

# *Fordham International Law Journal*

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*Volume 22, Issue 1*

1998

*Article 4*

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## Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity

Brook Sari Moshan\*

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# Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity

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## **Abstract**

This Comment addresses the intersection of gender issues and human rights law as illustrated by the formation of the permanent ICC. Specifically, it argues that the inclusion of gender-motivated crimes in the ICC's definition of crimes against humanity was necessary to emphasize women's wartime experiences and injuries, but that such inclusion is not enough to ensure gender justice as the ICC begins to prosecute war crimes and crimes against humanity. Part I of this Comment discusses the concept of gender-based crimes and illustrates these crimes through recent examples of gender-based violence. It also reviews the history of the ICC, focusing on the events leading up to the Rome Conference and the adoption of the ICC statute. Part II discusses the treatment of gender in the ICC statute. Part III argues that the inclusion of gender-based crimes in the definition of crimes against humanity in the ICC statute is a victory for women's rights, but that the Rome Statute fails to address some of the most essential concerns of women's rights advocates. This Comment concludes that the Rome Statute is ultimately only a partial victory for gender justice.

## COMMENTS

# WOMEN, WAR, AND WORDS: THE GENDER COMPONENT IN THE PERMANENT INTERNATIONAL CRIMINAL COURT'S DEFINITION OF CRIMES AGAINST HUMANITY

*Brook Sari Moshan\**

### INTRODUCTION

Throughout the twentieth century, serious debate has revolved around the need for a permanent International Criminal Court<sup>1</sup> ("ICC") with global jurisdiction to try individuals for gross breaches of international humanitarian law.<sup>2</sup> The international community has attempted to create such a court in the past, but until now no permanent ICC has yet materialized.<sup>3</sup> As the century and the millennium draw to a close, the international community has finally concluded a United Nations Diplomatic Conference in Rome, Italy<sup>4</sup> ("Rome Conference"), in

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\* J.D. Candidate, 1999, Fordham University School of Law. The author thanks her mother, father, and brother for their always extraordinary encouragement and support.

1. See *International Criminal Court: Local Efforts, ABCs of the ICC* (visited Feb. 22, 1998) <<http://www.igc.org/icc>> (on file with the *Fordham International Law Journal*) [hereinafter *ABCs of ICC*] (describing International Criminal Court ("ICC"), explaining why it is necessary, and noting status of court).

2. See Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77 & n.6 (defining basis of international humanitarian law as customary international law and Geneva Conventions of 1949); see also Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990s*, 10 DICK. J. INT'L L. 223, 223-29 (1992) (providing historical overview of past efforts to create permanent international criminal court).

3. See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 11-13 (1997) (reviewing United Nations' attempts to establish international criminal court and to codify certain international crimes). Between 1919 and 1994, and arising out of World War I and World War II, four ad hoc international criminal tribunals, five ad hoc international investigation commissions, and three internationally-mandated national prosecutions existed. *Id.* at 11.

4. See Brigid O'Hara Forster, *Justice Goes Global: Despite U.S. Dissent the World Community Finally Creates a New Court to Judge the Crimes of War*, TIME INT'L, July 27, 1998 (describing character of five-week conference and sense of accomplishment felt as delegates voted to create ICC). The United Nations Diplomatic Conference ("Rome Con-

which delegates adopted a statute establishing a permanent ICC, the Rome Statute of the International Criminal Court ("Rome Statute").<sup>5</sup> Now, with this creation of a statute establishing a permanent ICC, the international community has seized a unique opportunity to reconceptualize human rights by recognizing that gender-based crimes are as grave as any crime motivated by race, ethnic origin, or religion.<sup>6</sup>

This Comment addresses the intersection of gender issues and human rights law as illustrated by the formation of the permanent ICC. Specifically, it argues that the inclusion of gender-motivated crimes in the ICC's definition of crimes against humanity was necessary to emphasize women's wartime experiences and injuries, but that such inclusion is not enough to ensure gender justice as the ICC begins to prosecute war crimes and crimes against humanity. Part I of this Comment discusses the concept of gender-based crimes and illustrates these crimes through recent examples of gender-based violence. It also reviews the history of the ICC, focusing on the events leading up to the Rome Conference and the adoption of the ICC statute. Part II discusses the treatment of gender in the ICC statute. Part III argues that the inclusion of gender-based crimes in the definition of crimes against humanity in the ICC statute is a victory for women's rights, but that the Rome Statute fails to address some of the most essential concerns of women's rights advocates. This Comment concludes that the Rome Statute is ultimately only a partial victory for gender justice.

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ference") concluded on July 17, 1998. See *UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court*, UNITED NATIONS DEP'T OF PUB. INFO. PRESS RELEASE, July 20, 1998, at 1 (announcing that statute of ICC was adopted by vote of 120 in favor, 7 against, and 21 abstentions).

5. See UNITED NATIONS, DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT'L CRIMINAL COURT, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, U.N. Doc. A/CONF.183/9 (1998) (adopted by United Nations on July 17, 1998) (visited Aug. 8, 1998) <<http://www.un.org/icc>> (on file with the *Fordham International Law Journal*) [hereinafter *ROME STATUTE*].

6. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1, U.N. GAOR Preparatory Comm., 51st Sess., Supp. No. 22, at 33, U.N. Doc. A/51/22 (1996) [hereinafter *PrepCom Report*] (illustrating international community's relative disinterest in gender issues by demonstrating some delegates' view that crimes against humanity could be committed against groups defined by criteria other than race, ethnicity, religion, or politics, but that gender was not mentioned). Other criteria that were mentioned included intellectuals and social, cultural, or political groups. *Id.*

## I. GENDER CRIMES AND THE HISTORY OF THE PROPOSED PERMANENT INTERNATIONAL CRIMINAL COURT

The ICC concept has long intrigued the international community, and the history of the ICC is a complicated one.<sup>7</sup> In the last few years, the international community has crept laboriously closer to the adoption of the statute establishing the ICC, and feminists and human rights activists have questioned whether delegates to the Rome Conference would give gender issues the serious attention that they deserve.<sup>8</sup> An end result of the immense attention focused on crimes against women during the conflict in the former Yugoslavia<sup>9</sup> has been the international community's seeming recognition that gender violence is an integral and pervasive component of warfare.<sup>10</sup> Feminists and human rights activists lobbied strongly in the months leading up to the Rome Conference and at the conference itself for delegates to champion the issue of gender violence as they endeavored to draft the ICC statute.<sup>11</sup>

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7. See Cavicchia, *supra* note 2, at 224-29 (providing historical overview of international community's past attempts to create ICC).

8. See Farhan Haq, *U.N. Women: Seeking Gender Role in International Court Debate*, INTER PRESS SERVICE, Aug. 12, 1997 (describing concern of members of Women's Caucus for Gender Justice in the International Criminal Court ("Women's Caucus") who were unsure of whether ICC will adequately address sexual violence).

9. See Associated Press, *Bosnian Factions Make Land Grabs Before Peace Talks Intensify*, CHI. TRIB., Oct. 26, 1992, at 4 (explaining that civil war in former Yugoslavia began after Serbs opposed Muslims and Croats who voted for secession from Yugoslavia in February 1992) [hereinafter *Bosnian Factions*]; see also Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793, 794-95 (1997) (explaining that conflict took form of effort on part of Serbian forces to seize and to maintain territorial control of former Yugoslavia). The former Yugoslavia was populated by three principal ethnic groups. Croats, who dominated western Hercegovina, and Slavic Muslims, who dominated the extreme northwestern corner and eastern parts of Bosnia, supported Bosnia's independence. Serbs, however, who formed a majority in the northwestern part of Bosnia and the eastern portion of Hercegovina, supported a continued union with Yugoslavia. This tension led to a civil war beginning in late 1991, during which Slavic Muslims and Croats sought international recognition of Bosnia-Hercegovina as an independent state, while Serbs declared their own state within Bosnia-Hercegovina. See generally HELSINKI WATCH, *WAR CRIMES IN BOSNIA-HERCEGOVINA* (1992).

10. See Tina Rosenberg, *New Punishment for an Ancient War Crime*, N.Y. TIMES, Apr. 5, 1998, at D14 (suggesting that international community is finally focusing its attention on gender violence and noting favorably that gender violence is prominent focus of international tribunal for former Yugoslavia).

11. See *Gender Violence: Include 'Enforced Pregnancy' in War Crime Court Agreement*, HOUS. CHRON., July 15, 1998, at A24 (noting that women's advocates expressed belief

### A. *Defining Gender-Based Crimes*

The Women's Caucus for Gender Justice in the International Criminal Court<sup>12</sup> ("Women's Caucus") suggests that gender crimes are incidents of violence targeting or affecting women either exclusively or disproportionately, not because the victims of such crimes are of a particular religion or race, but because they are women.<sup>13</sup> The term gender crimes may also refer to violence against women that is rooted in or serves to perpetuate either socially-constructed gender roles or the power discrepancy between men and women.<sup>14</sup> Although rape may be the first crime that one envisions when one contemplates the concept of gender-based crimes, the term actually encompasses a great many crimes including sexual torture and mutilation, sexual slavery, and forced pregnancy.<sup>15</sup>

#### 1. Rape

Rape has always been a fundamental and accepted military tactic.<sup>16</sup> Historically, soldiers considered rape to be one of the spoils of war, associated with success in battle and serving as evi-

that it is crucial that the Rome Statute of the International Criminal Court ("Rome Statute") support prosecution of perpetrators of sexual violence).

