing was largely a one-way street, with some exceptions. Both Oosterveld and Matas (indeed, the entire Delegation) were made to sign a confidentiality agreement as a condition of their employment on CanDel.²⁸¹ Thus, as Matas describes, they “had to keep the confidence of what was going on within the

²⁷⁶ Kirsch and Holmes, *Birth*, 11.

²⁷⁷ FW interview, 7.

²⁷⁸ VO interview, 1, 4.

²⁷⁹ Matas interview, 2.

²⁸⁰ VO interview, 1, 4.

²⁸¹ *Ibid*; Matas interview, 2.

government delegation conversations.”²⁸² Of course, much of the information on any number of issues was all in the public eye, so confidentiality was only really an issue relating to Canadian strategy.²⁸³ Even with respect to strategy, Oosterveld or Matas would frequently leak to the NGOs the state of negotiations in informal meetings or working groups on a particular issue and an element of CanDel’s strategy in those negotiations. This information allowed those NGOs could aggressively lobby obstructionist States for a change in stance before the negotiations resumed.²⁸⁴ In that regard, without compromising confidentiality Matas and Oosterveld were able to act as a convenient point of contact between CanDel and NGOs, comprising a key element in the external politics of Canada’s diplomacy.

NGOs are not created equal, however, and the inherent differences led to some difficulties in working with non-government representatives at Rome. Matas argues that NGOs attempt to set out an ideal to achieve, and negotiate with the purpose of achieving that ideal even if it may not be practically achievable.²⁸⁵ The other side of this idealism is that anything less is grounds for criticism, fostering conflict.²⁸⁶ Despite this general idealism, LCol McAlea explains that “the NGOs were not monolithic; some had completely antagonistic agendas [to Canada’s Cornerstones].”²⁸⁷ Similarly, some NGOs worked towards a big picture, while others were narrowly focused on a single issue and

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ VO interview, 1, 10.

²⁸⁵ Matas interview, 3.

²⁸⁶ *Ibid.*

²⁸⁷ DM email response.

they only “play one note and that’s all they play and they play it all the time.”²⁸⁸

Fortunately, the CICC was able to elucidate a “tiny degree of coherence and general level of agreement on [NGO] objectives”, according the Fergus Watt, which in turn mitigated the potential incompatibility and conflict both among the NGOs and between the NGOs and the LMGs.²⁸⁹

Throughout the Rome Conference, NGOs played a pivotal role in internal and external communications, both formal and informal. On a formal, internal level, a group of NGOs published a daily journal called *Terra Viva*, which “discussed problems of principle, reported on regional or national situations or positions, and reviewed developments at the conference itself.”²⁹⁰ Kirsch and Holmes note that *Terra Viva* was a well-written, provocative publication that facilitated more than hindered negotiations by informing delegates of various positions and developments in which they were not personally involved.²⁹¹ Informally, the CICC assigned its members to monitor, summarize, and report on discussions and developments in each meeting and working group occurring at the Conference. All of these reports were consolidated, printed, and distributed to the CICC every day, allowing the NGO coalition to stay better informed than almost every national delegation.²⁹²

This “mobilization of information gathering”, so termed by Fergus Watt gave the NGOs a sophisticated understanding of the state of play and made it especially effective

²⁸⁸ DM interview, 7.

²⁸⁹ FW interview, 1.

²⁹⁰ Kirsch and Holmes, *Birth*, 11.

²⁹¹ *Ibid.*

²⁹² FW interview, 6-7.

in talking to the external media.²⁹³ Watt suggests that the media covering the Rome Conference trusted NGOs more than government delegations because NGOs were transparent about their priorities and the actual state of the negotiations.²⁹⁴ Watt recalls sending numerous press releases back to Canadian media from Rome and speaking to CBC radio on a few occasions about the NGO role at the Rome Conference and the Canadian Delegation's actions.²⁹⁵ It was important, therefore, for CanDel to communicate carefully with the NGOs and attempt to control the external message being sent to the Canadian public.²⁹⁶ Ultimately, working with the NGOs and not against them was crucial to CanDel's ability to pursue a soft power strategy for achieving its goals for an international criminal court.

Building Bridges – Canada-US Relations in Rome

Aside from the LMG and the NGOs at the Rome Conference, the most important single State in the external politics of Canada's diplomacy was the United States. Minister Axworthy writes "The serious test... was in trying to keep the U.S. in the fold."²⁹⁷ This test, whether actual or perceived, fits squarely within the broader trends of Canadian diplomacy since the end of WWII – finding a place for Canada in world affairs, especially relative to the US. On this point, Darryl Robinson describes the relationship and its effect on CanDel at the Rome Conference:

[because of Canada's] proximity of the United States and our close friendship with them, we saw ourselves as bridge builders between the US, with all of its concerns, and the like-minded group. We thought that

²⁹³ *Ibid*, 6.

²⁹⁴ *Ibid*.

²⁹⁵ *Ibid*, 5.

²⁹⁶ *Ibid*, 6; VO interview, 1, 6.

²⁹⁷ Axworthy, *New World*, 203.

maybe we could find ways to try to address all the US concerns in a principled way that would be acceptable to everyone else. ... We were pretty keen to try and get the US on board.²⁹⁸

Accommodating the United States without compromising principles created a number of specific challenges and required a carefully crafted strategy to deal with Canada's special relationship with the US.

As it was perceived that American support for the ICC would be necessary for the Rome Conference to be successful and the Court to be effective,²⁹⁹ CanDel was tasked with appeasing as many US demands as possible without sacrificing the Cornerstone principles. Axworthy himself reached out to Madeline Albright, then US Secretary of State, and "agreed that [Canada] would make every effort to meet US concerns."³⁰⁰ The problem with this, according to Axworthy, was that some American demands "simply could not be met without distorting the integrity of the court."³⁰¹ Further compounding the challenge of keeping the US in the fold was the American 'all or nothing' approach to the negotiations.³⁰² LCol McAlea explains that the American delegation came to the negotiations with a number of items on its agenda and anything less than achieving 100 per cent of those items would be considered a failure and the outcome would be unacceptable to the US.³⁰³ Further, the US delegation made its position on each issue

²⁹⁸ DR interview, 2.

²⁹⁹ *Ibid.*

³⁰⁰ Axworthy, *New World*, 204.

³⁰¹ *Ibid.*: Axworthy continues, "We couldn't accept an exemption for U.S. servicemen, for example, even though their own court system would have prime jurisdiction, nor could we accept a court that would be limited to cases referred by the Security Council." See also, "Axworthy rejects U.S. fears of new world criminal court" *Calgary Herald* (13 May 1998), A13.

³⁰² See "What a Let Down!" & "US Lays Down its Cards" *Terra Viva* (10 July 1998); Marcus Gee, "Indicting U.S. stance in Rome" *The Globe and Mail* (17 June 1998), A17; Alessandra Stanley, "U.S. Argues Against Strongly Independent War Crimes Prosecutor" *The New York Times* (18 June 1998), A7.

