

Ending Impunity for Gender Crimes under the International Criminal Court
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[T]hey brought her fourteen-year-old son and forced him to rape her. . . . On [another] occasion, I was raped with a gun by one of the three men. . . in the room. . . . Others stood watching. Some spat on us. They were raping me, the mother and her daughter at the same time. Sometimes you had to accept ten men, sometimes three. . . . I felt I wanted to die. . . . The Serbs said to us, "Why aren't you pregnant?". . . . I think they wanted to know who was pregnant in case anyone was hiding it. They wanted women to have children to stigmatize us forever. The child is a reminder of what happened. - Anonymous, Bosnia

Introduction

For millennia, women and girls have suffered rape, sexual slavery, forced pregnancy and other brutal forms of sexual and gender violence during armed conflict. Like other forms of war related brutality, such violence is often sanctioned, tolerated or ordered by military, paramilitary or other governmental actors. Although the international community has made some strides in outlawing and punishing atrocities committed during armed conflict through the development of international humanitarian law, gender-based violence has been consistently marginalized or dismissed as a natural consequence of war.

The international community's conclusion of a treaty in July 1998 to create a permanent International Criminal Court (the ICC or the Court) to investigate and punish genocide, crimes against humanity and war crimes in circumstances in which national authorities fail to do so was indeed an important step forward for humankind. Women's rights activists viewed the negotiations for the ICC as an historic opportunity to address the failures of earlier international treaties and tribunals to properly delineate, investigate, and prosecute wartime violence against women. Building on their successes in drawing attention to atrocities suffered by women in recent conflicts in Bosnia and Rwanda, women's rights advocates ensured that history did not pass women by yet again. The recognition that rape and other forms of sexual violence are among the most serious crimes under international humanitarian law was one of many historic accomplishments of the July 1998 United Nations Diplomatic Conference of Plenipotentiaries that negotiated the Rome Statute of the International Criminal Court (Rome Statute). The Rome Statute's gender provisions are an encouraging example of how the development of

the international women's rights movement is positively impacting international human rights and humanitarian law despite the strong influence of conservative political forces.

Part I of this article will provide background on the negotiating context with respect to gender issues and the effort of the international women's human rights movement to influence the Rome Statute. In the succeeding three parts, the article will summarize the provisions adopted under three broad categories of issues covered by the Rome Statute that will affect the Court's ability to carry out justice for women. In each of these parts, we include some discussion of the prior treatment of these issues under international law, as well as the background and politics surrounding the adoption of these provisions. In Part II, the article will summarize the Rome Statute's codification of various acts constituting sexual and gender violence as the most serious crimes under international humanitarian law. Part III will examine the structural provisions ensuring that women participate in all levels of the ICC's operations and requiring that among the ICC's staff there be adequate expertise for dealing with sexual and gender violence. Part IV summarizes those provisions that will aid in safeguarding the rights of victims of sexual and gender violence, including those guaranteeing gender sensitive methodologies during investigation and trial, as well as adequate protection of victims and witnesses.

I. THE NEGOTIATIONS ON GENDER ISSUES

During the early stages of the drafting of the Rome Statute, it became apparent that both governments and mainstream human rights groups were paying little attention to gender issues. Cognizant of this, a group of women's human rights activists began lobbying government delegations at the February 1997 Preparatory Committee (PrepCom) meeting. These activists subsequently founded the Women's Caucus for Gender Justice in the ICC2 with the objective of ensuring a gender perspective throughout the Statute. The Women's Caucus rapidly expanded its base of support to include, by the time of the Rome Diplomatic Conference, approximately two hundred women's organizations from all regions of the world. Women's Caucus members were active lobbying in their countries' capitals and participating in the PrepComs and the Rome Diplomatic Conference.