12. See Haq, *supra* note 8, at 1 (describing how Women's Caucus is group consisting of feminist human rights lawyers from around world committed to monitoring ICC delegates' treatment of gender issues in language of ICC statute). Members of the Women's Caucus were unsure of whether gender crimes would be given adequate weight in the statute establishing the ICC. *Id.*

13. WOMEN'S CAUCUS FOR GENDER JUSTICE IN THE INTERNATIONAL CRIMINAL COURT, RECOMMENDATIONS AND COMMENTARY FOR DECEMBER 1997 PREPCOM ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 24 (1997) [hereinafter WOMEN'S CAUCUS RECOMMENDATIONS] (suggesting that gender violence is most outrageous and extreme form of gender discrimination).

14. See Alda Facio, *A Word (or Two) About Gender* (visited Feb. 18, 1998) <<http://www.advocacy.net.igc.apc.org>> (on file with the *Fordham International Law Journal*) (defining gender crimes as those crimes based on power imbalance between men and women and social construction of femininity and masculinity)

15. See *id.* (suggesting that concept of gender crimes includes, but is much broader than rape or sexual violence).

16. See Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255, 257 (1994) (noting that rape has been used as method of warfare throughout centuries and has evolved as method for terrorizing and disheartening civilians during times of war); see also Diana Kapidzic & Aida Daidzic, *Biser: A Conversation with Bosnian Women Living in Exile*, 5 HASTINGS WOMEN'S L.J. 53, 63-64 (1994) (explaining that rape is often considered particularly effective tool of warfare because rape is inexpensive and does not require oil, weapons, ammunition, or skilled soldiers).

dence of complete victory.<sup>17</sup> Rape has functioned as a military tactic, a way to terrorize populations during warfare and to assert control over war enemies.<sup>18</sup> Thus, rape is a crime utilized in warfare for a variety of reasons, and while it is sometimes motivated by religion or ethnicity, it is always motivated in some way by gender.<sup>19</sup>

Rape was an important part of a carefully conceived strategy of war in the former Yugoslavia, one of many military tactics utilized primarily by Serbian soldiers against Bosnian and Croatian women.<sup>20</sup> The Serbian military utilized rape in its efforts to de-

17. See Simon Chesterman, *Never Again . . . And Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 *YALE J. INT'L L.* 299, 325 (1997) (discussing historical military phenomenon sometimes known as "booty and beauty" to highlight link between rape and conquest). For example, during the First Crusade, Emperor Alexius supposedly appealed to potential recruits by extolling the beauty of Greek women as an enticement to enlist and to go to war, implying that access to these women would be one of the spoils of military victory. *Id.*

18. See Levy, *supra* note 16, at 257 (suggesting that rape has been used to terrorize and to dominate civilian populations and to impose control over adversaries). Some scholars point out that not only rape but also its consequences of pregnancy and "psychological destruction" are used as military tactics. *Id.* at 258; see Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN'S L.J.* 243, 260 (1994) (noting that rape of women is engine of war that maintains morale of soldiers, feeds their hatred and sense of superiority, and keeps them fighting).

19. See Ray, *supra* note 9, at 814-15 (indicating that victims of gender violence are targeted based on their gender).

20. See *id.* at 802-03 (noting that rape was used as weapon of war to create climate of terror and to drive Croatian or Bosnian population from their villages). Tens of thousands of women were raped in the former Yugoslavia. *Id.* at 801; see Levy, *supra* note 16, at 258 (explaining that mass rapes committed primarily by Serbian soldiers brought issue of rape to attention of international community); see also Copelon, *supra* note 18, at 244 (cautioning that fact that rapes in former Yugoslavia captured world attention does not guarantee that they will not later disappear from history, or survive, at best, as exceptional case); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 *UCLA WOMEN'S L.J.* 59, 64-66 (1993) (explaining that rapes in former Yugoslavia existed as part of strategy of genocide and practice of misogyny, as well as sexual conquest). Catherine MacKinnon writes:

This is ethnic rape as an official policy of war: not only a policy of the pleasure of male power unleashed; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side; not only a policy of men posturing to gain advantage and ground over other men. It is rape under orders: not out of control, under control. It is rape unto death, rape as massacre, rape to kill and make the victims wish they were dead. It is rape as an instrument of forced exile, to make you leave your home and never come back. It is rape to be seen and heard by others, rape as a spectacle. It is rape to shatter a people, to drive a wedge through a community. It is the rape of misogyny liberated by xenophobia and unleashed by official command.

MacKinnon, *supra*, at 65-66.

stroy the Muslim population by raping and impregnating thousands of Muslim women,<sup>21</sup> thereby contaminating the "purity" of Muslim blood.<sup>22</sup>

The rape of women during the recent political conflict in Haiti functioned not as a weapon of war but as a weapon of terror.<sup>23</sup> Men raped women in Haiti who actively resisted or were perceived to have actively resisted the illegal Haitian regime<sup>24</sup> or whose family members resisted.<sup>25</sup> Men raped other women as a form of retaliation because the women lived in sections of the country that supported Jean-Bertrand Aristide.<sup>26</sup> Still other men raped as a means of generating or maintaining a sense of chaos because women had kept the society functioning while their hus-

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21. See Ray, *supra* note 9, at 799-809 (describing violence inflicted on women in former Yugoslavia by Serbian military forces). The following passage describes the experiences of one young woman in the former Yugoslavia:

One day in April, Serb [soldiers] came to the village near Tesanj, in Central Bosnia, where Marijana, a Muslim-Croat, lived with her family . . . . The soldiers raped Marijana and her mother there, then loaded Marijana on a truck, along with twenty-three other women from the village. This was the last time she saw her mother or her sister. Raping continued on the truck. The soldiers took the women to an improvised camp in the woods that operated as a military brothel. Women between the ages of twelve and twenty-five were kept in one room and raped daily. Marijana became pregnant in the first month. After four months, the soldiers let her and seven other visibly pregnant women go. Marijana says, "They told us to go and have our Serbian babies."

*Id.* at 800 (quoting Jasmina Kuzmanovic, *Legacies of Invisibility: Past Silence, Present Violence Against Women in the Former Yugoslavia*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 57, 57 (Julie Peters & Andrea Wolper eds., 1995)).

22. See Levy, *supra* note 16, at 258-59 (indicating that Serbian military raped women as method to ensure that resulting children will not be of pure Muslim descent). But see Rhonda Copelon, *Women and War Crimes*, 69 *ST. JOHN'S L. REV.* 61, 66-67 (1995) [hereinafter *Women and War Crimes*] (suggesting that rape in wartime is not always linked to ethnicity at all but is instead way of boosting morale of troops, as in case of Japanese comfort women in World War II).

23. See Copelon, *supra* note 18, at 259-60 (noting that women in Haiti were often raped in their own homes and in front of their children and families as part of campaign of terror).

24. See generally *Haiti: Punishing Victims*, *ECONOMIST*, Feb. 8, 1992, at 36 (providing background regarding illegal regime in Haiti that seized control and exiled Jean-Bertrand Aristide after he was elected in 1990 with sixty-seven percent of vote).

25. See *id.* at 260 (suggesting that women in Haiti were raped in order to render them powerless).

26. See *id.* (indicating that women who lived in sections that supported exiled Jean-Bertrand Aristide were targeted for rapes). The rapes in Haiti represented the ultimate invasion of security of person and home and resulted in many Haitian women going into hiding or exile. See *id.*



bands and fathers were forced into hiding.<sup>27</sup>

## 2. Sexual Torture and Mutilation

Like rape, sexual torture and sexual mutilation inflicted on a widespread scale are gender crimes because women suffer unique physical and psychological injuries when they become victims of such crimes.<sup>28</sup> The documentation of violence against women in Rwanda<sup>29</sup> and the former Yugoslavia illustrates how gender violence can take the form of sexual torture.<sup>30</sup> Common forms of sexual torture in Rwanda included attacking and impaling women through their vaginas, slashing breasts, and cutting out pregnant women's uteri.<sup>31</sup>

In the former Yugoslavia, sexual mutilation sometimes took the form of Bosnian-Serb soldiers slashing Muslim women's breasts.<sup>32</sup> Other victims of sexual torture and mutilation had their breasts cut off and their wombs ripped out of their bodies.<sup>33</sup> One woman described being tortured by electroshocks

27. *See id.* (suggesting that women were targeted as way to undermine any sense of community order while men were hiding or in exile).

28. *See* WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 27-29 (illustrating why sexual torture and mutilation are gender crimes); *see also* Kathleen M. Pratt & Laurel E. Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia*, 9 BERKELEY WOMEN'S L.J. 77, 77-78 n.4 (1994) (suggesting that social status of women makes them targets for gender-based violence).

29. *See* *Rwandans Agree to Cease Fire*, CHRISTIAN SCI. MONITOR, July 15, 1992, at 8 (noting that formal cease-fire was signed by Rwanda's government and rebels). The civil war in Rwanda pitted the minority Tutsi tribe against the majority Hutu tribe. *Id.* The Tutsi, who invaded in October 1990, were battling for the right to return to Rwanda after the Hutu excluded the minority tribe from the country thirty years ago. *Id.*

30. *See* WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 28 (documenting incidents of sexual mutilation, sexual slavery, and other forms of sexual violence against women in Rwanda and the former Yugoslavia).

31. *See* Pratt & Fletcher, *supra* note 28, at 86-87 (providing examples of sexual mutilation in Rwanda). Acts of sexual violence committed by Bosnian Muslims against Serbian men have also been documented. *See id.* (noting that Serbian men endured crude circumcisions); *see also* Mark S. Zaid, *Trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia*, 3 ILSA J. INT'L & COMP. L. 589, 594-95 (1997) (recounting incident in which one male prisoner was forced to bite off testicles of another prisoner, resulting in his death).

32. *See* Michele Brandt, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1413 n.3 (1995) (relating story of anonymous plaintiff who testified in class action lawsuit about sexual torture inflicted upon her by Bosnian-Serb soldiers).

