
Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law

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The author identifies the major goals and achievements in the area of recognizing women as full subjects of human rights and eliminating impunity for gender crimes, highlighting the role of non-governmental organizations (“NGO’s”). Until the 1990s sexual violence in war was largely invisible, a point illustrated by examples of the “comfort women” in Japan during the 1930s and 1940s and the initial failure to prosecute rape and sexual violence in the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda. Due in a significant measure to the interventions by NGOs, the ad hoc international criminal tribunals have brought gender into mainstream international jurisprudence. For example, the Yugoslavia tribunal has devoted substantial resources to the prosecution of rape and explicitly recognized rape as torture, while the Rwanda tribunal has recognized rape as an act of genocide. Elsewhere, the *Statute of the International Criminal Court* is a landmark in codifying not only crimes of sexual and gender violence as part of the ICC’s jurisdiction, but also in establishing procedures to ensure that these crimes and their victims are properly treated. Working towards this end the Women’s Caucus for Gender Justice met with significant opposition. It persisted because of the imperative that sexual violence be seen as part of already recognized forms of violence, such as torture and genocide.

L’auteur fait état des principaux objectifs et accomplissements dans le domaine de la reconnaissance des femmes comme titulaires à part entière des droits internationaux de la personne et de l’élimination de l’impunité pour les crimes à caractère sexiste (*gender crimes*), en accordant une importance particulière au rôle des organisations non-gouvernementales (ONG). Jusqu’aux années 1990, la violence sexuelle lors des conflits armés restait largement invisible, par exemple dans le cas de la prostitution forcée imposée par les forces japonaises dans les années 1930 et 1940 et dans celui des viols et de la violence sexuelle, initialement ignorés par les tribunaux internationaux *ad hoc* pour le Rwanda et l’ex-Yougoslavie. Grâce, en grande partie, aux efforts des ONG, ces tribunaux ont toutefois introduit ces questions dans la jurisprudence internationale. Par exemple, le Tribunal pénal pour l’ex-Yougoslavie a reconnu le viol comme une forme de torture et consacré des ressources significatives à tenter des poursuites pour ce crime. Le *Statut de la Cour pénale internationale* (CPI) constitue par ailleurs un point tournant, en ce qu’il codifie non seulement les crimes de nature sexuelle et les intègre à la compétence de la Cour, mais établit également des procédures visant à améliorer le traitement de ces crimes et de leurs victimes. Le caucus des femmes de la CPI a toutefois rencontré une forte opposition à la réalisation de ces fins ; il persista toutefois dans ses demandes en raison de la nécessité de voir la violence sexuelle être reconnue comme partie intégrante des formes de violence déjà criminalisées, tels la torture et le génocide.

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Introduction

Let me begin by saying that I am moved and honoured to participate in this conference along with so many committed scholars and agents of change—non-governmental and intergovernmental. It is also important that there are so many students here, as you are the ultimate repositories of memory, as well as the change agents of the next fifty years. Likewise, I feel very privileged to be engaged in the process of ending impunity for gender crimes along with students and attorneys-in-residence from other countries at the International Women's Human Rights Law Clinic ("IWHR"), which is part of CUNY's [City University of New York] clinical programs. IWHR has also been serving as the Legal Secretariat to the Women's Caucus for Gender Justice in the International Criminal Court,¹ which has, for the past two and a half years, convened an ever-broadening international delegation of feminist attorneys and advocates to bring a gender perspective into the United Nations negotiations of the ICC. The task of the Legal Secretariat has involved researching, vetting with our participants and supporters, and preparing the caucus's positions for each negotiating session. This has been an opportunity to work intensely and consistently with, and learn from, an extraordinary group of creative, committed, and feisty women from around the world, as well as to codify a gender-inclusive approach to international justice.

The Women's Caucus for Gender Justice is also heir to a process of women's caucuses, each one created in relation to the recent series of UN conferences to introduce the issue of women and gender. The first task was to write women into human rights at the 1993 Vienna Conference on Human Rights, and then to incorporate a women's human rights framework in, and thereby transform, the consensus documents that emerged from the 1994 International Conference on Population and Development in Cairo, the 1995 World Summit on Social Development, and the 1995 Fourth World Conference on Women in Beijing. For example, the Vienna document condemned "systematic rape", and called for the elimination of violence and discrimination against women in public and private life as a priority matter, as well as the mainstreaming of gender in the human rights system.² The *Beijing Declaration and Platform for Action* elaborated on the principle that "women's rights are human rights"; named, among others, "rape, including systematic rape, sexual slavery and forced pregnancy" as particularly egregious humanitarian law violations; and called for

¹ The Women's Caucus is now known as the Women's Caucus for Gender Justice in recognition of the fact that the International Criminal Court [hereinafter ICC] is only one mechanism of gender justice. The caucus can be contacted through its Web site: <<http://www.iccwomen.com>>.