³⁰³ DM interview, 2.

clear at the outset of each formal or informal and in many instances refused to budge from that starting point. Many States saw this approach as bullying or setting ultimatums, which disrupted the flow of the negotiations.³⁰⁴ On jurisdiction issue in particular, the head of the American Delegation, Ambassador David Scheffler, refused to let the US delegates even discuss potential compromises, setting the US on the fringes of the most complex and controversial issue.³⁰⁵

This combination of Canada's unique relationship with the US and that American approach to negotiations required a "special strategy with respect to the United States."³⁰⁶ Oosterveld recalls that CanDel was continuously asking itself in planning and strategy meetings: "How will the US react?"³⁰⁷ This consideration was not limited to the confines of the Rome Conference either, as it was equally important to beware of the potential impact of decisions taken in Rome on other aspects of Canada-US relations, especially trade.³⁰⁸ LCol McAlea explains that CanDel spearheaded a number of specific compromises relating to the powers of the prosecutor and the role of the Security Council in an attempt to get the US on board.³⁰⁹ Ultimately, CanDel was always preoccupied with strategic discussions about how to approach the United States, how to accommodate American views in a friendly manor, and how to keep a productive working relationship between Canada and the United States.³¹⁰

³⁰⁴ VO interview 2, 3-4.

³⁰⁵ DM interview, 2; James Blitz, "US blow to hopes for a World Court" *Financial Times* (18 June 1998), 4; "US Lays Down its Cards" *Terra Viva* (10 July 1998).

³⁰⁶ VO interview, 2, 3.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ DM interview, 7.

³¹⁰ VO interview, 2, 3.

Despite the difficulties, CanDel was able to work effectively to bring to US into the discussions on a number of issues – in some cases cooperating with American delegates to push the agenda with creative diplomacy. The American delegation was not as monolithic as CanDel, LCol McAlea argues, which required the Canadian delegates to work with their American counterparts on some issues while working against other Americans on the very same issue.³¹¹ In some cases, CanDel would strategize with American delegates in advance of negotiations on the best way to come to an agreed upon result. Oosterveld comments that it was sometimes useful to have the most extreme American position expressed first in formal meetings in order to gauge a room’s response in terms of where other States fell on the spectrum.³¹² This would allow CanDel to fashion a compromise with the American delegates prior to informal meetings that would satisfy US concerns, not jeopardize Canada’s cornerstone positions, and garner consensus support from other States.³¹³ LCol McAlea explains that this diplomatic maneuver was possible because it manipulated the “palpable pacifistic anti-Americanism in play during some of the meetings.”³¹⁴ He also notes that the Rome Statute reflects this engagement with the American delegation because “it reads like a US statute, because on most of the issues the US did engage and we were able to come to a consensus.”³¹⁵

Although the US did engage on some issues during the Conference, the final result was a mixed one. “Having the US on board was an extremely important tool,” Robinson remembers, but “when it came down to it, having a Court that could actually

³¹¹ DM interview, 3.

³¹² VO interview, 2, 4.

³¹³ *Ibid*; DM interview, 3.

³¹⁴ *Ibid*.

³¹⁵ DM interview, 2.

work was the most important.”³¹⁶ At the end of the Conference, American objections on particular issues could not be reconciled with 92 per cent of other States and the final draft presented to the Rome Conference reflected the majority consensus, omitting the American options.³¹⁷ On 17 July 1998, *The Globe and Mail* reported that the “Canadian-made, take-it-or-leave-it deal on the proposed world criminal court” would not be enough to sway the US to become a like-minded supporter of an independent and effective ICC.³¹⁸ Minister Axworthy later wrote that CanDel’s resistance of “American efforts to scuttle the International Criminal Court” is a prime example of an occasion when Canada “stood up to the US on matters of principle.”³¹⁹ In the final result, CanDel’s endeavour to bring the US on board fell short. Building one bridge at the expense of burning all others was not an acceptable outcome for the Canadian delegation, notwithstanding Canada’s special relationship with the United States. Nevertheless, the overwhelming influence of American positions in CanDel’s considerations at the Rome Conference reflected a continuing trend in Canadian diplomacy that Canada’s place in the world is still relative to its southern neighbour.

The Rome Conference in Phases & Canada’s Contributions Throughout

Having discussed the internal and external politics of Canada’s diplomacy at the Rome Conference generally, this section now turns to a phase-by-phase examination of CanDel’s specific role at each juncture of the Conference. Following the opening speeches at the Plenary session, the real work of the conference began. An independent

³¹⁶ DR interview, 2.

³¹⁷ FW interview, 13; DR interview, 6.

³¹⁸ “Canadian-Crafted world court plan doesn’t sway U.S.” *The Globe and Mail* (17 July 1998), A12.

³¹⁹ Axworthy, *New World*, 92.

publication of the CICC distributed daily at the Rome Conference, *Terra Viva*, suggested that it was “bracket-busting time”.³²⁰ “The formal organization of the conference had been planned in advance and was approved on the first day,” Kirsch and Holmes recall, “The need to undertake the substantive work without wasting any time was generally understood.”³²¹ The Bureau of the Committee of the Whole, comprised of representatives from Canada, Argentina, Romania, Lesotho, and Japan, managed the negotiation process.³²² Philippe Kirsch, as Chairman of the CW, sought to make the process most efficient by using an enlarged bureau that included a number of coordinators who were appointed to manage negotiations on specific issues. Each coordinator was charged with taking the lead in drafting provisions in their area and requested not to refer any bracketed texts to the CW – this would avoid, in Kirsch’s calculation, “miring in the negotiations on the multitude of square brackets.”³²³

Delegates recalled that the Conference progressed in roughly three phases: the first phase lasted roughly the first three weeks of the Conference, during which time very little was accomplished; the second phase began precisely on Sunday 5 July 1998, which is generally referred to as a turning point in the negotiations, and lasted roughly ten days; the third and final phase can be seen as the final days of the Conference, starting on 15 July 1998 and continuing through to the final acceptance of the Rome Statute in the early morning hours of 18 July 1998.

Phase One: Immobilizing Inertia

³²⁰ Farhan Haq, “Bracket-Busting Time Begins” *Terra Viva* (15 June 1998).

³²¹ Kirsch and Holmes, *Process*, 3; Kirsch and Holmes, *Birth*, 13-14.

³²² *Ibid.* For a description of the structure of plenary, drafting committee, CW, working groups, etc., see pg 3, fn 5.

³²³ *Ibid.*

Kirsch and Holmes write that the “[e]arly debates in plenary and in the CW largely consisted of largely consisted of formal statements, without much indication of where the middle ground might be found.”³²⁴ Following these first statements, Kirsch, in his role as Chairman of the CW, met privately with delegations to assess the prospects of compromise. For the most part, he recalls, “the same, well-known public positions were repeated in private with little elaboration, let alone indications of flexibility.”³²⁵ Darryl Robinson suggests “the problem with the Rome Conference was the absence of pivotal moments.”³²⁶ In the first three weeks of the Conference, States remained entrenched in their original positions and despite the Bureau’s encouragement, there was minimal activity and real engagement between States. Each State seemed to be waiting for others to propose a big solution to breakthrough the stalemate; none were willing to move from their positions to take the first step.³²⁷

A major problem in the first three weeks was a general reluctance to compromise. Kirsch and Homes note that “without being given a clear understanding of what the final package would be, delegations proved very reluctant to make enough concessions to lead to such a breakthrough.”³²⁸ Specific issues, particularly regarding jurisdiction, were highly politicized making the hesitance ever more pronounced. “The main political issues contained in part 2 of the statute were sensitive and complex. They were also, in the minds of many delegations, intertwined... the permissibility or not of reservations

³²⁴ Kirsch and Holmes, *Process*, 5.

³²⁵ *Ibid*; Kirsch and Holmes, *Birth*, 19.

³²⁶ DR interview, 5.

³²⁷ *Ibid*.