In many ways, it was an opportune time to lobby for an "engendered" statute for an international criminal tribunal. The achievements of the women's rights movement at the World Conference on Human Rights, held in Vienna in 1993 (the Vienna Conference), the Fourth World Conference on Women, held in Beijing in 1995 (the Beijing Conference), as well as other fora, gave the Women's Caucus authority for many of its proposals. At the Vienna Conference, governments condemned gender-based violence and violence against women in war situations and called on governments to integrate women's rights into the mainstream of the UN system.³ The Beijing Platform for Action committed governments to "integrat[ing] a gender perspective in the resolution of armed or other conflicts and foreign occupation." At the same time, the recent conflicts in the former Yugoslavia and Rwanda, and the publicized mass rapes committed during those conflicts, shocked the conscience of the world and spurred the creation of the two Ad

Hoc Tribunals. The issue of sexual violence in war had therefore received much attention by the time of the Rome Diplomatic Conference.

As a result, the majority of states at the Rome Diplomatic Conference supported the integration of gender provisions in the statute. The Women's Caucus, nonetheless, had to contend with a well-organized opposition, intent on undermining the Court's ability to appropriately address sexual and gender crimes. This opposition consisted of an alliance between some anti-choice groups, mostly from the U.S. and Canada, and a few delegations representing states where religion is used to justify discriminatory treatment of women. These delegations included the Vatican, and countries that followed its lead on certain issues, along with a core group of Islamic states. These delegations considered the proposals of the Women's Caucus for Gender Justice as a threat to their religious beliefs. Although the Caucus' agenda was supported by a broad majority of delegations, only a few states were willing to fight for it against the impassioned minority opposition. Furthermore, the states which were consistently willing to take a lead on gender issues, such as Canada, Australia, New Zealand, and Samoa, ⁶ found themselves on the defensive because of procedural obstacles in the negotiations. Namely, the Rome Treaty Conference was committed to working through the statute's provisions by consensus. This allowed the hostile states to obstruct the efforts to address gender crimes within the Rome Statute by refusing to accept wording favored by the majority, thereby forcing many provisions to be watered down.

This group of opponents focused on two fronts of attack. Firstly, as will be discussed in more detail below, the hostile states were intent on undermining the inclusion of the crime of "forced pregnancy" due to misleading linkages to the issue of the legalization of abortion. Secondly, the hostile states opposed the use of the term "gender" anywhere in the statute. The Women's Caucus pushed for the term "gender" as opposed to "sex" because the latter is restricted to the biological differences between men and women, whereas gender includes differences between men and women because of their socially constructed roles. Similarly, "gender crimes" is preferable to "sexual violence" because it includes crimes which are targeted at men or women because of their gender roles which may or may not have a sexual element. Some Arab states objected to the term "gender," claiming the term may be understood to include sexual orientation. However, their position on this issue also served as their justification for obstructing many provisions throughout the statute that promoted women's rights. The dispute regarding the terminology threatened the inclusion of certain gender crimes, of a non-discrimination clause, and of special protective measures under the procedural provisions.

The negotiations regarding the definition of gender therefore became central to many other gender issues. A definition of gender from the Report of the Secretary General to the Beijing Platform for Action was circulated among those delegates negotiating this issue. The Secretary General's definition acknowledged that the roles played by men and women are contingent on the social and economic context and can vary accordingly. Annex IV to the Beijing Platform for Action was also circulated to the delegates which stated that for the purposes of that document, the word "gender" was intended to be interpreted as it was in ordinary, generally accepted usage.⁹ Based in part on these

documents, the following provision was negotiated: "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."

As a result of this negotiated definition, the terms "gender" and "gender crimes" were utilized in many provisions of the Rome Statute instead of the narrower terms "sex" and "sexual violence." This was a significant victory, firstly, because it continued the well-established practice of using this broader concept in international instruments. The definition refers to "context of society," and therefore, includes the sociological differences between men and women. The second sentence, while somewhat tautological, suggests that the concept cannot be expanded beyond its current understanding as set out in the first sentence. The definition's acceptance was important because it cleared the way for many other provisions, among them a Women's Caucus proposed non-discrimination provision.

The non-discrimination provision which was ultimately adopted states that the application and interpretation of the law by the ICC must be consistent with internationally recognized human rights, and be without adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. This clause was essential to ensure that prosecutors, investigators, registrars, and chambers of the Court fairly treat individuals involved in the ICC process. The non-discriminatory clause will benefit both males and females, victims and accused alike. The states hostile to gender issues threatened to remove the clause completely because it included gender. It was sadly ironic that a group of Catholic and Islamic delegations, in their zeal to marginalize gender issues, would endanger a clause that would also protect individuals from religious discrimination. The fact that such an important clause was threatened over the disagreement on gender demonstrates how those states were more concerned with opposing gender provisions than protecting other basic rights. Fortunately, the compromise reached on the definition of gender saved this provision.