² *World Conference on Human Rights: Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23 at paras. 18, 28-30.

gender balance among judges and other personnel in judicial institutions, including the ad hoc tribunals.³

The gains of which I will speak today are the product of all these initiatives, which were successful because they emanated from a global mobilization of women, asserting that women's rights are human rights, that human rights (*i.e.* political, civil, social, and economic rights and the right to women- and human-centred sustainable development) are indivisible, and that impunity for gender crimes and acceptance of discrimination must end. Through mobilization, women's movements have become a force to be reckoned with internationally, despite the desperate and concerted efforts of right wing religious forces to block our progress and the reluctance of others to accept or recognize the need to make gender-inclusiveness a priority. The interrelationship between mobilization at every level and international legal change exemplifies the basic principle that human rights, like law itself, are not autonomous, but rise and fall based on the course and strength of peoples' movements and the popular and political pressure and cultural change they generate.

This last decade has indeed been historic in that there has been significant progress in transforming the discourse on a policy level. In the arena of international criminal law, there has been significant progress in eliminating the privatization of, and impunity for, gender crimes. For the first time, there have been steps to recognize women as full subjects of human rights and international criminal justice. Irwin Cotler told me that he was torn between placing me on this panel or the next one on the revolution in international criminal law, and suggested that I should declare myself part of both. I am happy to be the bridge, as I believe that gender justice—which is among the most vehemently resisted aspects of international criminal law—is both profoundly revolutionary and one of the ultimate tests of universal justice. In my brief remarks today, I will identify the major goals and achievements in this area at the same time as I highlight the role of NGOs in the process of legal change-making, a subject too often neglected in academic settings.

I. The Traditional Approach: Past and Present

Before the 1990s, sexual violence in war was, with rare exception, largely invisible. If not invisible, it was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for the fighting men. The *Leiber Code*, drafted to regulate the Union army during the American Civil War, identified rape as a capital offence. Otherwise, if condemned, as rape

³ *Fourth World Conference on Women: Beijing Declaration and Platform for Action*, 17 October 1995, UN Doc. A/CONF.177/20; see *e.g.* paras. 132, 224, 142(b), respectively. See also Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform IN Action—Putting the ICC on the Beijing +5 Agenda* (1999), online: Women's Caucus for Gender Justice <www.iccwomen.org/reports/bt5/index.htm> (date accessed: 7 October 2000).

was in the *Hague Convention* of 1907 and the *Geneva Conventions*, it was implicitly so, categorized as an offence against “family honour and rights”⁴ or as “outrages against personal dignity” or “humiliating and degrading treatment”.⁵ The *Fourth Geneva Convention* called for “protect[ion] against [rape as an] ... attack on their honour,”⁶ but rape was not treated as violence, and was therefore not named in the list of “grave breaches” subject to the universal obligation to prosecute.⁷ In 1977 the *Protocols to the Geneva Conventions* mentioned “rape, forced prostitution and any other form of indecent assault,” but only as “humiliating and degrading treatment”,⁸ a characterization that reinforced the secondary importance as well as the shame and stigma of the victimized women. The offence was against male dignity and honour, or national or ethnic honour. In this scenario, women were the object of a shaming attack, the property or objects of others, needing protection perhaps, but not the subjects of rights. Two examples illustrate this point, one from over fifty years ago, one from today.

II. Sexual Slavery: The “Comfort” Women

As my first example, both the post-World War II International Military Tribunals failed to adequately prosecute rape and sexual violence. Rape was not named in either charter or charged as a separate offence. Though listed as a crime against humanity in the Allied Local Council Law No. 10, under which intermediate-ranking Nazi war criminals were prosecuted, rape was never actually charged. In the Far East Tribunal, evidence of rape was part of the evidence of Japan’s crimes against humanity. But the tribunal ignored the abduction and deception of over two hundred thousand girls and young women of non-Japanese origin from Japanese occupied territories and their transport to “comfort stations”, now understood as rape camps. Euphemized as “comfort women”, they were made to follow the troops on the battlefield and were subject

⁴ *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 18 October 1907, 3 Martens Nouveau Recueil (Ser. 3) 461, art. 46, 187 Consol. T.S. 227 (entered into force 26 January 1910).