33. *See* MacKinnon, *supra* note 20, at 66 (describing sexual torture endured by women of former Yugoslavia).

while being gang-raped in a concentration camp by Serbian soldiers dressed in Croatian uniforms.<sup>34</sup> The soldiers videotaped the rapes and later forced the victim to state on film that she was raped by Croatian men, not Serbs.<sup>35</sup>

Women in Rwanda were sexually tortured through gang-rapes.<sup>36</sup> Rwandan soldiers tortured women by raping them with inanimate objects.<sup>37</sup> The Women's Caucus specifies that rape itself can take the form of sexual mutilation, though the mutilation often remains invisible because much of the injury is sustained to internal organs.<sup>38</sup>

### 3. Sexual Slavery

Sexual slavery is generally gender-based because it exploits women's traditional roles as passive sex objects and domestic service providers.<sup>39</sup> Both rape and forced prostitution can be components of sexual slavery.<sup>40</sup> In fact, it is the combination of hav-

34. *See id.* at 61 (relating experiences of sexual torture endured by some women in former Yugoslavia).

35. *Id.*

36. *See WOMEN'S CAUCUS RECOMMENDATIONS, supra* note 13, at 27 (maintaining that gang rapes in Rwanda were often inflicted in pursuit of victim's eventual death).

37. *See id.* (noting that women in Rwanda were sometimes raped with inanimate objects). Describing an unusual and brutal form of sexual torture, one woman in the former Yugoslavia testified that she was forced to perform oral sex on a Serbian soldier all night, night after night, and that she was threatened with immediate death if she failed to sustain his erection for the entire night. *See MacKinnon, supra* note 20, at 66 (providing examples of torture and sexual mutilation of women in former Yugoslavia).

38. *See WOMEN'S CAUCUS RECOMMENDATIONS, supra* note 13, at 28 (asserting that damage to internal organs through rape can result in loss of sexual function and infertility).

39. *See id.* at 30 (suggesting that example of forced temporary marriage is gender enslavement because it employs traditional female roles in order to control women).

40. *See Ray, supra* note 9, at 807-08 (discussing elements of sexual enslavement and issue of concentration camps as brothels). The Women's Caucus suggests the following:

[A] category may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power . . . . The decision whether to charge someone with forced prostitution, sexual slavery, or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.

*See WOMEN'S CAUCUS RECOMMENDATIONS, supra* note 13, at 29-30 (suggesting that some forced prostitution, for instance the situation endured by comfort women, rises to level of sexual slavery).

Some scholars acknowledge that forced prostitution endured by women in the for-

ing to endure serial rapes with no possibility of escape and no perceivable end to the violence that makes sexual slavery uniquely brutal.<sup>41</sup>

Illustrations of sexual slavery in recent history are numerous.<sup>42</sup> In Rwanda and the former Yugoslavia, women were forced into sexual slavery and held in prisons, occupied towns, and rape camps where they were repeatedly raped or threatened with sexual violence.<sup>43</sup> Perhaps the most notorious example of sexual slavery is the enslavement of comfort women in Asia.<sup>44</sup>

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mer Yugoslavia will inevitably lead to many of the victims prostituting themselves when they are no longer in the Serbian concentration camps. *See, e.g.,* Ray, *supra* note 9, at 810-11 (discussing phenomenon of women turning to prostitution after enduring forced prostitution in times of war). Many victims of forced prostitution will turn to prostitution because of social isolation, a history of rape, and economic deprivation. *See id.* (suggesting that when these three conditions exist, most women subject to conditions will engage in prostitution).

41. *See* Ray, *supra* note 9, at 808 (maintaining that sexual enslavement multiplies rape's impact).

42. *See* WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 28-30 (describing examples of gender enslavement in recent years, such as in former Yugoslavia and Rwanda).

43. *See id.* at 28 (describing recent occurrences of sexual enslavement and explaining that, depending on context, rape, forced pregnancy, and other forms of sexual violence and abuse can be recognized as sexual slavery).

44. *See id.* at 29 (noting that comfort women endured multiple rapes on daily basis, as well as severe physical abuse, by Japanese during World War II and suggesting that term "comfort women" is euphemism that "does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime").

Comfort women were subjected to sexual slavery, rape, torture, coercion, and other crimes of sexual violence, and many were killed in the last stages of World War II. *See Sex Slaves Remain to Haunt Japan-Asia Ties*, *NATION*, Aug. 14, 1998 (describing horrors endured by comfort women). The violence endured by the comfort women of World War II has yet to be fully recognized in Japan, as illustrated by recent statements made by Japan's Agriculture Minister, Shoichi Nakagawa, who publicly opined that comfort women willingly volunteered their sexual services to the Japanese army. *See id.* (discussing Japan's disquieting unwillingness to recognize suffering of comfort women and provide them with legal compensation); *see also* Rochelle Jackson, *The Comfort Women of Asia: Still Hurting from a 50 Year-old War* (visited July 12, 1998) <<http://advocacy@wyrwright.com>> (on file with the *Fordham International Law Journal*).

One surviving comfort woman from the Philippines, Malaya Lola, was forced into sexual slavery by the Japanese army for two years, and her husband left her soon after, taking their four young children with him. Jackson, *supra*. Lola, describing how her life might have been different had she received legal compensation and reparations from the Japanese government, states:

Had I received legal compensation and reparations from the Japanese government after the war, I know that my life would be different today. First I could have had a very much needed medical treatment of the injuries I suffered in

During World War II, the Japanese army kidnapped as many as 200,000 women and forced them to serve the army as sexual slaves.<sup>45</sup>

#### 4. Forced Pregnancy and Forced Motherhood

The crime of forced pregnancy is gender-based because only women are capable of conceiving children.<sup>46</sup> When rape results in a forced pregnancy, the victim suffers an additional level of sexual violence.<sup>47</sup> As in the case of sexual slavery, the injury suffered by victims of forced pregnancy is constant and subjects women to an incessant nine-month reminder of the sexual violence that they had endured.<sup>48</sup> Forced pregnancy also compels women to make often unbearable decisions concerning whether to carry the pregnancy to term and how to treat the resulting child.<sup>49</sup>

Forced motherhood<sup>50</sup> leads to a related set of injuries.<sup>51</sup>

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the hands of my Japanese captors, these injuries were aggravated by my inability to seek treatment due to my financial incapacity. I have to suffer pain and physical incapacities, like being unable to walk without aid, and being unable to do house chores. I could have continued my studies which would have taken only one more year and some months to be a . . . lawyer. I could have taken steps to reclaim my four children if I had the financial means. I could have had a better house to live in.

*Id.*

45. See WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 29 (maintaining that Japanese army forced 200,000 women to serve as comfort women and suggesting that practice of comfort women is clear case of sexual slavery); see also *Japanese Responsible*, *UN Says*, *GLOBE AND MAIL*, Aug. 13, 1998 (suggesting that Japanese government should take legal responsibility for sexual enslavement of 200,000 comfort women).

46. See Ray, *supra* note 9, at 809 (suggesting that women's unique ability to conceive children explicitly engenders crime of forced pregnancy).

47. See WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 28-29 (suggesting that when women are forcibly made pregnant, they suffer not only rape but also treatment as chattel for reproductive purposes). Recent estimates suggest that approximately one thousand women were the victims of forced pregnancies in the former Yugoslavia. Ray, *supra* note 9, at 809.

48. See WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 29 (suggesting that forced pregnancy controls victim's body for nine months).

49. See *id.* (noting intolerable choices that victims of forced pregnancy are forced to make). The Women's Caucus submits that "[t]he pregnancy of rape is intended to and does take over a woman's body for nine months, at the end of which she faces the intolerable 'choice' of keeping a child of rape, abandoning it, and, in some contexts, giving it up for adoption." *Id.*; see Ray, *supra* note 9, at 808-09 (noting that victims of forced pregnancy in former Yugoslavia were held by their rapists until it was too late to abort fetus).

50. See, e.g., Ray, *supra* note 9, at 808-09 (discussing effects of forced pregnancy and forced motherhood). Forced pregnancy and forced motherhood, though related

For instance, the victim of forced motherhood may feel loathing or hostility towards the child conceived from the rape.<sup>52</sup> The children resulting from these rapes ceaselessly serve as a reminder to their mothers of the violence inflicted on them.<sup>53</sup>

### B. *The History of the Permanent International Criminal Court*

The initiative to form a permanent ICC has a lengthy history.<sup>54</sup> Interest in such a court intensified after World War I, World War II, and the civil war in the former Yugoslavia.<sup>55</sup> The numerous attempts to create an ICC demonstrate the international community's consistent interest in the formation of an enduring system of international criminal justice.<sup>56</sup>

crimes, are not the same because forced pregnancy does not always result in motherhood due to abortion, miscarriage, or adoption. *Id.*

51. *See id.* at 809-10 (discussing unique experience of women who give birth to children resulting from rape).

52. *See id.* at 810 (suggesting that many women impregnated as result of rape experience disgust and revulsion toward their pregnancies and resulting children, and this often leads to rejection of these children following their birth).

53. *See generally* WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 28-29 (noting that continuation of hated pregnancy and presence of child who is product of rape is particularly invasive form of violence); *see also* Copelon, *supra* note 18, at 256 (suggesting that forced pregnancy is kind of psychological torture). Copelon suggests that:

the expressed intent to make women pregnant is an additional form of psychological torture; the goal of impregnation leads to imprisoning women and raping them until they are pregnant; the fact of pregnancy, whether or not aborted, continues the initial torture in a most intimate and invasive form; and the fact of bearing the child of rape, whether or not the child is placed for adoption, has a potentially life-long impact on the woman and her place in the community.