In general, the negotiations regarding the gender provisions illustrate the continuous struggle faced by those seeking to advance women's rights. The Women's Caucus often found itself fighting to retain concepts that had been well accepted in other international instruments, including the Vienna Conference's Programme of Action and the Beijing Conference's Platform for Action. However, unlike those non-binding human rights instruments, the Rome Statute is a treaty that creates a permanent judicial body empowered to determine individual criminal responsibility. As will be seen in the next sections describing the negotiations on separate issues, when it came time for states to fulfill their obligations under previous instruments, many states wavered in the face of opposition from states hostile to women's equality. Few, if any, government delegations would have been willing to expend the political capital needed to secure the provisions described herein without the persistent lobbying efforts of the Women's Caucus. Indeed, even the few willing to do so would not have been successful without the pressure exerted by Women's Caucus members on governments in every region of the world. In

this way, the Women's Caucus proved to be an essential catalyst in ensuring the integration of a gender perspective throughout the Rome Statute.

II. THE GENDER CRIMES IN THE ROME STATUTE

The most significant provisions of the Rome Statute regarding women's rights are contained in the definitional sections of the statute. The definitional sections in Part II of the statute define the crimes that will come within the jurisdiction of the Court. The impunity long enjoyed by perpetrators of gender crimes was perpetuated by the inadequate treatment of these crimes under prior legal instruments. Thus, the recognition of these crimes under Part II was key to ending this impunity for gender crimes.

The Rome Statute. Articles 7 and 8 in the Rome Statute defining war crimes and crimes against humanity, respectively, include a subparagraph listing a broad spectrum of gender-specific crimes. The enumerated crimes are: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach/serious violation of the Geneva Conventions (regarding war crimes) or other forms of sexual violence of comparable gravity (regarding crimes against humanity). This list of sexual violence crimes is included under the definition of war crimes for both international and non-international armed conflict. In addition to this list, two other gender-specific crimes have been enumerated under crimes against humanity. The first is the crime of persecution against any identifiable group or collectivity on various grounds, including gender. Secondly, the crime of "enslavement" is defined as the exercise of any power attaching to the right of ownership over a person, including in the course of trafficking in persons, in particular women and children.

The Significance of the Gender Crimes Provisions. The provisions on gender crimes under the definitional sections of the Rome Statute are a historic development under international law. Previous international humanitarian law treaties failed to properly address sexual and gender violence. Neither the Hague Conventions respecting the Laws and Customs of War nor the Nuremberg Charter contained in the Agreement for the Prosecution and Punishment of Major War Criminals after World War II included any mention of sexual violence. Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes and Crimes against Humanity for Germany included rape as a crime against humanity though not as a war crime. This was significant because the definition of crimes against humanity requires that the acts in question be either widespread or systematic. The ways in which sexual violence is committed during war makes it difficult to prove these conditions. Sexual violence crimes form part of the culture of war and are often committed on a sporadic basis. War crimes, in contrast, do not require any proof of systematic planning and therefore have a lower threshold of proof that is more appropriate for sexual assault cases.

Another troubling issue has been the underrecognition of sexual violence crimes as constituting "grave breaches" of the 1949 Geneva Conventions on the laws of war. Grave breach crimes are those crimes that are so horrible that their commission is deemed a

concern to the international community as a whole. Sexual violence crimes are not included in the articles enumerating grave breaches under the 1949 Geneva Conventions (nor under article 3 common to all of the Geneva Conventions, which lays out minimum protections during the course of armed conflict). Instead, article 27 of the Fourth Geneva Convention states that women shall be protected against "any attack on their honor, in particular, rape, enforced prostitution, or any form of sexual assault." This characterization of sexual violence as an attack against a woman's honor was based on the stereotype that a woman is shamed by being the victim of rape and denies the great physical and emotional harm suffered as a result of sexual violence crimes. The 1977 Additional Protocols to the Geneva Conventions continued this practice of subsuming these crimes under categories dealing with honor and dignity. The Protocols include rape, (en)forced prostitution, and any form of indecent assault but connect them to respect for women or "outrages upon personal dignity, in particular, humiliating and degrading treatment."