⁵ *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, art. 3, Can. T.S. 1965 No. 20.2 (*Geneva Convention I*); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, art. 3, Can. T.S. 1965 No. 20.3 (*Geneva Convention II*); *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, art. 3, 6 U.S.T. 3316 (entered into force 21 October 1950) (*Geneva Convention III*); *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, art. 3, 6 U.S.T. 3516 (entered into force 21 October 1950) [hereinafter *Geneva Convention IV*].

⁶ *Geneva Convention IV*, *ibid.*, art. 27.

⁷ *Ibid.*, art. 147.

⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, CTS1991/2.1; CTS1991/2; UNTS1125/3, art. 76 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating To The Protection of Victims of Non-International Armed Conflicts (Protocol II)*, CTS1991/2.2; UNTS1125/609, art. 4 (entered into force 7 December 1978).

to repeated rape, sometimes as often as forty times per day, as well as the domestic servicing of the Japanese troops. This “comfort”/slave system only came to public attention in the nineties, when aging and courageous survivors began to tell their stories, revealing the details and lifelong devastating effects of their enslavement, as well as of their exclusion from the halls of justice.

Why this official silence on sexual violence and on the unprecedented industrialization of sexual slavery, at least comparable in atrocity and systematization to the forced labour camps of Nazi Germany? There is still much to learn about the decision-making of that time and important work for historians. It is likely that rape was not explicitly prosecuted at Nuremberg, though it was a small part of the evidence,⁹ because some of the Allied troops were equally guilty of raping women—an example of the banality of evil in militarized patriarchal culture.

With regard to the “comfort women” system, I confess that I originally assumed that it was effectively kept secret or invisible. But that is absurd. A conversation with a cousin, who was with the Allied forces when they took over Saipan, made the openness of this “secret” painfully clear. Upon arrival, he said, they learned that women were hiding in the island’s caves. They found them—desperate, some driven mad, many pregnant, terrified of the new invader. In other words, the nature, scope, and consequences of the system were no secret. Recent research in the military archives in Australia, notably that of Ustina Dolgopol,¹⁰ makes clear that the Allies were fully aware of this system, aware that women were taken and kept against their will, and aware that they were subjected to extreme sexual violence. They documented it through questioning both Japanese prisoners, U.S. soldiers, and the victimized women. Recent research by Japanese historians into Japan’s archives has also revealed that the comfort women system, which began in 1932 and was expanded significantly in the Second World War, was authorized at the highest levels and minutely regulated.¹¹

The comfort women slave system was designed to meet at least four articulated military needs: the need of their soldiers to “have sex”/rape to keep them fighting; the need to avoid antagonizing the local populations by preventing rape of women in the communities being occupied; the need to minimize sexually transmitted disease among the troops; and the need to keep rape from international scrutiny and outrage such as had occurred during the rape and killing spree that attended the conquest of

⁹ See P.V. Sellers, “The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law” in G.K. McDonald & O. Smaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law*, vol. 1 (The Hague: Kluwer Law International, 2000) 263.

¹⁰ U. Dolgopol, “Rape as a War Crime—Mythology and History” in I.L. Sajor, ed., *Common Grounds: Violence against Women in War and Armed Conflict Situations* (Asian Center for Women’s Human Rights, 1998) 122.

¹¹ See generally Y. Yoshiaki, *Comfort Woman: Sexual Slavery in the Japanese Military during World War II*, trans. S. O’Brien (New York: Columbia University Press, 1995).

Nanking.¹² In other words, the notion of women as the “booty” of war and the entitlement of fighting men was never in question.