*Id.*

54. *See* Blakesley, *supra* note 2, at 81-85 (describing history of ICC concept); *see also* Christopher Keith Hall, *Origins of the ICC Concept (1872-1945)* (visited Sept. 1, 1998) <<http://www.igc.org/icc>> (on file with the *Fordham International Law Journal*) [hereinafter *Origins of ICC*] (describing early history of ICC concept); Christopher Keith Hall, *History of the ICC, Part II: From Nuremberg to the PrepComs* (visited Sept. 1, 1998) <[gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/monitor/seven/history2.txt](http://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/monitor/seven/history2.txt)> (on file with the *Fordham International Law Journal*) [hereinafter *History of the ICC*] (describing later history of initiative for permanent ICC); *Timeline for the Formation of the International Criminal Court* (visited Sept. 1, 1998) <<http://www.igc.org/icc>> (on file with the *Fordham International Law Journal*) [hereinafter *Timeline*] (providing concise history of ICC initiative).

55. *See* Blakesley, *supra* note 2, at 82-85 (discussing antecedents to permanent ICC, including Versailles Treaty, International Military Tribunal at Nuremberg, and ad hoc Tribunal in former Yugoslavia).

56. *See* Bassiouni, *supra* note 3, at 11-13 (illustrating international community's interest in ICC concept).

### 1. Early Modern Initiatives to Establish a Permanent International Criminal Court

The concept of a permanent ICC has intrigued the international community since the thirteenth century.<sup>57</sup> The modern initiative to establish an ICC grew out of the Treaty of Peace Between the Allied and Associated Powers and Germany<sup>58</sup> ("Treaty of Versailles") after World War I.<sup>59</sup> Though the Treaty of Versailles provided for the establishment of an ad hoc tribunal,<sup>60</sup> plans for a tribunal never materialized.<sup>61</sup>

At the end of World War II, outrage over the atrocities of World War II inspired a reinvigorated discussion of the ICC concept.<sup>62</sup> In 1942, the Allied Powers<sup>63</sup> established the United Na-

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57. See Blakesley, *supra* note 2, at 82 (noting that earliest interest in concept of culpability for war crimes was probably prosecution and execution of Conradin von Hohenstaufen for initiating war in 1268).

Conradin von Hohenstaufen was the son of Conrad IV, and the grandson of Frederick II. The sixteen-year old Conradin was beheaded by Charles, Count of Anjou, in 1268, after the battle of Tagliacozzo in Sicily. Crowds converged on the market square in Naples to watch the execution, fascinated by the unheard of fact that a king was to be executed. Conradin's execution marked the end of the long Hohenstaufen reign. It was said that, as the young Conradin's head fell to the ground, an eagle swooped down, trailed its right wing in the blood of the last of the Hohenstaufen kings, and soared to heaven. ERNST KANTOROWICZ, *FREDERICK THE SECOND (1194-1250)* 673-677 (1957).

58. Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919, 2 Bevans 43 [hereinafter Treaty of Versailles].

59. See Bassiouni, *supra* note 3, at 14-19 (describing first modern attempt to create ICC and explaining that failure to establish prosecutions pursuant to Treaty of Peace Between Allied and Associated Powers and Germany ("Treaty of Versailles") was due to unwillingness to create precedent of prosecuting head of state for new international crime). *But see* Blakesley, *supra* note 2, at 82 (suggesting that modern idea of establishing ICC began in 1899 with Hague Convention for Pacific Settlement of International Disputes). The Hague Convention for Pacific Settlement of International Disputes provided that signatory powers attempt mediation with "friendly powers" before resorting to war. WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW* 1006 (1962).

60. See Bassiouni, *supra* note 3, at 14-15 (noting that Article 227 of Treaty of Versailles provided for creation of ad hoc international criminal tribunal to prosecute Germany's Kaiser Wilhelm II for initiating war and that Articles 228-29 provided for prosecution of German military personnel accused of violating laws and customs of war).

61. See *id.* at 18-20 (describing political circumstances that prevented establishment of ad hoc tribunal after World War I, including Allies' decreasing enthusiasm for coordinating joint and separate military tribunals).

62. See *History of the ICC*, *supra* note 54, at 1 (discussing renewed interest in ICC concept after World War II); see also Cavicchia, *supra* note 2, at 225-26 (noting that atrocities committed by Nazis caused concept of ICC to resurface).

63. See David J. Scheffer, *United Nations Peace Operations and Prospects for a Standby Force*, 28 *CORNELL INT'L L.J.* 649, 649 (1995) (noting that central members of Allied Powers were United States, United Kingdom, Soviet Union, and China).

tions War Crimes Commission ("UNWCC").<sup>64</sup> Political considerations ultimately thwarted the international community's high expectations of the UNWCC.<sup>65</sup> Consequently, the UNWCC failed to actualize those high expectations and never functioned effectively.<sup>66</sup> In 1945, the Allied Powers established an international military tribunal in Nuremberg, Germany, with subject matter jurisdiction<sup>67</sup> over crimes committed against peace, war crimes, crimes against humanity, and conspiracy to commit such crimes.<sup>68</sup> The next year, the Allied Powers established another tribunal resembling the Nuremberg tribunal in Tokyo, Japan.<sup>69</sup>

At that time, the prevailing view in the international community was that these tribunals could serve as a starting point for the prosecution of various international crimes.<sup>70</sup> After the establishment of the United Nations, the international community

64. See Bassiouni, *supra* note 3, at 21 n.36 (explaining that United Nations War Crimes Commission ("UNWCC") was created to investigate and obtain evidence of war crimes). The UNWCC was comprised of representatives from seventeen countries, most of which had only limited political power and influence. *Id.* at 22.

65. See *id.* at 21-22 (noting that UNWCC was subordinated to political considerations and ultimately relegated to inferior role, in part because nations represented by UNWCC held little political authority).

66. See *id.* (noting that, by end of 1942, only seventy reports were submitted to UNWCC, most of which contained insubstantial information or incomplete data and that UNWCC was never provided with adequate investigatory and support staff or sufficient funds). Because the UNWCC was comprised almost entirely of representatives from exiled governments possessing only limited powers after World War II, the UNWCC had very little support and almost no political influence. *Id.* at 22.

67. BLACK'S LAW DICTIONARY 1425 (6th ed. 1990) (defining subject matter jurisdiction as court's power to hear and to determine cases of general class or category to which proceedings in question belong).

68. See Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 *CONN. J. INT'L L.* 1, 8 (1998) (indicating that Declaration of St. James, which endorsed legal process, rather than summary execution, of Nazi war criminals, submitted that civilized world's sense of justice required punishment of war criminals through organized justice). At Nuremberg, twelve high Nazi officials were convicted and sentenced to death, while ten defendants were sent to prison, one committed suicide, and one was found physically unable to stand trial. *Id.*

69. See *id.* at 8-9 (discussing establishment of tribunal in Tokyo, which was similar to tribunal in Nuremberg). The tribunals in Nuremberg and Tokyo confirmed the principles that individuals have international obligations that exceed national duties of obedience imposed by the state and that holding high positions in government does not shield individuals from accountability for violations of international law. *Id.*

70. See Cavicchia, *supra* note 2, at 226-27 (discussing fact that, despite concern that war criminals were charged with offenses not recognized under international law, international community saw tribunals held in Nuremberg and Tokyo as possible bridge to creation of ICC).

considered the creation of an ICC feasible.<sup>71</sup> In fact, the International Law Commission<sup>72</sup> ("ILC") examined the possibility of establishing a permanent ICC during the ILC's sessions in 1949 and 1950 and pronounced such a court to be both desirable and possible.<sup>73</sup>

In 1951 and 1953, two ad hoc committees on international criminal jurisdiction appointed by the U.N.'s General Assembly submitted draft statutes for an ICC.<sup>74</sup> Countries on both sides of the Cold War,<sup>75</sup> however, opposed the proposals.<sup>76</sup> During the next three decades, the international community made little progress towards the creation of an ICC.<sup>77</sup>

## 2. Evolution of the International Criminal Court Concept in the 1990s

With the lessening of Cold War tensions towards the end of the 1980s, the international community again became interested

71. See *id.* at 227 (discussing international community's belief that creation of United Nations made creation of ICC more feasible).

72. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1037 (1996) (indicating that International Law Commission ("ILC") was created by U.N. General Assembly in 1947); see also MacPherson, *supra* note 68, at 11 n.59 (noting that ILC was created for purpose of establishing comprehensive international penal code).

73. MacPherson, *supra* note 68, at 11.

74. See Cavicchia, *supra* note 2, at 227 (describing submission of draft statutes in 1951 and 1953).

75. See Timothy S. Dunning, *D'Amato in a China Shop: Problems of Extraterritoriality with the Iran and Libya Sanctions Act of 1996*, 19 U. PA. J. INT'L ECON. L. 169, 190 (1998) (explaining that term "Cold War" refers to power struggle and "stalemate of nuclear parity" that constituted relationship between United States and former Soviet Union from 1950s to late 1980s).