³²⁸ Kirsch and Holmes, *Birth*, 18.

also had an impact on positions” according to Kirsch and Holmes.³²⁹ Additionally, the convoluted structure of the negotiations³³⁰ made it nearly impossible for all but the largest of delegations to have a comprehensive understanding of the status of negotiations on any one part, let alone the entire Conference.

Surrounding all of these issues was the specter of adjournment. Kirsch and Holmes describe time constraints as a dominant factor:

Another factor that dominated the negotiating process was the lack of time allocated to the conference. Because of the myriad of options it contained, the draft statute that served as the basis for discussion was difficult to discuss and even to understand.³³¹

At the midway point of the Conference, *Terra Viva* ominously reminded delegates that time was slipping away for an agreement to be reached.³³²

Recognizing this limitation, the US and other States, as well as a large number of NGOs pushed for adjournment of the Rome Conference, proposing that negotiations be picked up at a later time.³³³ On one hand, the American delegation saw early on that it would be extremely difficult to win all of the concessions it was seeking.³³⁴ On the other, the NGOs were worried that the statute was becoming too narrow and catering too much to the points of view of conservative countries or the United States.³³⁵ Kirsch’s CW maintained steadfast in its commitment that “concluding the Conference in Rome was

³²⁹ *Ibid*; Kirsch and Holmes *Process*, 5.

³³⁰ The substantive negotiations occurred in a number of simultaneous working groups on the various parts and issues called ‘informals’; when those informals reached a standstill, the Chair of the working group would hold an informal wherein select States would be invited to a closed-door meeting to breakthrough a logjam on a particular article or option; meanwhile, a large measure of corridor diplomacy was occurring between States and involving the NGOs. Positions and negotiations were in constant flux.

³³¹ Kirsch and Holmes, *Birth*, 11.

³³² Alejandro Kirk “Tick-Tock Tick-Tock...” *Terra Viva* (9 July 1998).

³³³ JH email response; VO interview, 2, 6-7; Matas, “Hard Realities”.

³³⁴ JH email response.

³³⁵ VO interview, 2, 6.

preferable to a deferral with a view to resuming its work at a later date.”³³⁶ To adjourn the Conference simply on account of States’ inactivity in the early days and hesitance to reach compromises would have defeated the purpose of holding multilateral negotiations in the first place. And, as time went on, it became evident that some States were not going to change their minds no matter how much additional time was added.³³⁷

CanDel’s Creative Compromises

During this initial inertia, CanDel’s role was essentially one of playing a broken record. “It was a daily grind,” Watt indicates, “a gradual process of evolving consensus on various interconnected issues.”³³⁸ Robinson later wrote “the Canadian delegation played a brokering role in all areas of negotiation ... by bridging gaps and finding creative ways to address legitimate concerns while maintaining a strong Court.”³³⁹ At base, CanDel kept pointing to the complementarity provisions that had been agreed upon during the PrepCom. Axworthy writes, “we felt that this point was essential to overcome fears of a transnational takeover of national criminal proceedings.”³⁴⁰ Hence, regardless of the issue in question – whether jurisdiction, crimes, or defences, all contentious issues in Part Two of the Statute – CanDel would point to the work done by John Holmes at the PrepCom and assure States that they would always have primary responsibility over crimes committed within their own sovereign territory.

Although CanDel played the complementarity card often in the early stages, it was not sufficient to allay concerns on the most contentious issues. “The biggest single

³³⁶ Kirsch and Holmes, *Birth*, 36.

³³⁷ DM interview, 7; JH email response; VO interview, 2, 7; Kirsch and Holmes, *Birth*, 36.

³³⁸ FW interview, 13.

³³⁹ Robinson, “The ICC”, 173.

³⁴⁰ Axworthy, *New World*, 203.

issue was the question of jurisdiction,” LCol McAlea notes.³⁴¹ What State would have primary jurisdiction over international crimes; when would the ICC’s take jurisdiction; and what preconditions or procedural steps would the ICC need to take jurisdiction? These questions were so important to the successful completion of the Conference, Kirsch instructed CanDel to “develop a whole hockey sock full of jurisdictional options.”³⁴² The United States was especially problematic in this regard. LCol McAlea recalls “on jurisdiction, US “diplomacy” was basically limited to Ambassador Scheffer going into the Plenary sessions, stating the US position and just walking out. Sometimes he would stay a while but there was no engagement, no discussion, and he prohibited his staff from discussing it.”³⁴³ This problem was especially difficult to solve, even with CanDel’s soft power approach and reliance on complementarity; jurisdiction was a major contributor to the inertia of the early stage of the Rome Conference.

Canadian delegates were also quite active in the first few weeks of the Conference attempting to “strike a middle ground” on the definitions of international crimes.³⁴⁴ With respect to war crimes and crimes against humanity, the middle ground Robinson and LCol McAlea were attempting to strike was somewhere “between the Permanent Five [members of the Security Council] and a lot of conservative States that wanted a restricted definition, and the like-minded States that wanted a more broad definition.”³⁴⁵ McAlea states that CanDel’s “mantra was that this Court and Statute was to be faithful to

³⁴¹ DM interview, 2.

³⁴² *Ibid.*: “We came up with many options for dealing with it, we had an option which would have limited the prosecutors ability to lay charges, we had referrals to the security council, we had all kinds of other options.”

³⁴³ *Ibid.*

³⁴⁴ DR interview, 4. See generally, Darryl Robinson, “Defining “Crimes Against Humanity” at the Rome Conference” *American Journal of International Law*, 93.1 (1999), 43.

³⁴⁵ DR interview, 4; See also, Donald K Piragoff, “Mental Element” in Triffterer, ed., *Commentary*.

existing customary international law; the Rome Conference was not meant to be a legislative body or to create new laws.³⁴⁶ For this reason, CanDel worked on a compromised definition of these crimes that was intended to come in between those two camps, without flouting existing international law, but also without fabricating new law.³⁴⁷ This was, of course, a very delicate process, which contributed to the inertia of the Conference and was not ultimately resolved until the late days of the negotiations.

Phase Two: Taking Stock and Turning Points

There was a break in the middle of the five-week negotiation, Fergus Watt recalls, before which all momentum had stopped, after which the negotiations seemed to plow full steam ahead.³⁴⁸ Kirsch and Holmes summarize the logjam concisely:

As the third week of the conference drew to a close and the bureau took stock of the state of negotiations, progress on the main issues in part 2 of the draft statute had ground to a near standstill. Informal summaries of debates, prepared by the conferences secretariat for the bureau and by NGOs, revealed clear trends on most issues, which were met with equally clear and determined opposition. The road to an acceptable text of part 2 was neither certain nor apparent. States were reluctant to agree to compromises on specific issues without knowing how the entire package would emerge.³⁴⁹

As Chairman of the CW, Kirsch and his Bureau decided to try and kick-start the momentum of discussions and avoid a failed Conference. This section assesses the questions: how this logjam was broken, and what if any role did the Canadian Delegation play in its demolition?

What happened on Sunday, 5 July 1998 is unanimously identified as a turning

³⁴⁶ DM interview, 1.

³⁴⁷ DR interview, 4.

³⁴⁸ FW interview, 9.