Perhaps this explains why responsibility for the outrages against comfort women was never prosecuted in the International Tribunal for the Far East in Tokyo.¹³ Calling the “comfort stations” brothels, not rape camps, and referring to the women as prostitutes and not sexual slaves, obfuscated the horrors of the system through a suggestion of immorality and voluntariness. And perhaps the fact that the U.S. military also organized and directed men to STD-safe brothels was too close to the comfort station idea. To my knowledge, the manuscripts or recollections that would fill in this gap of explanation have not yet been made public or studied. It is a timely and pressing inquiry that suggests an after-the-fact complicity and, at least, reflects a lack of responsibility of the Allied nations to hold the perpetrators accountable and insist upon reparations, including compensation.

The failure, seemingly deliberate, to prosecute the sexual enslavement of the comfort women is also closely connected to the privatization of sexual violence in patriarchal culture. Not until the use of rape as a tool of ethnic cleansing in the former Yugoslavia did media and policy-makers begin to speak of rape as a “weapon of war”. This formulation operated to transform rape from private, off-duty, collateral, and inevitable excess to something that is public or “political” in the traditional sense. Rape drew broad attention, at the outset, however, more because it was a genocidal or ethnic attack than because it was an attack on women. Undoubtedly this politicization of rape—and its characterization as a “weapon of war”—contributed to the force of the condemnation of rape and to changing public attitudes toward it. But, like all arguments that deflect attention from the essential need to recognize women as subjects, it had a potentially regressive aspect in suggesting that this use of rape was qualitatively different from the traditional use of women as booty.

By contrast, women’s human rights activists have insisted, in many contexts, that rape is an atrocity whatever the purpose and whether or not widespread or systemic. The comfort women system illustrates, however, in a highly systematized and brutal way, that the rape of women, as booty or as the reward for the penultimate expression of the norm of masculinity, is also an integral part of the arsenal of war.

III. Rape and Genocide in Rwanda: Invisibility and Inclusion

The failure to prosecute sexual violence against women is not, however, a thing of the past. My second example concerns the initial failure to recognize and prosecute

¹² See *e.g.* Y. Tanaka, “Rape and War: The Japanese Experience” in Sajor, *supra* note 10, 148 at 165-66; Yoshiaki, *ibid.* at 49.

¹³ The crimes of the Japanese military with regard to the sexual slavery of the comfort women will be the subject of an historic independent Women’s International War Crimes Tribunal to take place in Tokyo, 8-12 December 2000.

rape and sexual violence in Rwanda. Recall that genocide and other atrocities in Rwanda occurred after the widespread commission of rape and sexual violence in the former Yugoslavia had broken through media disinterest and captured world attention, and after rape had been listed as a crime against humanity in the statute of the ad hoc International Criminal Tribunal for the Former Yugoslavia.¹⁴ Nonetheless, the media and other observers of the genocide in Rwanda did not report the massive and notorious rape of women during the Rwandan genocide. Rape was essentially invisible until nine months later, when a Belgian doctor publicized that women were presenting themselves in unusual numbers to bear the children of rape. Nor was it, thereafter, officially documented. That was left to the initiatives of two NGOs, African Rights and the Women's Project of Human Rights Watch.¹⁵

Though included as a crime against humanity in the *Statute of the International Criminal Tribunal for Rwanda* and also mentioned therein as an example of the war crime of humiliating and degrading treatment,¹⁶ rape formed no part of the first series of ICTR indictments. This was notwithstanding that the Human Rights Watch/FIDH report focussed on rape and sexual violence in the Taba Commune, led by Jean Paul Akayesu, the first accused to go to trial. That report also documented the failure of the prosecutorial staff to take rape seriously, as well as the utter inappropriateness and lack of training of the investigative staff to undertake such an inquiry.¹⁷

It was common, at that time, to hear the assertion that genocide is killing, not rape, and that the women who were raped and survived were lucky they were not dead. Indeed, *Shattered Lives* reported that "[t]here is a widespread perception among the Tribunal investigators that rape is somehow a 'lesser' or 'incidental' crime not worth investigating."¹⁸ So, notwithstanding the legal definition of genocide which clearly encompasses sexual violence, as discussed below, and documentation of the terrible personal and societal impact of rape, including women's view that rape left them wishing for death, the *Prosecutor v. Jean Paul Akayesu* case¹⁹ went to trial with

¹⁴ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993) [hereinafter *ICTY Statute*].

¹⁵ Human Rights Watch/Africa, Human Rights Watch Women's Rights Project & Fédération Internationale des Lignes des Droits de L'Homme, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996) [hereinafter *Shattered Lives*]; African Rights, *Rwanda: Death, Despair and Defiance*, 2d ed. (London: African Rights, 1995).