76. See generally Bassiouni, *supra* note 3, at 52 (noting that Soviet Union opposed creation of ICC, believing that its sovereignty might be compromised by such court, and that United States was not committed to ICC concept either). In 1950, France was the only permanent member of the U.N. Security Council that supported the formation of an ICC. *Id.*

77. See MacPherson, *supra* note 68, at 12 (noting that, though little progress was made between mid-1950s and late 1980s, interest in ICC was kept alive by scholars and non-governmental organizations ("NGOs")). Like the plans to form a permanent ICC, the General Assembly's plans to draft an international criminal code were stalled and interrupted. Cavicchia, *supra* note 2, at 228. In fact, by 1974, the General Assembly had only progressed as far as adopting a consensus resolution on the definition of the term "aggression." *Id.*; see Bassiouni, *supra* note 3, at 52 (explaining that many countries expressed desire to create ICC but absence of consensus among world's major powers doomed its establishment).



in the ICC concept.<sup>78</sup> In 1989, the U.N. asked the ILC to consider the question of whether an ICC would be feasible or desirable.<sup>79</sup> In 1992, the ILC examined the Special Rapporteur's<sup>80</sup> tenth report on the possibility of an ICC and later that year created a working group to examine the question further.<sup>81</sup>

The civil war in the former Yugoslavia, which began in 1992, revived the international community's interest in the ICC concept.<sup>82</sup> In February 1993, the U.N. Security Council<sup>83</sup> established the ad hoc International Criminal Tribunal for the former Yugoslavia ("ICTFY").<sup>84</sup> The U.N. Security Council established the ad hoc Rwandan tribunal ("ICTR") in 1994.<sup>85</sup> Both the ICTFY and the ICTR have the jurisdiction to prosecute crimes of genocide and crimes against humanity.<sup>86</sup>

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78. See William Gilmore, *The Proposed International Criminal Court: Recent Developments*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 263, 264 (1995) (indicating that easing of Cold War tensions allowed for renewed focus of international community on ICC concept); see also MacPherson, *supra* note 68, at 12 (noting that renewed interest in ICC focused on terrorism and narcotics trafficking rather than war crimes and genocide). In 1987, President Mikhail Gorbachev of the U.S.S.R. called for an international criminal court to prosecute international terrorism. *HISTORY OF THE ICC, supra* note 54, at 2. In 1989, representatives from Trinidad and Tobago reintroduced the ICC concept to the U.N. General Assembly. *TIMELINE, supra* note 54, at 2; *HISTORY OF THE ICC, supra* note 54, at 2.

79. See Gilmore, *supra* note 78, at 265 (explaining that United Nations asked ILC to focus primarily on feasibility of ICC in dealing with problem of drug trafficking).

80. See STEINER & ALSTON, *supra* note 72, at 402-07 (explaining that Special Rapporteurs are chosen by U.N.'s Commission on Human Rights to investigate countries accused of human rights violations).

81. See Gilmore, *supra* note 78, at 265 (indicating that ILC created working group to examine ICC question).

82. See O'Hara Forster, *supra* note 4 (suggesting that atrocities that accompanied disintegration of Yugoslavia galvanized international community to form ICC).

83. See BLACK'S LAW DICTIONARY, *supra* note 67, at 1356-57 (defining U.N. Security Council as United Nations executive body charged with duty of preventing or stopping wars by diplomatic, economic, or military action). The U.N. Security Council consists of five permanent member states and six additional member states elected at intervals. *Id.*

84. See S.C. Res. 808, U.N. SCOR, 48th Sess., at pmb., U.N. Doc. S/RES/808 (1993) [hereinafter ICTFY Statute] (establishing International Criminal Tribunal for former Yugoslavia). Resolution 808 provided that the U.N. Security Council "[d]ecides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *Id.* The international criminal tribunal was formed officially on May 25, 1993. Douglas Stringer & Diane Marie Amann, *International Criminal Law*, 31 *INT'L LAW.* 611, 611 (1996).

85. See S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute] (establishing ad hoc Rwandan tribunal).

86. See MacPherson, *supra* note 68, at 13-14 (stating fact that ad hoc Rwandan tri-

In 1993, the U.N. General Assembly requested that the ILC create a draft statute for a permanent ICC as a matter of priority and that this draft statute be ready by July 1994.<sup>87</sup> Although the ILC attempted to respond to the political reservations of some of the world's major powers,<sup>88</sup> the U.N. General Assembly defeated the proposal to transmit the ILC's statute to a diplomatic conference.<sup>89</sup>

### 3. The Preparatory Committees and the Rome Conference

In December 1995, the U.N. General Assembly established the Preparatory Committee on the Establishment of an International Criminal Court<sup>90</sup> ("PrepCom") that set about preparing a consolidated draft text for a diplomatic conference to consider.<sup>91</sup> The PrepCom used as a guide the same ILC draft statute that the ad hoc Committee on the Establishment of an International Criminal Court used as a foundation.<sup>92</sup>

Six PrepCom sessions were held between March 1996 and April 1998,<sup>93</sup> in preparation for an international treaty conference in Rome, Italy, convened for the purpose of establishing a permanent ICC.<sup>94</sup> The international community's enthusiasm

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bunal ("ICTR") and ad hoc International Criminal Tribunal for the former Yugoslavia ("ICTFY") had jurisdiction to deal with war crimes and crimes against humanity in Rwanda and Yugoslavia, respectively). The ICTFY and ICTR are true international tribunals, in that their membership represents the entire international community and they have the power to prosecute certain crimes irrespective of the party committing them. *Id.* at 14.

87. HISTORY OF THE ICC, *supra* note 54, at 2-3.

88. See Bassouini, *supra* note 3, at 56 (noting that ILC's 1994 draft statute was not adopted, though it attempted to answer concerns of major powers).

89. See HISTORY OF THE ICC, *supra* note 54, at 3 (stating fact that U.N. General Assembly refused to accept ILC's draft statute for permanent ICC).

90. See G.A. Res. 50/46, U.N. GAOR, 50th Sess., Supp. No. 49, U.N. Doc. A/RES/50/46 (1995) (establishing Preparatory Committee on Establishment of International Criminal Court ("PrepCom")).

91. See MacPherson, *supra* note 68, at 14 (indicating that PrepCom was established to prepare draft statute that would be considered by conference of plenipotentiaries).

92. See Bassouini, *supra* note 3, at 57 (describing use of ILC statute by PrepCom).

93. TIMELINE, *supra* note 54, at 3. The first PrepCom session was held from March 25 to April 12, 1996; the second PrepCom session occurred from August 12 to 30, 1996; the third PrepCom session was held from February 11 to 21, 1997; the fourth session was held from August 4 to 15, 1997; the fifth PrepCom session was held from December 1 to 12, 1997; and the sixth PrepCom session was held from March 16 to April 3, 1998. *Id.*

94. See O'Hara Forster, *supra* note 4 (noting that international community convened Rome Conference in order to draft treaty establishing ICC).

for the ICC concept as illustrated by the convening of the Prepcom sessions and the Rome Conference was particularly encouraging, considering that as recently as four years ago, the international community, including non-governmental organization<sup>95</sup> ("NGO") observers, considered that the creation of an international criminal court would take at least another fifty to 100 years.<sup>96</sup>

Delegates to the Rome conference convened for five weeks.<sup>97</sup> During this time, they created and adopted the Rome Statute.<sup>98</sup> The diplomatic conference adopted the statute by 120 votes to 7, with 21 abstentions.<sup>99</sup>

At the Rome Conference, the United States disagreed with many of its usual allies concerning basic statute provisions such as jurisdiction and prosecutorial power.<sup>100</sup> The United States took the position of rejecting the concept of universal jurisdiction.<sup>101</sup> Delegates from the United States sought a clause al-

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95. See generally STEINER & ALSTON, *supra* note 72, at 456-99 (examining role played by NGOs in general human rights movement). NGOs are a vital component of the human rights landscape, energizing it and exerting pressure on governments and human rights organizations to reconsider policy and to enforce human rights norms. *Id.*; see Karen Berg, *A Permanent International Criminal Court*, U.N. CHRON., Dec. 22, 1997 (examining considerable influence of NGO Coalition for International Criminal Court ("CICC"), main purpose of which was to bring NGOs together with international law experts to develop strategies for ensuring just and effective ICC). More than 200 NGOs attended the Rome Conference. See UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, U.N. DIPLOMATIC CONFERENCE CONCLUDES IN ROME WITH DECISION TO ESTABLISH PERMANENT INTERNATIONAL CRIMINAL COURT (1998) (reporting that Representative of Secretary-General to Rome Conference, Hans Corell, recognized important role played by NGOs at conference).

96. See *Outlook for the Formation of the International Criminal Court* (visited on Mar. 2, 1998) <<http://www.igc.org/icc>> (on file with the *Fordham International Law Journal*) [hereinafter *Outlook for Formation of ICC*] (describing recent discouragement expressed by international community regarding possibility of ICC creation).

97. *International Criminal Court Is Major Step Towards Universal Human Rights, Rule of Law*, M2 PRESSWIRE, July 21, 1998 [hereinafter *ICC Is Major Step*].

98. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998) (adopted by United Nations on July 17, 1998).

99. Iain Guest, *Beyond Rome—What Are the Prospects for the International Criminal Court?*, ON THE RECORD (visited July 30, 1998) <<http://www.advocacy.net/org/icc>> (on file with the *Fordham International Law Journal*).

100. See O'Hara Forster, *supra* note 4 (describing tensions between United States and so-called like-minded nations seeking strong and independent court).

101. See *id.* (explaining that universal jurisdiction would subject any state guilty of war crimes to ICC's automatic jurisdiction, regardless of signatory status). The United States agreed that, in the case of genocide, the ICC should have automatic jurisdiction. *Id.*

lowing nation states to opt out of the ICC's jurisdiction regarding war crimes and crimes against humanity for ten years.<sup>102</sup> The adopted statute, however, allows nation states to opt out of ICC's jurisdiction for seven years and only for war crimes.<sup>103</sup> Another point of contention between the United States and most of its usual allies was the issue of prosecutorial power.<sup>104</sup> While the United States argued that prosecutorial power should be restricted to the U.N. Security Council and nation states party to the statute, the adopted statute provides that ICC prosecutors have prosecutorial power as well.<sup>105</sup>

## II. GENDER ISSUES CONSIDERED AT THE PREPCOM SESSIONS AND THE ROME CONFERENCE

Gender issues framed some of the most fiercely contested debates of the PrepCom sessions and the Rome Conference.<sup>106</sup> The draft statutes that emerged from the PrepCom sessions illustrated an increased willingness on the part of the delegates to implement gender concerns.<sup>107</sup> In the last days of the Rome Conference, delegates tackled numerous issues involving gen-

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102. *See id.* (stating fact that United States, opposing universal jurisdiction and advocating for weaker ICC, argues for inclusion of clause that would allow states to more easily opt out of ICC's jurisdiction).