³⁴⁹ Kirsch and Holmes, *Process*, 5; Kirsch and Holmes, *Birth*, 19-20.

point in the trajectory of the Conference, but it also created confusion and blurred lines in the minds of the participating delegates and NGOs. As Chairman, Kirsch organized a rare Sunday meeting of twenty-eight delegations³⁵⁰ at the Canadian Embassy in Rome “to explore possible areas of compromise and to analyze the reactions of delegations.”³⁵¹ Despite the Chairman’s assurances that “[t]he meeting was limited in size because of the available facilities, but was not secret” and “[t]he attending delegations reflected different regions and represented varying perspectives”,³⁵² the meeting invited criticism on a number of grounds. On one hand, States that were not invited to the special meeting felt as though their views and opinions were not acknowledged or appreciated.³⁵³ On the other hand, NGOs perceived the meeting as a Canadian meeting and felt that the meeting was an inappropriate usurping of Kirsch’s role as Chairman to push the Canadian agenda.³⁵⁴

Criticism notwithstanding, the Sunday meeting did initiate some momentum in negotiations on substantive issues. The Bureau of the CW met on 6 July to review the results of the meeting and consolidate a *Bureau Discussion Paper*³⁵⁵ on Part Two of the draft statute. The discussion paper was distributed to delegations on Tuesday, 7 July 1998 and set a deadline for the participants to reach a broadly acceptable solution.³⁵⁶ Kirsch and Holmes explain that the Bureau had taken an intentionally cautious approach, offering a combination of proposals, options, and alternatives on the contentious issues of

³⁵⁰ “US Launches Preemptive Strike on ICC Statute” *On the Record in Terra Viva* (9 July 1998), 1.

³⁵¹ *Ibid*, 20.

³⁵² *Ibid*; Kirsch and Holmes, *Process*, 5.

³⁵³ Farhan Haq, “Canadians Float Compromise” *Terra Viva* (7 July 1998).

³⁵⁴ *Ibid*; also, VO interview, 1, 8.

³⁵⁵ UN Doc.A/CONF.183/C.1/L.53 (1998).

³⁵⁶ Kirsch and Holmes, *Birth*, 21; *Bureau Discussion Paper*, Art 5; *Terra Viva* (8 July 1998)

jurisdiction, aggression, treaty crimes, the threshold for war crimes, prohibited weapons and internal armed conflict.³⁵⁷ The most positive reaction from States was with respect to the structure of the proposal, but on substance the same debates still raged.³⁵⁸ Still, *Terra Viva* reported on 8 July that the “Canadian Paper” was a “best seller”,³⁵⁹ and that by 9 July “the so-called Canadian proposal – officially, the Bureau Discussion Paper – has already achieved much; all countries were forced to speak their minds around a specific set of issues. Thus, nobody can now reasonably argue that the conference will not produce a Statute by 17 July.”³⁶⁰

The discussion paper alone was not enough to dislodge the stalemate, however, and significant advocacy was required to move some States out of their entrenched positions. As Chairman, Kirsch was especially activist in his approach to building consensus.³⁶¹ From 7 to 10 July, Kirsch held a series of bilateral discussions with delegations as some “proved more willing to discuss areas of compromise and bottom line positions privately, but not publically.”³⁶² During these meetings Kirsch encouraged delegations to, in the words of Farhan Haq, reporter for *Terra Viva*, “speak now (or forever hold you peace)”.³⁶³ Essentially, Kirsch was enticing delegations to explain their reservations as clearly as possible and attempting to gather as much information as he could to consolidate into what would ultimately become the final package. In the interim, the Bureau released a second, more narrow discussion paper based on the feedback it had

³⁵⁷ Kirsch and Holmes, *Process*, 5-7, 9; Kirsch and Holmes, *Birth*, 21; Schabas, *Intro to the ICC*, 20-21.

³⁵⁸ Kirsch and Holmes, *Process*, 5-6.

³⁵⁹ “Canadian Paper: A True Best Seller” *Terra Viva* (8 July 1998).

³⁶⁰ Alejandro Kirk “Tick-Tock Tick-Tock...” *Terra Viva* (9 July 1998).

³⁶¹ Matas interview, 6.

³⁶² Kirsch and Holmes, *Process*, 6.

³⁶³ Farhan Haq, “Speak Now (or forever hold your peace)” *Terra Viva* (8 July 1998).

received in the four days of reviewing the first.

CanDel Quiets Down

Meanwhile, the Canadian Delegation was playing two roles during this phase of the Conference. In the first, CanDel was quietly supporting its leader – Kirsch remained, after all, Canada’s formal Head of Delegation. Minister Axworthy writes “The chairmanship proved a real test of our soft-power capacity, pitting us in a strategic position,” while at the same time requiring tactful diplomacy so that Kirsch would not be seen as biased.³⁶⁴ Yet, Kirsch was still a member of the Canadian Delegation and he looked to his team for advice and support during this frantic phase of the Conference. LCol McAlea recalls his “special relationship with Ambassador Kirsch” wherein the Chairman would frequently take McAlea aside and ask for a frank assessment of the situation: “call it a bullshit check or a second opinion, but I just think Kirsch saw it as valuable because he saw me as an honest broker. There were some issues which I had no stake at all, so I would simply give him an objective legal analysis of it.”³⁶⁵ As discussed above, CanDel’s communication with Kirsch throughout the Conference were necessarily more covert, especially when trying to dispel confusion that the Bureau Discussion Paper was a Canadian proposal, but the team relentlessly advocated for consensus around its cornerstone positions.

The second role was unique to select members of CanDel and required a fair measure of diplomatic finesse. If the lines were blurred with respect to the discussion paper, they were certainly crossed and crossed back again by John Holmes and Darryl

³⁶⁴ Axworthy, *New World*, 203.

³⁶⁵ DM interview, 8.

Robinson, who both attempted to balance two sets of responsibility in this second phase of the Rome Conference. Holmes had worked for Kirsch from the beginning, but Robinson was brought on during this second phase of the Conference to assist the Chairman's consensus building exercise. Under Kirsch, Holmes and Robinson were "shuttling back and forth between different delegations, exploring the kind of things they might agree on."³⁶⁶ While acting on behalf of the Chairman, Holmes and Robinson were expected to maintain neutrality; yet both Holmes and Robinson were still intimately engaged in negotiations on contentious issues of jurisdiction and definitions of crimes on behalf of Canada. In this light, it is not difficult to understand why NGOs, Conference publications, and international media frequently confused Kirsch's motivations as Chairman with his motivations as a Canadian delegate.³⁶⁷

Phase Three: High Noon in Rome

As described above, Darryl Robinson cleverly notes "The absence of pivotal moments was the most pivotal moment of all. Then that meant the pivotal moment was the bureau on the last day coming up with a compromised package."³⁶⁸ As the final days drew closer, working group coordinators redoubled their efforts to find compromise. Some solutions were found,³⁶⁹ but significant disagreement remained, according to Kirsch and Holmes, "on a number of elements relating to war crimes, jurisdiction, the role of the Security Council, aggression, and treaty crimes."³⁷⁰ These final days

³⁶⁶ DR interview, 3.

³⁶⁷ Farhan Haq, "Speak Now (or forever hold your peace)" *Terra Viva* (8 July 1998); "Canadian Paper: A True Best Seller" *Terra Viva* (8 July 1998); "Canada shines on world stage" *Toronto Star* (21 July 1998), 1.

³⁶⁸ DR interview, 5.

³⁶⁹ Including on issues relating to gender questions, the death penalty, national security information, financing, and more: Kirsch and Holmes, *Birth*, 29.

³⁷⁰ *Ibid.*

constitute the last phase of the Rome Conference and raise the question: how did this discord in the terminal stage of the Conference play out, and what, if any, was the Canadian role in this stage?