This inadequate treatment in prior instruments was duplicated in the statutes of the two Ad Hoc Tribunals which were set up for the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia and Rwanda (the ICTY and the ICTR, respectively). The statutes of the two Ad Hoc Tribunals included the crime of rape as a crime against humanity, but omitted it from the other categories of crimes. Once again, rape was included neither as a grave breach of the Geneva Conventions, nor as a violation of the laws or customs of war. Nor were sexual violence crimes other than rape enumerated.

The lack of explicit mention of sexual violence crimes as grave breaches failed to give due recognition to the seriousness of the crimes. This treatment was discriminatory since it treated with less seriousness violence which occurs mostly to women in relation to violence which occurs to both men and women. The prohibition against adverse discrimination in international law therefore necessitated the separate enumeration of gender crimes under international humanitarian law. ²⁴ Moreover, the inferior treatment of gender crimes perpetuated their underinvestigation and underprosecution. For example, in the tribunals established after the Second World War to prosecute German and Japanese war criminals, gender crimes were not pursued with the same degree of diligence as other crimes. Rape was included in the indictments of some of the individuals tried by the Tokyo Tribunal but not in any of the indictments of the Nuremberg Tribunal. As another example, despite the overwhelming evidence of mass rapes during the 1994 genocide in Rwanda, the ICTR did not include any charges of rape in its indictments until 1997 after concerted pressure from civil society.

The fact that sexual violence crimes had not been explicitly listed as grave breaches under the Geneva Conventions or included as such under the ICTY and ICTR Statutes was problematic, though not determinative of their status under international law. International legal experts and courts increasingly came to recognize that these crimes are in fact grave breaches because the acts involved also constitute elements in the definition of other crimes listed as grave breaches. For example, rape may constitute torture, inhuman treatment, willful killing, willfully causing great suffering or serious injury to

body or health, enslavement, and other crimes depending on the facts of the case. Following this line of thinking, the general practice of the Prosecutor at the ICTY and more recently at the ICTR has been to charge the crime of rape both as rape and as a constituent act of another crime under the statute. The Women's Caucus was able to draw upon these developments to push for codification of this treatment in the Rome Statute.

The Rome Statute represents a significant step to overcoming the discriminatory and inadequate treatment of sexual violence crimes under international law. The Rome Statute includes gender crimes as both war crimes and as crimes against humanity. Under the war crimes section, the language makes it clear that the enumerated crimes are crimes of the gravest nature. The trailer "or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" which follows the enumerated sexual violence crimes under article 8(2)(b)(xxii) signals that the enumerated crimes (rape, sexual slavery, etc.) are themselves grave breaches of the Geneva Conventions. It is also a signal that acts of sexual violence can be charged as sexual violence crimes or as the other grave breaches crimes listed in article 8(2)(a) such as murder, torture, mutilation, enslavement, etc. This characterization of sexual violence crimes is therefore important to the ICC's capacity to indict sexual violence crimes in multiple ways.

Moreover, the Rome Statute recognizes a spectrum of gender crimes in addition to rape. It was important to separately identify other sexual and gender crimes in order to recognize the distinct characteristics of the different crimes. This serves to acknowledge the aggravating harm caused to the victim. For this reason, the Women's Caucus fought to separately identify certain crimes, such as forced pregnancy, sexual slavery, and gender-based persecution.

The Rome Statute includes the crime of forced pregnancy defined as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy." The Rome Statute is the first international treaty specifically listing the crime of forced pregnancy. Forced pregnancy is not found in the Geneva Conventions or the statutes of the two Ad Hoc Tribunals. However, the crime has been recognized as a fundamental humanitarian and human rights violation in the Vienna Conference's Programme of Action, the Beijing Conference's Platform for Action and by the UN Commission on Human Rights.