¹⁶ SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994), arts. 3, 4 [hereinafter *ICTR Statute*].

¹⁷ *Shattered Lives*, *supra* note 15 at 91-97.

¹⁸ *Ibid.* at 94.

¹⁹ Judgment, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda, Trial Chamber), online: International Criminal Tribunal for Rwanda <<http://www.ictt.org>> (date accessed: 13 September 2000) [hereinafter *Akayesu*].

no charges or evidence of rape, and with the prosecutor claiming that it was impossible to document rape because women wouldn't talk about it.²⁰

All that changed when Judge Navanethem Pillay, the only woman judge on the ICTR Trial Chamber hearing the case, pursued the inquiry with two of the women—who were called by the prosecutor to testify to other crimes—whether rape had occurred in the Taba Commune. Witness J stated that three *Interahamwe* raped her six-year-old daughter when they came to kill her father, and also that she had heard that young girls had been raped at the *bureau communal*, which was under the authority of the accused. Witness H revealed that she had been raped in a sorghum field and that she had seen other Tutsi women being raped. She also testified that she knew of other women raped either in the nearby fields or on the site of the *bureau communal*, and that the accused and other commune officers were present and should have prevented it.²¹

Despite this, it appeared from confidential inside information that the *Akayesu* prosecutors were not planning to amend the indictment to charge rape or sexual violence. This despite the fact that a coalition, first pulled together by Human Rights Watch and later consolidated by the International Centre for Human Rights and Democratic Development (“ICHRDD”) in Montreal²² as the Monitoring Project on Gender-Related Crimes at the International Criminal Tribunal for Rwanda, had sent numerous critical letters to Judge Louise Arbour, the chief prosecutor with responsibility for both the ICTY and ICTR, calling for institutional changes that would facilitate the effective investigation of gender crimes. Thus there seemed little choice but to file an *amicus curiae* brief, bringing this discriminatory situation out into the open and appealing to the court to call upon the prosecutor, or step in itself, to ensure the inclusion of rape in charges of genocide, as well as war crimes and crimes against humanity. Thus IWHR, the Working Group on Engendering the Rwanda Tribunal, organized by a dedicated group of recent grads from the University of Toronto Faculty of Law, and the Center for Constitutional Rights in New York City, prepared and submitted an *amicus curiae* brief. The ICHRDD project circulated the brief for signature to women's groups in Rwanda, elsewhere in Africa, and throughout the world. Later that year, Rwandese women's organizations organized the first women's march for justice.

Approximately two weeks after the filing of the *amicus* brief, the prosecutor returned to court and indicated his intention to amend the indictment to include charges of rape. It was motivated, he argued, by Witness H's testimony linking *Akayesu* to the rapes, and not by the *amicus* brief. A reliable participant in the process later informed me that the testimonies had, in fact, triggered further investigation. This does not ne-

²⁰ *Shattered Lives*, *supra* note 15 at 95. The report is also critical of the methods of investigation which were insensitive to the needs, desires, and security of the women from whom they purportedly sought such testimony (*ibid.*).

²¹ *Akayesu*, *supra* note 19 at paras. 416-17.

²² Now known as Rights & Democracy.

gate the fact that, without the intervention of the only woman judge and the serendipitous disclosures at trial, this issue would not have been pursued by the prosecutor.

Whatever the full truth of the matter, the amicus served the purpose of making visible the invisibility of the survivor community, emphasizing to both the court and the public the unacceptability of excluding sex-specific crimes against women from the justice process. Curiously, although the chamber originally acknowledged in a fax receipt of the amicus brief, other ICTR personnel later claimed not to have received it, and you will not find it listed in the docket of the case. The judgment refers to it implicitly.²³ I tell this story because it is important that we understand the critical and, like gender, often “invisibilized” role of NGOs in the process of making change, as well as the indispensability of mechanisms like the amicus curiae brief that make the courts permeable to the concerns of the larger community. It is likewise important that official documents recognize the contributions of NGOs.