103. *See id.* (indicating that majority of delegates rejected United States' proposed opt-out clause and adopted narrower opt-out clause).

104. *Id.*

105. *See id.* (explaining position of United States regarding prosecutorial power, as well as that of adopted statute). The ICC will be located at the Hague, near the International Court of Justice. *Id.* It will consist of four branches, namely a Presidency; an appeals, trial, and pre-trial division; an office of the Prosecutor; and an administrative division. *Id.* The adopted statute will remain in Italy until mid-October 1998, at which time it will be handed over to the Secretary-General of the United Nations and will remain open for signature until December 31, 2000. *Id.*

106. *See generally* Alessandra Stanley, *Semantics Stalls Pact Labeling Rape a War Crime*, N.Y. TIMES, July 9, 1998, at A3 (discussing dispute between women's groups and Vatican over term 'enforced pregnancy'); Farhan Haq, *Rights—Women: Women's Groups Urge Caution on Compromises*, INTER PRESS SERVICE, June 30, 1998 [hereinafter *Women's Groups Urge Caution*] (noting women's groups' anxiety that conference delegates would abandon Women's Caucus' main concerns); *Gender Dispute Haunts Rome Conference to the End*, ON THE RECORD (July 11, 1998) (visited Aug. 20, 1998) <<http://www.igc.org/icc/>> (on file with the *Fordham International Law Journal*) (describing expulsion of NGO participants from conference meeting due to Arab opposition to Women's Caucus' gender concerns).

107. *Compare* Preparatory Committee on the Establishment of an International Criminal Court, Draft Consolidated Text (Aug. 1996) (on file with the *Fordham International Law Journal*) [hereinafter August 1996 Draft Text], with Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the Interna-

der.<sup>108</sup> One such issue was determining a compromise between women's groups and Islamic countries on the status of the term "enforced pregnancy."<sup>109</sup> Another gender issue emerged as delegates debated whether the ICC's jurisdiction should encompass gender-based crimes that are neither systematic nor widespread, but are nonetheless savage and brutal.<sup>110</sup>

#### A. *The Concept of Gender Crimes in the PrepCom Sessions*

The Draft Consolidated Texts ("Draft Texts") indicate that gender issues confronted PrepCom delegates throughout the sessions leading up to the Rome Conference.<sup>111</sup> For instance, delegates to the March-April 1996 PrepCom session and the August 1996 PrepCom session debated whether the definition of crimes against humanity should provide that certain motivating factors be established in order for an act to qualify as a crime against humanity.<sup>112</sup> The Report of the Preparatory Committee on the Establishment of an International Criminal Court<sup>113</sup>

tional Criminal Court (Jan. 1998) (on file with the *Fordham International Law Journal*) [hereinafter January 1998 Draft Text].

108. See *Gender Dispute Haunts Rome Conference*, *supra* note 107 (suggesting that delegates wrestled with gender issues throughout Rome Conference).

109. See Stanley, *supra* note 106, at 3 (noting conflict between women's groups on one hand and Vatican and Islamic states on other hand over issue of enforced pregnancy). The conflict between the Women's Caucus and both the Vatican and certain Islamic states threatened to jeopardize the already-settled issue of whether rape would be declared a war crime. See *id.* (suggesting that tensions between Women's Caucus and both Vatican and Islamic states was fierce battle between gender politics and religion that threatened progress already made by women's groups at Rome Conference).

110. See *Crimes Against Humanity Compromise*, ON THE RECORD (July 11, 1998) (visited Sept. 1, 1998) <<http://www.igc.org/icc/>> (on file with the *Fordham International Law Journal*) (indicating that delegates at Rome Conference had to compromise on definition of crimes against humanity and women's groups were particularly dissatisfied with definition's seeming ineffectiveness to encompass certain gender crimes that are not committed as part of systematic or widespread attack).

111. See, e.g., *Press Briefing of the NGO (Non-Governmental Organization) Coalition for an International Criminal Court: A Report on the Fourth Session of the U.N. Preparatory Committee*, U.N. CORRESPONDENTS ASS'N, Aug. 4, 1997 [hereinafter *Press Briefing*] (introducing Women's Caucus' concerns and presence at PrepCom sessions).

112. See *PrepCom Report*, *supra* note 6, at ¶ 87 (noting disagreement between delegates at March-April 1996 and August 1996 PrepCom sessions concerning presence of motivational grounds in definition of crimes against humanity). For instance, some delegates expressed the view that the inclusion of motivational grounds would help demonstrate the types of situations in which crimes against humanity could be committed. *Id.* Other delegates, however, suggested that motivational grounds would only complicate the prosecution of war criminals. *Id.*

113. See *id.* (representing detailed summary of work of PrepCom during its March-

("PrepCom Report") suggests that in mid-1996, delegates were not yet seriously debating the inclusion of gender as a motivational factor triggering the definition of crimes against humanity because the term is not mentioned in the text of this report.<sup>114</sup>

The draft text resulting from the February 1997 PrepCom session<sup>115</sup> expanded the limited motivating factors included in the Statute of the International Tribunal for Rwanda ("Rwanda Statute").<sup>116</sup> While the delegates expanded the list of motivating factors, they failed to include gender in the newly-expanded list.<sup>117</sup> Delegates to the February 1997 PrepCom session, however, did include rape and enforced prostitution in the definition of crimes against humanity.<sup>118</sup> Moreover, the draft resulting from the February 1997 PrepCom session includes a broad

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April and August 1996 sessions, including various positions put forth regarding definitions of crimes, organizational questions, procedural questions, complementarity, and assistance of non-parties).

114. *See id.* (indicating that persecution of intellectuals and social, cultural, and political groups was considered by delegates, but that persecution based on gender was not considered). The term gender does not even appear bracketed in the text, which would indicate that the PrepCom delegates were in the process of considering its inclusion in the draft statute. *Id.* The PrepCom delegates analyzed and considered the motivational grounds listed in the statute for the Rwanda Tribunal. *Id.* The Statute of the International Tribunal for Rwanda ("Rwanda Statute") includes the following language in its definition of crimes against humanity:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on *national, political, ethnic, racial or religious grounds*.

ICTR Statute, *supra* note 85, art. 3 (emphasis added). Gender is not listed as a motivating factor under the Rwanda Statute. *Id.*

115. Working Group on Definition of Crimes, Preparatory Committee on the Establishment of an International Criminal Court, Draft Consolidated Text, A/AC.249/1997/WG.1/CPR.5 (1997) [hereinafter February 1997 Draft Text].

116. *Compare* ICTR Statute, *supra* note 85, art. 3 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on *national, political, ethnic, racial or religious grounds*") (emphasis added) with February 1997 Draft Text, *supra* note 115 ("For the purpose of the present Statute, any of the following acts constitutes a crime against humanity when . . . [as part of a widespread [and] [or] systematic attack against any [civilian population] [committed on a massive scale] [in armed conflict] [*on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds.*]") (emphasis added).

117. *See* February 1997 Draft Text, *supra* note 115 (bracketing motivating factors was limited to "political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds").

118. *Id.* The Draft Consolidated Text prepared in the February 1997 PrepCom session ("February 1997 Draft Text") provides that "rape or other sexual abuse [of comparable gravity,] or enforced prostitution" constitutes a crime against humanity. *Id.*

catch-all phrase that would fulfill the motivational requirement of the definition of crimes against humanity and could arguably encompass gender.<sup>119</sup> In addition, persecution based on gender appears in this draft.<sup>120</sup>

The list of motivating factors triggering the definition of crimes against humanity in the draft statute proceeding from the January 1998 PrepCom session<sup>121</sup> ("January 1998 Draft Text") omits gender entirely.<sup>122</sup> The January 1998 Draft Text, however, does retain language indicating that rape and other forms of sexual violence may be considered crimes against humanity.<sup>123</sup> Moreover, gender-based persecution appears later in the definition in brackets, indicating that, at the time of the January 1998 PrepCom session, delegates were considering the inclusion of gender.<sup>124</sup>

119. *Id.* The February 1997 Draft Text provides that certain crimes constitute a crime against humanity when committed "[as part of a widespread [and] [or] systematic attack against any [civilian population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]." *Id.* (emphasis added).

120. *Id.* The February 1997 Draft Text provides that "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [*or gender*] [or other similar] grounds [and in connection with other crimes with the jurisdiction of the Court]" may constitute a crime against humanity. *Id.* (emphasis added).

121. Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court (Jan. 1998) [hereinafter January 1998 Draft Text].

122. *See* January 1998 Draft Text, art. Y(1). The language in the January 1998 Draft Text is as follows:

For the purpose of the present Statute, . . . a crime against humanity means any of the following acts when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population]

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds].

*Id.*

123. *Id.* The January 1998 Draft Text provides that "rape or other sexual abuse [of comparable gravity,] or enforced prostitution" constitute crimes against humanity when committed as part of a widespread or systematic attack "on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds." *Id.*

124. *Id.* The January 1998 Draft Text provides that "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [*or gender*] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court]" constitute crimes against humanity. *Id.* (emphasis added).

B. *The Concept of Gender Crimes at the Rome Conference and in the Rome Statute*

Gender issues occupied the delegates to the Rome Conference considerably.<sup>125</sup> Along with the United States' rejected demands for a U.N. Security Council-controlled prosecutor<sup>126</sup> and guarantees that U.S. citizens would be immune from prosecution,<sup>127</sup> gender issues debated by women's groups, the Vatican, and Arab states caused some of the fiercest debates at the Rome Conference.<sup>128</sup> The completed Rome Statute is a partial success for women's advocates, as it incorporates several recommendations of the Women's Caucus and other women's advocates, but neglects to include other key proposals.<sup>129</sup>

1. Debates over Gender Issues at Rome Conference

Debates pertaining to gender issues erupted throughout the Rome Conference, and some threatened to stall the completion of the Rome Statute.<sup>130</sup> One of the most contentious of these debates pertained to the decision of whether to include the term

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125. See, e.g., *Gender Dispute Haunts Rome Conference*, *supra* note 106 (noting that gender concerns raised passions throughout Rome Conference).