The Rome Statute also codified for the first time the crime of sexual slavery. The Women's Caucus lobbied to have sexual slavery listed in addition to enslavement and enforced prostitution in order to recognize the particular elements of sexual slavery. The term sexual slavery is preferable to enslavement and enforced prostitution because it includes the sexual aspect of the crime of slavery, while also highlighting the coercive element involved where women are forced to provide sexual services. At the same time, the crime of "enforced prostitution" was retained in the Rome Statute to capture those situations that lack slavery-like conditions. The Rome Statute also established a new definition for enslavement. The definition of enslavement in the Rome Statute draws

from prior definitions of slavery, with the important addition of trafficking in persons, in particular women and children. As a result, the crime of trafficking in persons has been brought within the jurisdiction of the Court.

Finally, the ground of gender was added to the crime of persecution under the crimes against humanity section. Gender-based persecution, such as the sexual apartheid regime in Afghanistan, involves the intentional and severe deprivation of fundamental rights by reason of the victim's gender. Prior formulations of the crime of persecution named only political, racial or religious grounds, but not gender. This suggested that gender-based persecution was less important or less prevalent than persecution on the other enumerated grounds. The inclusion of the ground of gender in the Rome Statute was an important step to ensuring that gender-based persecution would receive greater attention.

The ICC Negotiations.

The first few drafts of the Rome Statute replicated the defects in the traditional treatment of sexual violence crimes under international law. Specifically, the ICC draft statutes in 1996 continued to link rape to outrages upon personal dignity under war crimes, ignored crimes other than rape, and failed to recognize them as grave breaches of the laws and customs of war. The December 1997 PrepCom was the first opportunity to correct these problems and in particular to delink sexual violence crimes from outrages upon personal dignity under war crimes. Because of Women's Caucus lobbying prior to and during that PrepCom, the draft statute was changed to create a separate category for rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence. This separate category was included in the draft unbracketed, meaning that there was consensus among the delegates to include the separate category. The sole dissenting voice was the Vatican, which argued that forced pregnancy should be replaced with "forcible impregnation." The candidates disregarded this suggestion and the separate category for gender crimes under war crimes was established.

The issue of forced pregnancy was resurrected in Rome and became the most contentious issue of all the gender provisions. In the aftermath of the rape and detention of Bosnian women by soldiers to force them to bear Serb babies, the Women's Caucus believed that it was important to explicitly recognize this crime. This crime inflicts incomparable harm on the victims by occupying a woman's body and forcing her to bear her rapist's child. A group of anti-choice organizations seized this issue to promote their agenda, falsely arguing that including this crime in the statute would in itself support the right to abortion. This group found sympathetic ears among a few delegations such as the Vatican and Ireland, which worried that their policy prohibiting all abortions might come within the scope of the crime of forced pregnancy. The intention of those who wanted the crime in the statute was not to criminalize the denial of abortion services (what is considered an omission under criminal law). Rather, the crime of forced pregnancy was meant to criminalize the acts of making and keeping a woman pregnant (a commission under criminal law). For this reason, negotiations were conducted to arrive at a definition of forced pregnancy clarifying the scope of the crime. While the Vatican initially conducted negotiations with Women's Caucus members, it eventually refused to do so, claiming that

it would only negotiate with states. This was a deliberate strategy to undercut efforts to appropriately integrate a gender perspective by dealing only with government delegation where women are underrepresented. A few key delegates from Australia, New Zealand, Bosnia-Herzegovina, Canada, and the US continued negotiations with the Vatican and Ireland in order to keep forced pregnancy in the statute.

The Holy See tried to restrict the definition to acts committed for the purpose of ethnic cleansing. These proposals were resisted because it would have excluded many other forms of the crime. For example, during the Second World War, Jewish women were forcibly made pregnant so that they and their fetuses could be used for medical experiments. Only on the second to last day of the conference did the parties finally agree to a definition which includes "carrying out other grave violations of international law" as an alternative purpose for the crime's commission.

While some negotiating took place on the other gender crimes, such as enslavement and gender-based prosecution, none of them was the subject of such intense opposition as forced pregnancy. It is indeed important to note that there was no serious opposition to including the other gender crimes, nor to the way they were characterized under the war crimes and crimes against humanity sections. While the opposition to forced pregnancy and the term "gender" was a sobering reminder of the unrelenting hostility of some states to women's rights, it must not cloud our recognition of the significant support for criminalizing acts of sexual violence among both governmental and non-governmental participants of the Rome Diplomatic Conference.