The amended *Akayesu* indictment included general allegations of sexual violence and that Akayesu knew that such acts were taking place and encouraged them by his presence and words.²⁴ As a legal matter, this was part of the factual basis for the charges of genocide, crimes against humanity (rape and other inhumane acts), and war crimes (still charged only as outrages upon personal dignity, in particular rape, degrading and humiliating treatment, and indecent assault).²⁵ Five more women testified pseudonymously to rape and forced nudity.²⁶ The judgment finds that Akayesu knew that sexual violence was being committed by *Interahamwe*, among others, on or near the premises of the commune office and that women were being taken away, that he did nothing to prevent it, and that in some instances he was present and/or had ordered, instigated, or encouraged it.²⁷

²³ In *Akayesu*, *supra* note 19, the chamber states at para. 417:

The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.

²⁴ See *ibid.* at para. 6; paras. 12A, 12B of the Indictment, reproduced therein.

²⁵ *Prosecutor v. Jean Paul Akayesu*, Amended Indictment, ICTR Trial Chamber (June 1997), Case No. ICTR-96-4-I, Indictment Counts 1, 2, 13-15 (International Criminal Tribunal for Rwanda, Trial Chamber), online: International Criminal Tribunal for Rwanda <<http://www.icttr.org>> (date accessed: 13 September 2000).

²⁶ *Akayesu*, *supra* note 19 at paras. 418-38.

²⁷ *Ibid.* at paras. 449-52.

Akayesu was a landmark: the first international conviction for genocide, the first judgment to recognize rape and sexual violence as constitutive acts of genocide, and the first to advance a broad definition of rape as a physical invasion of a sexual nature, freeing it from mechanical descriptions and required penetration of the vagina by the penis. The judgment also held that forced nudity is a form of inhumane treatment,²⁸ and it recognized that rape is a form of torture and noted the failure to charge it as such under the rubric of war crimes.²⁹

With respect to the issue of rape and sexual violence as genocide, the *Akayesu* judgment is important because it explains why rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.”³⁰ The judgment emphasizes the ethnic targeting produced by the sexualized representation of ethnic identity, such as *Akayesu*’s statement “let us now see what the vagina of a Tutsi woman tastes like”,³¹ and parenthetically notes here the notion of women as booty as itself an instrument of genocide. The judgment characterizes these crimes as infliction upon women of serious bodily and mental harm, as they were charged,³² and also as an “integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole...- destruction of the spirit, of the will to live, and of life itself.”³³ It notes the close connection with killing—that death or the threat of death often accompanied the rape of women.³⁴

Ironically, the evidence associated with rape and sexual violence provided some of the strongest evidence of genocide. By emphasizing the suffering imposed on the women as well as its role as a tool of their destruction and the destruction of the group, the Trial Chamber took a significant step in recognizing women both as subjects in themselves and as part of their ethnicity.

The reproductive motives and consequences of sexual violence may also satisfy other constituent acts of genocide, as provided by the *Genocide Convention*. *Akayesu*

²⁸ *Ibid.* at para. 697.

²⁹ *Ibid.* at paras. 687, 690.

³⁰ *Ibid.* at para. 731.

³¹ *Ibid.* at para. 732.

³² *Ibid.* at para. 731; this indicates that rape and sexual violence violates art. II(b) of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, Can. T.S. 1949 No. 27 (entered into force 12 January 1951) [hereinafter *Genocide Convention*], and art. 2(2)(b) of the *ICTR Statute*, *supra* note 16, by causing serious bodily or mental harm to members of the group.

³³ *Akayesu*, *ibid.* at paras. 731-32; this indicates that rape and sexual violence may also qualify under art. II(c) of the *Genocide Convention*, *ibid.*, and art. 2(2)(c) of the *ICTR Statute*, *ibid.*, as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”

³⁴ *Akayesu*, *ibid.* at para. 733.

recognizes that the constituent act of preventing births within the group³⁵ includes measures such as forced sterilization, abortion, or birth control, as well as forced pregnancy where, in patriarchal societies, that represents an effort to affect ethnic composition by imposing the enemy's ethnicity on the children of rape.³⁶ Rape, with its potential to cause infertility or make sexual intercourse impossible, as well as its potential to render a woman psychologically or culturally unable to reproduce, may also qualify, as a measure intended to prevent births within the group.

At the same time, it is significant that *Akayesu* did not, as some had contended, emphasize the reproductive consequences as the hallmark of rape as a genocidal measure. Rather, rape and sexual violence are understood as instruments of genocide based primarily on the physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community. To emphasize the reproductive impact on the community would threaten once again to reduce women to being simply the vehicles of the continuity of the targeted population. It would also tend toward a biological as opposed to socially constructed view of identity as the value intended to be protected by the concept of genocide.