126. See Thomas W. Lippman, *America Avoids the Stand: Why the U.S. Objects to a World Criminal Court*, WASH. POST, July 26, 1998, at C01 (indicating that United States argued for U.N. Security Council-controlled prosecutor because United States has veto power in Security Council).

127. See *id.* (indicating that United States pursued clause that would exempt all U.S. citizens from ICC prosecution). The United States sought a special exemption for its citizens because it was concerned that U.S. soldiers, who were stationed all over the world, would be especially vulnerable to prosecution. *Id.*

The United States also argued for the inclusion of a provision allowing states to opt out of the ICC's jurisdiction for war crimes and crimes against humanity for a period of ten years. *Id.* The United States' argument was rejected, however, and the final statute allows for states to opt out for war crimes only and only for seven, rather than ten, years. *Id.*

128. See, e.g., Stanley, *supra* note 106 (suggesting that tensions between women's groups, Vatican, and Arab states pertaining to gender issues threatened to hinder completion of statute).

129. See *Women Withhold Final Verdict*, TERRA VIVA (visited Aug. 24, 1998) <<http://www.ips.org/icc/tv180705.htm>> (on file with the *Fordham International Law Journal*) (indicating that women's advocates view Rome Statute as limited victory for women's rights, as it implements only some of Women's Caucus' suggestions pertaining to gender-based violence).

130. See *id.* (suggesting that fractious debates over definitions of terms pertaining to gender, such as enforced pregnancy, were not resolved until last hours of Rome Conference). Referring to this debate between the Women's Caucus and the Vatican and Arab states, Alda Facia, Director of the Women's Caucus, stated, "The Vatican and the Arab league are going to claim they've pushed back Beijing, but this is an illusion



enforced pregnancy in the definition of crimes against humanity.<sup>131</sup> Women's groups fought to include enforced pregnancy as a crime against humanity.<sup>132</sup> Arab states and the Vatican, however, fearing that such language would invite the international community to challenge anti-abortion laws, fought bitterly to have the term excluded.<sup>133</sup> In the end, delegates resolved to include the term "forced pregnancy," and excluded the term enforced pregnancy.<sup>134</sup>

## 2. Provisions of the Rome Statute that Represent Victories for Women's Advocates

Women's advocates successfully persuaded delegates to implement many of their recommendations into the Rome Statute.<sup>135</sup> One victory for advocates of women's rights is that the Rome Statute's definition of crimes against humanity does not associate sexual violence with humiliating and degrading treatment.<sup>136</sup> The Women's Caucus advised the delegates of the December 1997 PrepCom session to ensure that the definition of crimes against humanity clearly detach gender violence from outrages upon personal dignity or humiliating and degrading treatment.<sup>137</sup> Incorporating the recommendation of the Women's

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. . . . It's a victory for us that the crimes against women and the concepts are in the Statute and it's a paper victory for them that their definitions were so narrow." *Id.*

131. *See, e.g.*, Guest, *supra* note 99 (describing battle fought over definition of war crimes and crimes against humanity); Stanley, *supra* note 106 (maintaining that battle over enforced pregnancy became one of most glaring examples of how contentious and intractable process of negotiating treaty on war crimes can be).

132. *See* Stanley, *supra* note 106 (indicating that women's groups envisioned that crime of enforced pregnancy would encompass act of impregnating women and forcing them to bear children as tools of ethnic reprisal).

133. *See id.* (noting that Vatican and Arab states feared that inclusion of enforced pregnancy could be interpreted as challenge to anti-abortion laws and that this debate polarized delegates).

134. *ROME STATUTE*, U.N. Doc. A/CONF.183/9 (1998), art. 7(g). Paragraph (g) provides that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitute crimes against humanity when committed with knowledge as part of a widespread or systematic attack against a civilian population. *Id.*

135. *See A Court Is Born, ON THE RECORD* (July 17, 1998) (visited Sept. 1, 1998) <<http://www.igc.org/icc/>> (on file with the *Fordham International Law Journal*) (noting Women's Caucus' success in helping ensure that rape, forced pregnancy, and sexual slavery are all included in Rome Statute as war crimes and crimes against humanity).

136. *Compare* WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 19 *with* *ROME STATUTE*, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

137. *WOMEN'S CAUCUS RECOMMENDATIONS*, *supra* note 13, at 19. The Women's

Caucus, the Rome Statute emphasizes the gravity of gender violence by not linking such violence to outrages upon personal dignity or humiliating treatment.<sup>138</sup>

An additional victory for women's advocates is the Rome Statute's enumeration of gender-based crimes by positioning such crimes in a separate subparagraph in the definition of crimes against humanity.<sup>139</sup> Again, the Women's Caucus recommended that crimes of sexual violence be identified in a separate paragraph in the Rome Statute's definition of crimes against humanity in order to emphasize the severity and peculiarity of such crimes.<sup>140</sup> The Rome Statute incorporates this suggestion by enumerating rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of comparable gravity in an isolated paragraph within the definition of crimes against humanity.<sup>141</sup>

The Rome Statute comprises another recommendation of women's advocates, as it includes the crime of sexual slavery in its list of illustrative forms of gender violence.<sup>142</sup> Hoping to stress the gravity of sexual enslavement, the Women's Caucus recommended that sexual enslavement and slavery-like practices be enumerated in the Rome Statute.<sup>143</sup> The Rome Statute enumerates the crime of sexual slavery in its definition of crimes against humanity.<sup>144</sup>

A final victory for women's advocates is the Rome Statute's enumeration of persecution based on gender as a crime constituting a crime against humanity.<sup>145</sup> Rhonda Copelon, the director of the International Women's Human Rights Law Clinic at the City University of New York School of Law, has urged the international community to recognize that persecution based on

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Caucus has suggested that linking gender violence with humiliating and degrading treatment ignores the brutality of gender violence. *Id.* at 30-31.

138. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

139. Compare WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 31-32 with ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

140. WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 31-32.

141. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

142. Compare WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 32 with ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

143. WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 32.

144. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

145. Compare *Surfacing Gender*, *supra* note 18, at 261-62 with ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(h).

gender should constitute a crime against humanity.<sup>146</sup> The Rome Statute provides that persecution based on politics, race, national origin, ethnicity, culture, religion, or gender constitutes a crime against humanity.<sup>147</sup>

### 3. Failures of the Rome Statute to Address Concerns of Women's Advocates

The Rome Statute fails in many respects to address the concerns of the Women's Caucus and other women's advocates.<sup>148</sup> At the conclusion of the Rome Conference, women's groups expressed doubt that the ICC will function effectively.<sup>149</sup> Most of these fears were grounded in concern that crimes committed against women may prove to be the most vulnerable to loopholes in the ICC statute.<sup>150</sup> For instance, gender crimes may prove most vulnerable to the textual loophole requiring that perpetrators commit offenses with intent because intent is often particularly difficult to prove in cases of sexual violence.<sup>151</sup>

Another failure of the Rome Statute to address the concerns of women's advocates is the inclusion of a qualification of the term gender.<sup>152</sup> Women's activists have expressed concern that the qualification will complicate the prosecution of gender-based crimes.<sup>153</sup> Activists have also lamented that delegates to the Rome Conference wasted valuable time rehashing old de-

146. *Surfacing Gender*, *supra* note 18, at 261-62.

147. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(h).

148. *See Women Withhold Final Verdict*, *supra* note 129 (noting Women's Caucus' disappointment with certain provisions of Rome Statute, including opt-out clause and requirement that crimes against humanity be committed with knowledge of attack). Eleanor Conda of the Women's Caucus stated, "When we started out, we had a vision of the ICC as a court of universal justice, but that was a long time ago. We have achieved gender and sex violence provisions, but women are the most likely victims of the opt-out regime on war crimes." *Id.*

149. *See id.* (noting Women's Caucus' concerns that prosecutors will be able to prosecute perpetrators of gender-based crimes under ICC effectively).

150. *See id.* (noting Women's Caucus' concern that perpetrators of gender-based crimes will avoid prosecution by exploiting Rome Statute's loopholes).

151. *Id.*

152. *Compare Women Withhold Final Verdict*, *supra* note 129, at 2 with ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), 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."). The qualification of the term gender was included in return for the Arab states' assent to the inclusion of rape, forced pregnancy, and sexual slavery. *Women Withhold Final Verdict*, *supra* note 129, at 2.

153. *Women Withhold Final Verdict*, *supra* note 129, at 2.

bates pertaining to the definition of gender and that the definition finally elected appears unworkable and impractical.<sup>154</sup>

Finally, the Rome Statute fails to address adequately the concerns of women's advocates that the definition of crimes against humanity facilitate the prosecution of gender crimes.<sup>155</sup> The Women's Caucus strongly recommended that the Rome Statute facilitate the prosecution of gender crimes by rejecting the requirement that acts constituting crimes against humanity be committed systematically or prevalently.<sup>156</sup> Ignoring these concerns, delegates elected to include provisions requiring that acts constituting crimes against humanity be committed as part of a widespread or systematic attack and that these acts be committed with knowledge of the attack.<sup>157</sup>

### III. THE ROME STATUTE PARTIALLY RESOLVES THE GENDER CONCERNS OF THE WOMEN'S CAUCUS

In many ways, the Rome Statute is a victory for women.<sup>158</sup> Although this statute emphasizes the brutality of gender crimes more than any war crime tribunal in history, it fails to meet the expectations of women's advocates.<sup>159</sup> Moreover, considering the opportunity the international community possessed in drafting a statute that would finally emphasize the truly unique experiences of women in warfare, the ICC is at best a limited success for women.<sup>160</sup>

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154. *See id.* (noting women activists' dissatisfaction with Rome Statute's qualification of gender).