The Rome Conference was scheduled to close, with or without a Court, on Friday, 17 July 1998. In addition, the Committee of the Whole was supposed to have its work complete by Wednesday to give enough time to have the Draft translated and prepared for a final vote in the Plenary. By Tuesday, 14 July, no agreement existed on a number of fundamental questions.³⁷¹ At that point, Axworthy writes, “Kirsch made a bold decision to forgo the normal UN practice of working from a bracketed text that delegations could haggle over and presented instead a take-it-or-leave-it package that addressed a number of reservations coming from recalcitrant delegations.”³⁷² *Terra Viva* described the final days in theatrical fashion:

Like the lone sheriff in a classic Western, chairman Philippe Kirsch is conducting a desperate but determined search for a critical number of deputies to back his attempt to gather support for a compromise Statute for an International Criminal Court (ICC) before the Wednesday “high noon” deadline of sorts, set for the Committee of the Whole to complete its work.³⁷³

Over the course of the next two days, Kirsch gathered his Bureau to work tirelessly preparing the final package. “These discussions continued until very late on the penultimate day of the conference,” Kirsch and Holmes write, “By the end of Thursday, July 16, the Bureau submitted its final package, which delegations received in the early

³⁷¹ Kirsch and Holmes, *Process*, 9; Kirsch and Holmes, *Birth*, 28.

³⁷² Axworthy, *New World*, 204; see also, Alejandro Kirk, “Take it or Leave it” *Terra Viva* (14 July 1998); VO interview, 2, 9.

³⁷³ Farhan Haq, “High Noon” *Terra Viva* (15 July 1998).

hours of July 17.”³⁷⁴

Resolving CanDel’s “Key Priority Concerns”

As the end of the Conference approached, CanDel worked assiduously on a number of “key priority concerns.”³⁷⁵ The more that was resolved prior to the consideration of the final package, the less would be left up to chance at the final vote. Kimberly Prost remembers that a number of issues in Part Nine of the Statute on cooperation were not resolved until the last 24-48 hours of the Conference. She worked tirelessly to assuage some States’ constitutional concerns about extraditing nationals to the ICC, an issue which was resolved through carefully selected language, and to find a compromise on protecting national security information without sacrificing the effectiveness of the Court.³⁷⁶ Simultaneously, David Matas’ efforts to ensure that the death penalty was not included in the Statute “proved to be a full-time job for virtually the entire conference.”³⁷⁷ Ultimately, a compromise was struck that avoided what Matas termed “a deal breaker” if the death penalty was included.³⁷⁸ Excluding the death penalty, but including a ‘non-prejudice provision’³⁷⁹ resolved the problem along with a statement read into the record by the President of the Conference to clarify that the decision to not include the death penalty was not a crystallization of international law

³⁷⁴ Kirsch and Holmes, *Process*, 10; Kirsch and Holmes, *Birth*, 30; see also, Schabas, *Intro to the ICC*, 21.

³⁷⁵ Kirsch and Holmes, *Process*, 6.

³⁷⁶ KP interview, 5; see also Kimberly Prost, “Availability of Procedures under National Law” in Triffterer, ed., *Commentary*; Kimberly Prost and Angelika Schlunnk, “Other Forms of Cooperation” in Triffterer, ed., *Commentary*; Kimberly Prost and Angelika Schlunnk, “Consultations” in Triffterer, ed., *Commentary*.

³⁷⁷ Kirsch and Holmes, *Birth*, 14: referring to the Penalties working group coordinator, Rolf Einar Fife’s efforts to find a compromise to satisfy pro-death penalty States.

³⁷⁸ Matas interview, 4-5.

³⁷⁹ *Rome Statute*, art 80.

prohibiting it.³⁸⁰ Additionally, the definition of gender under the Statute was finally resolved on the second last day of the Conference. Oosterveld, acting for Canada, a Chilean representative, and a few representatives of States from the Organization of Islamic States were sent to an informal informal with strict instructions not to come out until an agreement had been struck.³⁸¹ What came out of that meeting would be accepted as what became article 7(3) of the Statute.³⁸² These examples demonstrate CanDel's continuing influence on the shaping of the substantive issues in the late days of the Conference.

Again the Canadian role during this final phase was multifaceted. Holmes and Robinson were continuing to support Kirsch and his Bureau, now almost exclusively.³⁸³ As part of the Bureau team, Robinson and Holmes were part of the private discussions in the final days about different plans and proposals, ultimately attempting to get as many States as possible in agreement.³⁸⁴ These private contemplations led many delegations outside of the process to question, "where are decisions being made?"³⁸⁵ Despite concerns, Robinson assures that the Bureau's discussions were deliberately careful not to merely succumb to majority opinions:

³⁸⁰ The President of the Conference stated at the time of the addition of Art. 80 to the ICC statute, "It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes": UN Doc. A/Conf. 183 /C. i/WGP/L. 14 /Add.3/Rev. 1 (17 July 1998).

³⁸¹ VO interview, 2, 3.

³⁸² *Rome Statute*, art 7(3): "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."

³⁸³ DR interview, 6.

³⁸⁴ *Ibid*; JH email response.

³⁸⁵ "Where are decisions being made?" *Terra Viva* (15 July 1998).

The majority position on everything was really overwhelmingly like-minded but we didn't want to just follow the majority. We tried to extend all assurances to concerned states; so "what can we do with France?" "what can we do with Russia?" and so on. More importantly, "is there anything that can be done to bring the United States into agreement?"³⁸⁶

So the conversations inside the Bureau went until the penultimate night of the Conference when the Chairman's text was complete. Holmes remembers staying up "till the early morning making sure the UN secretariat translated it and got it circulated in time to meet the UN's 24 hour rule."³⁸⁷

Presenting the Final Package

The final package, which was available to delegations by the early morning of 17 July 1998,³⁸⁸ represents the clearest example of blurred lines between the Bureau and Canada, and Canada's influence over the outcome of the Conference. Kirsch's goal for the package was always to gain consensus behind it, but failing that "enough support to survive a vote."³⁸⁹ Holmes explains that to do this, the Bureau "had to decide on a number of key issues,"³⁹⁰ striking a balance between the LMG, NGOs, and concerned States without sacrificing any of the original Cornerstone principles. Schabas comments

³⁸⁶ DR interview, 6.

³⁸⁷ JH email response.

³⁸⁸ Kirsch and Holmes, *Birth*, 34; Schabas, *Intro to the ICC*, 21.

³⁸⁹ JH email response; Kirsch and Holmes, *Process*, 10. This approach was in fact mandatory by the Conference's Rules of Procedure: *Rules of Procedure*, Rule 34 and 52 UN Doc.A/CONF.183/Add.2 (1998).

³⁹⁰ JH email response: "We included key crimes, but rejected terrorism and drugs. We developed a clever compromise on aggression, including the crime in the Statute but leaving the definition for later in the Assembly of States Parties. We rejected universal jurisdiction (a key demand of NGOs and a number of LM) and chose nationality of the perpetrator and territory where the crime was committed. We allowed the UNSC to refer cases (such as later occurred with Sudan) and to ask the ICC to defer cases while peace talks were on, but did not accept a veto over jurisdiction nor allowing the UNSC to completely stop a case. To get French support, we had to include a provision allowing a state to opt out of the war crimes provision for ten years."