III. INSTITUTING STRUCTURAL MECHANISMS TO ENSURE GENDER BALANCE AND EXPERTISE

As women have increasingly begun to acquire political power, the international community has acknowledged that their participation in international criminal fora is fundamental, both because it values gender equity as a goal in itself and because women are frequently more motivated than their male counterparts to ensure that gender-based crimes such as rape are investigated and punished. An important achievement of the Women's Caucus during the negotiations was ensuring that the composition of the Court would include women in all of its organs and that women and men with specific expertise in dealing with sexual and gender violence would be included on the Court's staff at all levels.

The Rome Statute.

The Rome Statute requires that "fair representation of female and male judges" be "take[n] into account" in the selection process, as well as fair representation of females and males in the selection of staff in all other organs of the Court. 46 It also mandates that the selection of judges and other staff "take into account the need to include" persons "with legal expertise on. . . violence against women or children." 47 Moreover, the Prosecutor is required to "appoint advisers with legal expertise on specific issues, including... sexual and gender violence." 48 Part 4 also provides for the creation of a

Victim and Witness Unit within the ICC's Registry to "provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims... and others who are at risk on account of [their] testimony." The unit must "include staff with expertise in trauma, including trauma related to crimes of sexual violence."

Recent Experience Confirming the Need for Gender Balance and Expertise. Although these principles of female representation and gender expertise had never before been incorporated explicitly in a treaty forming an international body, the precedents for the adoption of these principles were clear. Building on the Vienna Conference, 50 the Beijing Conference urged governments and intergovernmental organizations to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the [ICTY], the [ICTR] and the International Court of Justice, as well as other bodies related to peaceful settlement of disputes." The U.N. General Assembly has echoed these words in its call to all member states to "commit themselves to gender balance" by "creating special mechanisms," including "by presenting and promoting more women candidates" within both national and international bodies and institutions.

The ICTY and ICTR are case studies on why it is so crucial to include women as well as men with appropriate expertise in international bodies charged with investigating war and conflict situations. The gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY and ICTR as investigators, researchers, judges, legal advisors, and prosecutors. 53 In 1993, two of the eleven judges elected by the General Assembly to serve on the ICTY were women - an unprecedented - if still grossly inadequate - step. The two women elected were the only women on the list of 23 candidates. Only after heated political negotiations was a woman from Costa Rica, Elizabeth Odio-Benito, elected over far less qualified male candidates from Latin America.

Indeed, Judge Navi Pillay, the only woman judge on the ICTR, was instrumental in questioning witnesses in the Akayesu case and evoking testimony of gross sexual violence, resulting in additional charges being added to the indictment. The sexual violence charged in the amended indictment eventually led to the defendant's conviction for genocide due to those acts, the first time an international tribunal has found that rape and sexual violence can constitute genocide. Judge Pillay observed recently: "Who interprets the law is at least as important as who makes the law, if not more so.... I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary."

The tribunals are also two of the first examples of the international community applying other key principles articulated in fora such as the Beijing Conference. In 1995, Chief Prosecutor Richard Goldstone instituted the position of Legal Advisor for Gender-Related Crimes (the Gender Legal Advisor). The Gender Legal Advisor has been instrumental in ensuring the investigation and prosecution of sexual violence crimes

despite the legal difficulties in doing so given their inadequate enumeration in the ICTY and ICTR Statutes.

ICC Negotiations. The International Law Commission's 1994 draft of the Rome Statute included provisions requiring judges and staff with expertise in criminal law and international law; 60 however, it did not take account of the U.N.'s consensus that the inclusion of women is fundamental in forming new international bodies nor did it focus on the need for gender expertise. In 1996, a proposal of the United States and a joint proposal from Denmark, Finland, Malawi, New Zealand, Norway, and Sweden, proposed adding concepts of gender balance to the criteria for the selection of judges. During the March 1998 Preparatory Committee when the provisions related to composition and administration were debated in detail, the Women's Caucus proposed language to ensure that judges and other ICC staff included individuals with expertise in gender analysis. 62 The draft that emerged from the March PrepCom included bracketed language referring to "gender balance" and "expertise on issues related to sexual and gender violence."