155. Compare WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 19 with ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7.

156. WOMEN'S CAUCUS RECOMMENDATIONS, *supra* note 13, at 19.

157. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7 (providing that acts considered crimes against humanity must be committed "as part of a widespread or systematic attack directed against civilian population, with knowledge of the attack").

158. *See supra* notes 135-47 and accompanying text (discussing aspects of Rome Statute that represent victories for women's advocates).

159. *See supra* notes 148-57 and accompanying text (considering provisions of Rome Statute that fail to address concerns of women's groups).

160. *See supra* notes 135-57 and accompanying text (considering that some aspects of Rome Statute emphasize gender concerns while other provisions diminish gender issues).

### A. *The Limited Success of the Rome Statute*

The Rome Statute is a partial victory for women.<sup>161</sup> One way the Rome Statute achieves gender justice is by eliminating the association between sexual violence and outrages upon personal dignity.<sup>162</sup> Moreover, the Rome Statute enumerates gender-based violence in a separate definitional paragraph, thus emphasizing the magnitude of such crimes.<sup>163</sup> In addition, the drafters of the Rome Statute included sexual slavery in the list of illustrative forms of gender violence, instead of simply relying on the general paragraph specifying enslavement.<sup>164</sup> Finally, the Rome Statute enumerates persecution based on gender as an act constituting a crime against humanity.<sup>165</sup>

#### 1. The Rome Statute Correctly Eliminates the Link Between Sexual Violence and Outrages upon Personal Dignity

The Rome Statute rightly eliminates the link between sexual violence and humiliating and degrading treatment, a position recommended by the Women's Caucus.<sup>166</sup> The effects of sexual and gender violence are numerous and may include feelings of humiliation and degradation. Explicitly linking such violence with outrages upon personal dignity and humiliating and degrading treatment, however, threatens to diminish the violence that is fundamental to gender-based crimes. Thus, by eschewing the link between sexual violence and humiliation and degradation, the Rome Statute attests to the gravity of gender-based crimes.

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161. *See supra* note 129 and accompanying text (indicating that women's advocates consider Rome Statute to be limited achievement for gender justice).

162. *See supra* notes 136-38 and accompanying text (noting that Rome Statute incorporates recommendation of Women's Caucus that sexual violence be detached from humiliating and degrading treatment and outrages on personal dignity).

163. *See supra* notes 139-41 and accompanying text (describing Rome Statute's adoption of Women's Caucus' recommendation that sexual violence be identified in separate paragraph).

164. *See supra* notes 142-44 and accompanying text (noting that Rome Statute enumerates crime of sexual slavery and that Women's Caucus supported that inclusion).

165. *See supra* notes 145-47 and accompanying text (indicating Rome Statute's enumeration of persecution based on gender).

166. *See supra* notes 136-38 (emphasizing Rome Statute's rejection of link between sexual violence and humiliating and degrading treatment).

## 2. The Rome Statute Properly Positions Crimes of Sexual Violence in a Separate Paragraph

The drafters of the Rome Statute appropriately devoted a separate paragraph to gender-based crimes.<sup>167</sup> Isolating the gender-based crimes in the definition of crimes against humanity indicates that the delegates recognized the seriousness and gravity of such crimes. Thus, devoting a separate paragraph to gender-based crimes contributes to the mainstreaming of such crimes into the body of international human rights law.

## 3. The Rome Statute Appropriately Enumerates Sexual Slavery in its Definition of Crimes Against Humanity

The Rome Statute rightly enumerates the crime of sexual slavery.<sup>168</sup> The crime of enslavement falls under the ICC's definition of crimes against humanity.<sup>169</sup> While the drafters of the Rome Statute might have depended on others to infer the incorporation of sexual slavery in the general category of enslavement, the drafters instead enumerated the specific crime of sexual slavery in Article 7(g).<sup>170</sup> Enumerating the crime of sexual slavery in the definition of crimes against humanity ensures the conspicuity of the crime in the landscape of the Rome Statute, thus increasing the possibility that such crimes will be prosecuted.

## 4. The Rome Statute Properly Enumerates Gender in the List of Persecution Grounds

The Rome Statute justly enumerates the crime of gender-based persecution.<sup>171</sup> The Rome Statute provides that persecution against an identifiable group based on certain impermissible grounds falls under the definition of crimes against humanity.<sup>172</sup> While delegates to the February 1997 PrepCom included

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167. *See supra* notes 139-41 and accompanying text (describing Rome Statute's positioning of gender-based crimes in separate subparagraph of definition of crimes against humanity).

168. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), at art. 7(g).

169. *Id.* art. 7(c).

170. *Id.* art. 7(g).

171. *See supra* notes 145-47 and accompanying text (indicating that Rome Statute includes gender-based persecution based on gender as crime against humanity).

172. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(h).

gender as bracketed text,<sup>173</sup> delegates to the Rome Statute enumerated persecution based on gender as an act constituting a crime against humanity.<sup>174</sup> The inclusion of gender-based persecution as a crime against humanity adds validity to the concept of gender-based crimes. In addition, this inclusion may prove helpful in the prosecution of war criminals who rape or otherwise violate women as an expression of their misogyny, rather than as a means of persecuting a particular ethnic or religious group.

### B. *The Rome Statute Fails to Address Adequately Gender Issues*

Although the Rome Statute is a partial victory for gender justice,<sup>175</sup> certain provisions might make it difficult for attorneys to prosecute gender-based crimes effectively. For instance, the inclusion of a phrase that qualifies sexual violence potentially limits the range of gender abuses to which the ICC could extend its jurisdiction. In addition, the Rome Statute inappropriately qualifies the term gender. Finally, the Rome Statute requires that the acts constituting crimes against humanity be committed as part of a widespread or systematic attack and that they be executed with knowledge of the attack.

#### 1. The Rome Statute Inappropriately Qualifies the Term Sexual Violence

Language in the Rome Statute improperly limits the range of gender violence prosecuted under the ICC by qualifying the term sexual violence so that such violence must be of comparable gravity to the enumerated examples of gender crimes.<sup>176</sup> The language of the qualification is hostile to the ends of gender justice because such conditions threatens to create confusion when war criminals accused of sexual violence are prosecuted. Moreover, the qualification suggests that an act of sexual violence in warfare might not be grave enough to warrant prosecution under the ICC, regrettably implying that violence against women is not always a grave offense.

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173. *See supra* note 120 and accompanying text (indicating that February 1997 Draft Text includes persecution based on gender in bracketed text).

174. *ROME STATUTE*, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(h).

175. *See supra* Part II(B)(2) (describing aspects of Rome Statute that represent victories for women's advocates).

176. *ROME STATUTE*, U.N. Doc. A/CONF.183/9 (1998), art. 7(1)(g).

## 2. The Rome Statute Unsuitably Qualifies Gender-Based Persecution

In addition to qualifying sexual violence inappropriately, the Rome Statute inappropriately qualifies the definition of gender-based persecution.<sup>177</sup> Besides potentially limiting the range of gender persecution under the ICC's jurisdiction, the qualification implies that gender-based persecution is somehow different than other classifications because it is the only persecution qualified. Highlighting gender in this way suggests that gender-based persecution is somehow less grave than other forms of discriminatory persecution.

## 3. The Rome Statute Impermissibly Requires that Acts Constituting Crimes Against Humanity Be Part of a Widespread or Systematic Attack and Be Committed with Knowledge of the Attack

The *chapeau* to Article 7 inappropriately provides that acts constituting crimes against humanity be committed as part of a widespread or systematic attack,<sup>178</sup> and that the acts constituting crimes against humanity be committed with knowledge of the attack.<sup>179</sup> Both provisions may hinder the facility with which perpetrators are brought to justice. Because rape and other gender-based crimes in warfare are often isolated events,<sup>180</sup> some perpetrators of serious sexual violence might escape the ICC's jurisdiction. Moreover, the requirement that the perpetrator have knowledge of the attack could hinder prosecutions of gender crimes. For instance, a defendant accused of enforced pregnancy could argue that he had no way of knowing whether he actually impregnated his victim.

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177. See *supra* notes 152-54 and accompanying text (discussing Rome Statute's qualification of gender-based persecution). The qualification reads as follows: "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." ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(3).

178. ROME STATUTE, U.N. Doc. A/CONF.183/9 (1998), art. 7(1).

179. *Id.* art. 7(1).

180. See *Crimes Against Humanity Compromise*, *supra* note 110, at 5 (suggesting that *chapeau* language threatens to exclude sexual violence that was consistent feature of conflicts in Rwanda and former Yugoslavia).



## CONCLUSION

The international community has long considered the concept of a permanent ICC.<sup>181</sup> The long-awaited ICC has provided the international community with the opportunity to recognize the prevalence and gravity of gender-based crimes. The Rome Statute is a partial victory for women, as it diminishes the perceived link between sexual violence and humiliating treatment, validates the gravity of gender crimes by enumerating such crimes in a distinct paragraph, enumerates the crime of gender-based persecution, and enumerates the crime of sexual enslavement. An analysis of the Rome Statute suggests, however, that it may be difficult for prosecutors to litigate gender-based crimes effectively, as it inappropriately qualifies certain essential terms and requires that acts included in the definition of crimes against humanity be part of a widespread or systematic attack. As the international community begins to labor through the provisions of the Rome Statute and the world awaits the first prosecutions under the new court, it remains to be seen whether the Rome Statute of the ICC will adequately address the horror of gender-based violence.

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181. See Cavicchia, *supra* note 2 (providing historical overview of past efforts to create permanent ICC); see also Bassiouni, *supra* note 3 (reviewing United Nations' attempts to establish ICC).