“like a skilled blackjack player, Kirsch had counted his cards, yet he had no guarantee that his proposal might not meet unexpected opposition and lead, inexorably, to the collapse of the negotiations.”³⁹¹ Holmes continues further, “We tried everything to get the USA in, including tougher complementarity provisions which would have upset the LMG and NGOs. At the end of the day, the USA wanted to be exempt from the Court. This would have destroyed the ICC proposal. *After consulting the Minister* [of Foreign Affairs from Canada, Lloyd Axworthy], *we agreed that the USA would not be accommodated.*”³⁹² For a Chairman and a Bureau that strongly insisted on consensus throughout the entire process,³⁹³ it is significant that the decision in the final hours to forgo consensus in favour of a strong, like-minded majority was made by Minister Axworthy, and not independently by the Bureau.

It would require a counterfactual analysis to speculate whether the Rome Statute would not have come into existence if the Bureau did not consult Axworthy and ultimately attempted to accommodate the American concerns. This work will not conduct such an analysis. It is sufficient to conclude that Minister Axworthy’s involvement in the late stages of the Bureau’s decision-making represents a culmination of Canada’s soft power advocacy for an international criminal court. At the same time, the Canadian Foreign Minister “also made calls to foreign ministers to address particular concerns at critical stages of the negotiations.”³⁹⁴ Axworthy explains that his job

was to help sell this package to the NGOs and those governments that had reservations. Sitting in a hallway a few hours before the vote, I reached

³⁹¹ Schabas, *Intro to the ICC*, 21.

³⁹² JH email response, emphasis added.

³⁹³ DR interview, 6-7; Kirsch and Holmes, *Process*, 11; Alejandro Kirk, “A Tale of Two Courts” *Terra Viva* (16 July 1998).

³⁹⁴ Robinson, “The ICC”, 173.

Secretary Albright on a cellphone to tell her of the package approach. I stressed that it met many of the American concerns and that I detected a strong movement of support. She heard me out, but said her own reports were that the package would fail. Having already counted the votes, I said that the U.S. would find itself in a very small bloc of opposition, which would be most regrettable considering how she and the president had played such an important role in giving momentum to the idea. I didn't prevail...³⁹⁵

Axworthy's demarches were part of a larger effort on the part of CanDel to, in John Holmes' words, "lobby like mad to secure support."³⁹⁶ Axworthy, Holmes, and the other Canadian delegates first worked to convince the disappointed NGOs and LMG States that "this was the best deal feasible."³⁹⁷ Thereafter, CanDel was joined by the LMG and NGOs, despite their concerns about certain aspects of the final package, in "pulling the vote"³⁹⁸ from as many non-like-minded States as possible and to develop "a strategy to counter procedural challenges to the adoption of the package as a whole."³⁹⁹

A Word on CanDel's Work Throughout

At each phase of the Rome Conference, Canada's delegates were in the thick of negotiations. Whether attempting to avoid inertia and adjournment, contributing to the building momentum after the turning point midway through the Conference, passionately advocating to resolve issues in the final days, or madly scrambling to pull the vote on the last night of the Conference, CanDel was intimately involved. It is also clear that, save a few scarce examples, Canadian delegates were neither the only players involved nor even the most important of individual issues. The clear trend that emerged over the course of

³⁹⁵ Axworthy, *New World*, 204.

³⁹⁶ JH email response.

³⁹⁷ *Ibid.*

³⁹⁸ VO interview, 2, 8.

³⁹⁹ Kirsch and Holmes, *Process*, 11; Kirsch and Holmes, *Birth*, 34.

the PrepCom and the Rome Conference was CanDel's consistency. Whether the Delegation had clear instructions or strong views on an issue or not, Canada's delegates were involved in every discussion; the Canadians were quietly shaping negotiations and forming consensus, using the power of persuasion and compromise rather than banging tables and making singular, unwavering demands. But at the end of the day, none of these efforts would have mattered if Canada had not secured the international treaty that its Delegation was assigned to secure.

A Court Built on Canadian Cornerstones?

The Committee of the Whole approved the draft statute without a vote in the afternoon of 17 July 1998, sending the draft on to the Plenary for its final approval and the creation of international law. In the Plenary, the United States requested an unrecorded vote and the *Statute of the International Criminal Court* was overwhelmingly approved by conference participants (120 in favour, 7 opposed and 21 abstaining).⁴⁰⁰

Robinson later expressed exactly what the adoption of the Rome Statute represented:

The delegates assembled in Rome were celebrating the successful climax of years of painstaking effort, and a major milestone in bringing an effective ICC into being. The international community had overcome diverging and conflicting national perspective, priorities, and legal systems, and agreed on a detail blueprint for a new international criminal justice systems. Participants recognized that they were adding to the international architecture a structure that has long been needed to provide

⁴⁰⁰ Kirsch and Holmes, *Birth*, 35; Schabas, *Intro to the ICC*, 21; Robinson, "The ICC", 174; ("A Court Is Born: Applause, Jubilation as US and Indian Amendments are Rejected" *Terra Viva* (18 July 1998). Kirsch and Holmes note that "Since the United States had specifically requested an unrecorded vote, the list of states that voted against the Statute, and certainly of those that abstained, is likely to remain largely a matter of speculation, except for those who subsequently explained their vote." Schabas writes that the United States, Israel, China, and Iran later admitted that they voted against adopting the Statute; among the abstainers, Schabas explains, were several Arab and Islamic States, as well as some delegations from the Commonwealth Caribbean.

a response to genocide, crimes against humanity, and war crimes....
Canada was frequently singled out for praise for its pivotal role.⁴⁰¹

On 17 July 1998, international law was made. An overwhelming majority of States agreed to codify international criminal law and simultaneously built an international institution capable of applying that law. And as Robinson suggests, the international community recognized Canadian diplomacy as pivotal to making this international law.

When asked whether CanDel achieved Canada's foreign policy goals for the ICC, John Holmes responded: "Yes, without a doubt."⁴⁰² "For us it was a win," Robinson explains, "We had all the instruction books with our goals, and we got everything we wanted from the Statute. Really this Court was better than we expected, and the level of support was better than we expected. So it was a win in both columns."⁴⁰³ Axworthy's account demonstrates his satisfaction with CanDel's efforts: "When the prime minister called later that evening to congratulate Philippe and his team, we all savoured the moment, realizing we had been part of a historic undertaking. To use the phrase of Dean Acheson, it was good to be there "at the creation."⁴⁰⁴

Although Canada was there 'at the creation', the foregoing has demonstrated that Canada alone was not 'the creator'. Rather, the creation of this international law should be understood as the culmination of an idea, relentless advocacy through diplomacy, and a particular historical moment. The moment was ripe, for reasons discussed above, it was an era when an idea could succeed on the merits of its own moral suasion, Watt and

⁴⁰¹ Robinson, "The ICC", 174.

⁴⁰² JH email response.

⁴⁰³ DR interview, 8; also, Robinson, "The ICC", 175; VO interview, 2, 8; KP interview, 6.

⁴⁰⁴ Axworthy, *New World*, 205.