At the Rome Treaty Conference, the Women's Caucus faced a struggle to ensure the retention of this language. Middle Eastern delegations, particularly Egypt, Iran, Oman, Syria, and United Arab Emirates, vehemently opposed the inclusion of gender balance and expertise on sexual and gender violence. Delegations fighting to include these concepts had to accept compromise language that replaced "gender balance" with "fair representation of men and women." 64 The failure to use the term "balance," well-accepted in many U.N. documents, was a disappointing signal of continued resistance to women's equality in international institutions. However, the compromise language may have little practical impact, provided states take seriously the obligation to nominate and elect women judges, prosecutors and high-level staff. In addition, "expertise on issues related to sexual and gender violence, violence against children and other matters" was replaced with "legal expertise on specific issues, including, but not limited to, violence against women or children." 65 The loss of the language proposed by the Women's Caucus specifying sexual and gender violence ironically excludes men, who also are victims of sexual violence during wartime, but is still revolutionary for requiring the expertise it does.

IV. SAFEGUARDING THE RIGHTS OF VICTIMS OF SEXUAL AND GENDER VIOLENCE

In every legal system of the world, the investigation and prosecution of sexual and gender violence has been undermined by discriminatory and patriarchal procedural and evidentiary rules as well as law enforcement attitudes and practices. Underlying these rules and practices is the prevailing cultural view that while it is correct for society to formally outlaw rape and other crimes, governmental enforcement of these legal prohibitions threatens the prevailing male-dominated social order and the "private" or domestic sphere of relations between men and women. 66 This attitude has pervaded the international arena as well, 67 and accounts for much of the reason international crimes of violence against women have gone unsanctioned.

The Rome Statute. The Rome Statute is revolutionary because it codifies a mandate for the Court to adopt specific investigative, procedural, and evidentiary mechanisms that are essential to ensure gender justice. The Women's Caucus was able to lobby successfully for inclusion of these provisions using precedents from the rules and decisions of the ICTY and ICTR, as well as recent reforms made in some domestic legal systems. More procedural and evidentiary safeguards related to sexual violence must still be drafted and finalized when the Court's Rules of Procedure and Evidence (the "Rules") are negotiated by ICC signatories at upcoming Preparatory Committee meetings scheduled for 1999. 68 However, the Rome Statute lays the necessary foundations in various provisions.

Article 68 of Part 6 concerns the protection of victims and witnesses and their participation in proceedings. The Court is required to take appropriate measures, including conducting proceedings in camera or allowing the presentation of evidence by electronic means, to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account such factors as age, gender, health, and the nature of the crime, particularly where the crime involves sexual or gender violence. The same provision permits the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.

The protections in Article 68 are echoed in other provisions. Part 5 of the statute, concerning investigation and prosecution, requires the Prosecutor to "take appropriate measures to ensure the effective investigation and prosecution of crimes," and to "respect the interests and personal circumstances of victims and witnesses, including age, gender, . . . and health, and take into account the nature of the crimes, in particular where it involves sexual violence, gender violence or violence against children." Similarly, in Part 6, concerning the trial, the Trial Chamber is required to ensure that the trial is conducted showing "due regard for the protection of victims and witnesses." The same provision also requires the Trial Chamber prior to and during trial to "[p]rovide for the protection of confidential information" and "the protection of the accused, witnesses and victims."

Article 69 of Part 6, concerning evidence, provides that the Court "may rule on the relevance or admissibility of evidence, taking into account . . . the probative value of the evidence and any prejudice that such evidence may cause. . . to a fair evaluation of the testimony of a witness." Finally, the statute includes a provision that is fundamental to the Court's ability to ensure concrete justice to victims. It enables the Court to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, upon request or on its own motion.

Precedents for the Inclusion of a Gender Perspective in the Court's Workings. Only in the past few decades have some domestic legal systems begun to enact procedural and evidentiary reforms to ensure that charges of rape, sexual violence and domestic violence are appropriately treated by law enforcement and judicial officials in order to encourage victims to come forward and to better ensure successful prosecution. Following extensive lobbying from women's rights organizations supported by the two female judges on the ICTY, 77 the judges of the ICTY and ICTR adopted important rules of procedure and evidence to protect and counsel victims of sexual crimes and to ensure proper handling of

sexual crimes during trial.⁷⁸ As noted by Gender Legal Advisor Patricia Viseur Sellers, "the Rules [of Procedure and Evidence of the ICTY] offer the strongest evidence of the [ICTY's] specific intent to investigate, prosecute, and adjudicate sexual assaults." For example, Rule 96, related to evidence in sexual assault cases, and its counterpart in the ICTR are revolutionary in their approach to evidence of rape and other sexual crimes. ⁸⁰ Rule 96 provides that no corroboration of the victim's testimony is required, that consent shall not be allowed as a defense except in limited circumstances, and that no prior sexual conduct of the victim may be introduced.

ICC Negotiations. As was the case with every provision related to sexual and gender violence, there was staunch opposition from some delegations, particularly Arab states, regarding special measures of protection for sexual and gender violence. Delegates from these states questioned the need to "single out" sexual and gender violence for any form of special protection over other crimes. Using arguments put forth by the Women's Caucus, a large number of other states countered that it was entirely appropriate to include such protections. They argued that the long history of inadequate treatment of sexual and gender violence committed during armed conflict, as well as the initial failures to properly investigate and prosecute such violence in the former Yugoslavia and Rwanda, demonstrated how essential special measures are. These provisions were also embroiled in the larger debate about the use of the term "gender," as discussed in Section I above. In the end, the vast majority of delegations understood the need to explicitly include mechanisms to ensure that investigations and trials involving sexual and gender crimes are appropriately handled and such mechanisms were included in the Statute.

Toward the end of the negotiations and in connection with Article 68 (protection of victims and witnesses and their participation in the proceedings), some Arab states staged a culturally revealing exercise in semantics whose purpose seemed to be to require the Court to hold proceedings in camera or allow the presentation of evidence by electronic or other means in cases involving sexual violence or children. Such an extreme exception to the requirement of public hearings on grounds of "public morality" was rightly rejected by other delegations, though a presumption favoring such non-public hearings was retained. ⁸² While a strong provision favoring closed hearings for victims of sexual violence at their request is essential to counteract the continuing culturally induced feelings of humiliation and guilt that often cause such victims to refuse to testify, the effort of the Middle Eastern states was aimed at keeping the "taboo" issue of sexual violence "under wraps." Thus, a blanket secrecy requirement would not only undermine the rights of the accused in some cases, but would perpetuate the negative stereotypes associated with these crimes, undermining society's ongoing effort to punish those who merit punishment - the perpetrators - and remove the veil of shamefulness from the victim. In some cases, a victim may prefer to testify publicly, exposing the horror of what she suffered as a step forward in her own healing process.

Conclusion

The integration of gender concerns into the Rome Statute is a concrete indication of how far the international women's human rights movement has come. The inclusion of the

specific provisions discussed herein reflects a mainstreaming of women's rights into the normative structures of international humanitarian law, a body of law that had previously marginalized women's rights. In the years leading up to the Rome Treaty Conference, the political will to address the heinous crimes perpetrated against women during armed conflict had begun to build among the great majority of nations. The Women's Caucus was able to exert pressure through its members' presence as NGO observers during the treaty negotiations as well as through national-level supporters lobbying government officials at home. Yet the fierce opposition by a few government and NGO delegations in Rome to the Women's Caucus agenda - in the face of countless recent and historical examples of women being systematically subjected to rape, forced pregnancy and other forms of atrocious gender violence during wartime - suggests that future progress for gender justice should not be taken for granted.

No treaty or court judgment can remedy the suffering of wartime victims of rape, forced pregnancy, and other sexual violence, nor undo society's gender constructs that so cruelly multiply their suffering to include shame and guilt. Yet the codification of a mandate to end impunity for these acts is a significant step in the right direction. It was high time that such crimes cease to be regarded as "inevitable by-products" of war and receive the serious attention that they deserve.

As just two of the many supporters of the Women's Caucus, the authors would like to recognize all of the women and men around the world that contributed to the success of the Women's Caucus, including the government delegates who supported the goal of gender justice. We thank Alison-Maria Bartolone for her assistance with this article.