Robinson suggested.⁴⁰⁵ The idea that arguably prevailed with the creation of the ICC was a commitment to ensuring human security and preventing impunity.⁴⁰⁶ It was through soft power diplomacy and building like-minded coalitions that the Canadian Delegation was able to contribute to the advocacy necessary to bring the idea to fruition.⁴⁰⁷

Canada was not alone in this pursuit, joined by the LMG every step of the way; but CanDel was, according to Holmes, the “driving force” of the group and of the Bureau.⁴⁰⁸ Kirsch and Holmes write that the LMG’s “impact in Rome was critical to the success of the conference” for three reasons:

First, it never strayed from its objective of ensuring the adoption of the statute in Rome, and it steadfastly supported the process initiated and led by the Bureau and the final package, despite the preference of many of its members for a broader jurisdictional approach. Second, the force of its numbers and the support its positions received (for example, from most African and Latin American states) dictated the trends in the Plenary and in the Committee of the Whole debates. Third, because its agreed positions were general in nature, given the wide cross-section of its membership, the LMG had the flexibility to adjust to new solutions.⁴⁰⁹

Along the way Canada’s delegates were consistently sought for opinions and advice from delegations inside and outside of the LMG, as well as NGOs. LCol McAlea, speaking for a consensus among CanDel, indicates that other delegations frequently deferred to what the Canadians were doing and thinking on all manner of issues.⁴¹⁰ Whether or not

Canada was in a formal leadership position, CanDel demonstrated, “great leadership in

⁴⁰⁵ For example in DR interview, 7, Robinson explains “with all those stars lined up, it was a time when you could prevail with an idea just because it was a good idea. There was all this interest in creating a rules based international order so something could get done because it was the right thing to do.”

⁴⁰⁶ Kirsch and Holmes, *Birth*, 37; Robinson, “The ICC”, 174-75; Catherine Ford, “Human rights at the heart new court's worthiness” *Calgary Herald* (28 July 1998); VO interview, 2, 11, describing the ICC as “a game changer for international criminal accountability.”

⁴⁰⁷ Kirsch and Holmes, *Birth*, 37; Robinson, “The ICC”, 174-75.

⁴⁰⁸ JH email response.

⁴⁰⁹ Kirsch and Holmes, *Birth*, 36-37.

⁴¹⁰ DM interview, 9.

the diplomatic sphere”, according to Prost,⁴¹¹ and the treaty that emerged from the Conference satisfied all of Canada’s initial cornerstone positions.

The Canadian delegates unanimously reflect that the Rome Conference was a “high point in Canadian diplomacy,”⁴¹² “a crowning moment for Canada,”⁴¹³ and “one of our finest hours.”⁴¹⁴ Axworthy’s memoir indicates that the Foreign Minister saw the ICC as his greatest achievement while at DFAIT – indeed, in his entire career to that point.⁴¹⁵ Simply put, CanDel “had a policy and [was] exerting effort to implement it. Countries sought us out for our opinions and our help and we led the world.”⁴¹⁶ Back home, Canadian media reported of Canada’s shining on the world stage, and the thanks owed to Axworthy and his team of diplomats for reviving Canadian foreign policy.⁴¹⁷ At the end of the day, the Rome Statute, for all its limitations and criticisms,⁴¹⁸ created international law through the concentrated efforts of committed States like Canada through effective and persuasive diplomacy.

Canada’s official statement to the UNGA the following year reveals exactly what the Canadian government thought about the Rome Statute, and, by extension, about the success of the Canadian Delegation to Rome. On behalf of Canada, John Holmes declared:

Canada regards the Rome Conference and the Statute it adopted as one of the most compelling illustrations of the willingness of States to work

⁴¹¹ KP interview, 6.

⁴¹² VO interview, 2, 11; DM email response.

⁴¹³ KP interview, 6.

⁴¹⁴ JH email response.

⁴¹⁵ Axworthy, *New World*, 205-06.

⁴¹⁶ DM interview, 9.

⁴¹⁷ “Canada shines on world stage” *Toronto Star* (21 July 1998), 1; Marcus Gee, “The thanks owed to Axworthy” *The Globe and Mail* (22 July 1998), A15.

⁴¹⁸ As stated in the introduction to this work, these limitations and criticisms are not discussed here.

collectively to put the security of individuals at the centre of world affairs. In our view, the Statute adopted in Rome reflects a dramatic advancement in moving beyond the elaboration of rules and toward the concrete enforcement of those rules. We believe that the ICC Statute provides the framework for an independent and effective Court, a Court with the necessary tools to make a real difference. At the same time, the Statute also contains the necessary safeguards to ensure that it will operate in a credible and responsible manner, thus addressing the concerns of those States who had hesitations about the creation of this institution.

This outcome illustrates that human security and national security are not contradictory goals, but rather are mutually supportive. Improving the human security of individuals helps to strengthen the legitimacy, stability and long-term security of a State.⁴¹⁹

Holmes' speech regarding what the Statute achieved is strikingly reflective of Minister Axworthy's opening address to the Conference about what Canada saw as a Court worth having. The mission remained the same, CanDel's commitment never wavered, and through its decentralized and empowered mandate the Delegation was able to create something they could be proud of.

⁴¹⁹ John T Holmes, "Statement for Canada to the UNGA on the Establishment of the International Criminal Court" (21 October 1999).

CONCLUSION

Even after the Rome Conference concluded there was still more work to be done to bring the International Criminal Court into being. Despite the jubilation, Oosterveld recalls that nobody “felt that the job was done.”⁴²⁰ Kirsch and Holmes wrote in 1998 “the challenge ahead, to be taken up largely through the work of the Preparatory Commission, will be to supplement the Statute and address seriously any legitimate concerns that may still exist about its implementation and ensure judicial fairness and certainty.”⁴²¹ Canada remained a key player after the Rome Conference, ensuring that the Rome Statute received the necessary 60 ratifications to come into force,⁴²² which it did on 1 July 2002. Although the precise details of Canada’s contributions after Rome is beyond the scope of this essay, it is important to note that Canada’s diplomacy in support of the ICC did not end in Rome.

After the Conference, Canada immediately set to work on implementing the Statute within the Canadian justice system.⁴²³ Axworthy explains that Bill-C-19, eventually named the *Crimes Against Humanity and War Crimes Act*,⁴²⁴ was meant to “build a model on which other countries could pattern their own changes.”⁴²⁵ To this end, Minister Axworthy also funded an outreach team to assist States that lacked

⁴²⁰ VO interview, 2, 11. Minister Axworthy admits in his memoir, “The Rome Statute is by no means a perfect document and it will need a great deal of refining in the years ahead. But it was a giant step towards applying the rule of law to global behaviour and promoting human rights.” Axworthy, *New World*, 205.

⁴²¹ Kirsch and Holmes, *Birth*, 38.

⁴²² *Rome Statute*, art 162.

⁴²³ Darryl Robinson, “The Rome Statute and its Impact on National Law,” in Cassese, Gaeta, and Jones, eds., *The Rome Statute: A Commentary*, 1849-62.

⁴²⁴ SC 2000, c 24.

⁴²⁵ Axworthy, *New World*, 206.

governmental or legal resources to ratify and implement the Statute.⁴²⁶ Canada also pledged logistical and monetary support to the ICC, and created the Human Security Network to assist the Court's operations.⁴²⁷ Axworthy's memoir sets out his reasoning that Canada was in a prime position to continue championing the development of the ICC. He writes:

No country is better placed to take on the ongoing stewardship of the ICC and the building of an international judicial system than Canada. We begin with the knowledge and practice of both common and civil law. We have a well-trained legal profession, a respected police force in the RCMP with extensive international experience and a cadre of dedicated officials in DFAIT and the justice department who know the intricacies of international law. We were at the forefront of the campaign to create the court, and one of our distinguished diplomats, Philippe Kirsch, has been elected its president. We have the confidence of the broad coalition of NGOs involved. We have passed our own ratification legislation that is a model for other countries to emulate. We have the opportunity to mobilize the Human Security Network on behalf of the court. We should take the lead.⁴²⁸

Whether Canada actually took the lead over the last decade is a subject for discussion in another work. But it is important to recognize that Minister Axworthy and his team believed in the righteousness of leadership on this cause and believed that the ICC "is the most important institution created since the UN itself."⁴²⁹

Notwithstanding these outstanding questions, multiple lessons can be learned from the case study of Canadian diplomacy before and during the Rome Conference. First, this case study clearly answers the original question: "How was the international law that is the *Rome Statute of the International Criminal Court* made?" The Rome

⁴²⁶ *Ibid*; Matas interview, 4; FW interview, 14-15.

⁴²⁷ Axworthy, *New World*, 210-213, 404-406.

⁴²⁸ *Ibid*, 413.

⁴²⁹ JH email response.

Statute was the culmination of five decades of protracted anticipation, nearly five years of concentrated efforts, and five weeks of non-stop, exhausting negotiations that ultimately came to the eleventh hour. The ICC was very nearly just another pipedream in international law. Negotiations for an international criminal court in 1998 occurred against a unique backdrop of relative calm and cooperation in international affairs. In that moment, building on work that had been done intermittently since 1948, and picked up with renewed vigor at the close of the Cold War, the international community met to build an international institution capable of ending impunity for international crimes and protecting victims from criminals of the most heinous nature.⁴³⁰

Two coalitions working in parallel, sometimes in partnership,⁴³¹ were fundamental to the momentum of support for the creation of a statute at the Rome Conference. The like-minded group of States, growing from its conception at the PrepCom to over 60 States by the end of the Rome Conference, committed themselves to a set of cornerstone principles, first advanced by Canada, and pooled their diplomatic resources in pursuit of those broad, progressive goals for the Court. Meanwhile, international civil society, as represented by non-government organizations arrived in force to Rome, skillfully organized by the Coalition for an International Criminal Court, which shared many of the same goals as the LMG. NGOs played an important role in the creation of the Rome Statute through their use of principled, rational argument and advocacy.⁴³² These two groups worked diligently, sometimes independently but oftentimes together, to create the strongest, most independent and effective ICC possible

⁴³⁰ Kirsch and Holmes, *Process*, 12.

⁴³¹ Matas, "Hard realities"; Matas interview, 7.

⁴³² For a comprehensive assessment, see: Struett, *The Politics of Constructing the ICC*.

while at the same time convincing others of the desirability of such an idea. Finally, Philippe Kirsch, as Chairman of the Committee of the Whole, and his Bureau and team of working group coordinators played an especially important and delicate role in crafting compromises and building consensus. Thus, the Rome Statute was conceived under a constellation of factors, through teamwork and cooperative diplomacy, in pursuit of an ideal institution that would end international criminal impunity.

This thesis has also endeavored to show how Canadian diplomacy contributed to the making of international law in this instance. Of course, Kirsch's role as Chairman on its face speaks to the Canadian contribution to the creation of the ICC. But, as described herein, this vital assignment merely complicated the Canadian Delegation's exercise of diplomacy in Rome. In only one instance did Kirsch's roles as Chairman and as Head of Delegation for Canada truly blend when Kirsch adopted Minister Axworthy's approach in the final days of the Conference to forego consensus rather than attempt to accommodate the United States. Although this was an important decision, it was neither determinative of the result, nor of Canada's contribution to the process.

During the Rome Conference, CanDel became a lynchpin between the LMG, the NGOs, and the US. Balancing between competing demands and interests, while refusing to concede on principle, the Canadian delegates often became the 'go-to' team when delegations sought advice or opinions as well as the 'go-between' when participants reached an impasse. As part of the LMG, Canada worked in one of the most dominant organized bodies at the Conference to achieve what were originally Canadian cornerstones. As a persistent advocate for the value of enlisting international civil society, Canada was a trusted partner of the NGOs and accessed the CICC's immense

knowledge and organizational capacity. And as a bridge-builder between the abovementioned groups and the US, Canada consolidated its position in world affairs as ‘more than a junior partner to the United States’⁴³³ by being responsive and compromising, proposing constructive amendments and imaginative formulas, exploiting occasions, and insisting on certain basic principles.⁴³⁴

Possibly Canada’s most important contribution to the establishment of the International Criminal Court and the codification of international criminal law was not to the process of negotiations, though, but rather the idea on which the negotiations were conducted. Writing a few months after the Rome Conference, Minister Axworthy, with Norwegian Foreign Minister Knut Vollebak, suggested:

One of the most fundamental challenges we face is the realization of a humane world. This must be more than a vision. It is a moral imperative... Our goal is to work with other like-minded countries and partners from civil society to promote respect for human rights and humanitarian law. This is the new diplomacy that we want to put to work. A humane world is a safe world.⁴³⁵

The idea of human security evolved significantly over the decade leading up to the Rome Conference. Minister Axworthy placed it at the centre of Canada’s foreign policy and advocated a new diplomacy in order to reach human security’s objectives.⁴³⁶

The Rome Conference was a proving ground for the merits of the human security agenda and the efficacy of soft power diplomacy advanced by Canada. CanDel utilized a

⁴³³ Axworthy, “Introduction”, 8.

⁴³⁴ Holmes, *The Shaping of Peace*, ix.

⁴³⁵ Lloyd Axworthy and Knut Vollebaek, “Now for a New Diplomacy to Fashion a Humane World” *The New York Times* (21 October 1998).

⁴³⁶ See Rob McRae, “International Relations and the New Diplomacy” in McRae and Hubert, ed., *Human Security and the New Diplomacy*, 250-259; Lloyd Axworthy, “Postscript, Reflections on the Ghana Conference and the Freetown Visit” in McRae and Hubert, eds., *Human Security and the New Diplomacy*, 260-265.

combination of soft power diplomacy technique at the PrepCom and in Rome to advance the human security agenda, build an international institution, and codify international criminal law. In the final result, the Canadian Delegation stayed within its decentralized and empowering mandate en route to achieving a stronger Statute than expected and an International Criminal Court built on Canada's cornerstones. Robinson suggests that this case study demonstrates the importance of "maintaining Canada's position as a middle power and broker of ideas."⁴³⁷ In principle, this thesis agrees but suggests a further lesson. Diplomacy, at base, is the communication of ideas between people on behalf of States, not States alone; thus, selecting diplomats carefully for both their commitment to an idea and their skill in communicating it, then empowering them to do so persuasively and effectively is paramount. This is how Canadian diplomacy was able to contribute to the creation of international law at the Rome Conference.

Finally, throughout the course of this analysis, this essay attempted to distill a universal framework with which we can generalize how international law is made. Although it would be necessary to apply the model to various case studies to determine its accuracy, the basis elements are simple. This thesis suggests that in order for international law to be made a culmination of three factors is necessary: first, a compelling idea for a new institution or law; second, persuasive and relentless advocacy through diplomacy or litigation, as the case may be, in favour of the acceptance of the idea; and third, a particular historical moment, a constellation of factors, in international relations must exist that allows for the idea to take hold and crystalize as international law. These three elements, simple enough on the surface, can each be dissected and

⁴³⁷ DR interview, 7.

examined in the context of any number of international law-making conferences or precedent-setting litigation before the International Court of Justice. It is also an open question whether this formula is applicable across time, or limited to, say, the post-WWII United Nations international system; or perhaps it is even more limited, to an era of new diplomacy in the 21st century. Still, observing and appreciating the existence and interplay between these principles may allow for international lawyers, historians, or political scientists to understand how international law is made. It may even allow practitioners, that is government ministers, ambassadors, and diplomats, to more effectively practice their trade – especially in an era of new diplomacy.