IV. Engendering International Jurisprudence: The ICTY

The *Akayesu* judgment is part of an historic process of mainstreaming gender in international jurisprudence in which the ad hoc International Criminal Tribunal for the Former Yugoslavia took the first, landmark steps. The women's human rights movement mobilized to support the election of women judges, and their presence has been critical on the ICTY, just as Judge Pillay has played a critical role in the ICTR. In the start-up period, the ICTY judges, under the tutelage of the two women judges, Judge Gabrielle Kirk McDonald and Judge Elisabeth Odio-Benito, adopted, as part of the initial rules of evidence and procedure, evidentiary rules, such as Rule 96, to prevent harassment of and discrimination against victims and witnesses through admitting evidence of prior sexual conduct or permitting unexamined consent defences in sexual violence cases. The ICTY rules also authorize other protections of victims and witnesses, including protective measures at trial and the creation of a victims and witnesses unit. The open process of rule-making, in which NGOs and states were invited to make suggestions, enabled feminist groups to focus attention on these problems.³⁷

Then a long overdue revolution in the jurisprudence of sexual violence was begun by the Office of the Prosecutor ("OP"), here as a result of the acknowledged value of interchange between women's human rights advocates and scholars and officials

³⁵ *Genocide Convention*, *supra* note 32, art. II(d); *ICTR Statute*, *supra* note 16, art. 2(2)(d).

³⁶ *Akayesu*, *supra* note 19 at para. 507.

³⁷ J. Green *et al.*, "Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique" (1994) 5 *Hastings Women's L.J.* 171.

within the ICTY. In that regard I want to recognize here the openness and commitment of Justice Richard Goldstone, the first chief prosecutor, who will speak to us later. First, he heeded the demand of the movement to incorporate an expert on gender at the highest level, and he appointed the brilliant and dedicated Patricia Viseur Sellers as the gender legal adviser to the OP. While over the years her impact on the approach of the prosecutor, particularly in The Hague where she is based, has been formidable, the effect was nonetheless not immediate.

In the first papers filed by the ICTY prosecutor—the motion for deferral of the *Tadić* prosecution from the German court to the ICTY—the prosecutors responsible filed an affidavit that treated rape of women in Omarska prison as a background matter, while emphasizing the beatings of male prisoners.³⁸ We discovered this on the Saturday before the Monday hearing. There was no time to bring this informally to the attention of the prosecutor. So together with Jennie Green of the Harvard Human Rights Program (now of the Center for Constitutional Rights) and Felice Gaer, director of the Jacob Blaustein Institute, who has played a considerable role in strengthening the tribunals, including their gender perspective, and is also a participant here, we filed our first amicus brief.³⁹ The brief emphasized the failure to treat rape as an indictable offence. To tie it to the issue of deferral, the brief questioned whether the tribunal should accept the case from Germany since it wasn't clear that the prosecutor would follow the precepts of universal justice. Judge Odio-Benito questioned the lack of sexual violence charges from the bench. The deferral was, of course, granted, but the issue of sexual violence was also on the table. Somewhat to my surprise, I was not disinvited to participate in training the OP several months later in rape and humanitarian law. And the first prosecutor to speak during that session started out by saying, "I am the idiot who filed that affidavit."

As a background matter, it must be noted that the *ICTY Statute*, while listing rape as a crime against humanity, did not name rape in article 2, which defines grave breaches of the laws of war.⁴⁰ Thus, to include charges of rape as a war crime, it was necessary for the OP to treat it as a form of other accepted crimes. Though the statutory omission of rape as a war crime was disappointing at the time, in retrospect I believe that it was fortuitous as it made it easier to argue for the mainstreaming of sexual violence crimes, else they would be excluded altogether.

³⁸ *An Application for Deferral by the Federal Republic of Germany in the Matter of Duško Tadić Also Known by the Names Dusan "Dule" Tadić*, Application, ICTY Trial Chamber (11 October 1994), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

³⁹ R. Copelon, F. Gaer & J. Green, *Amicus Memorandum Re: Application for Deferral by the Republic of Germany in the Matter of Duško Tadić also known by the Names Dusan "Dule" Tadić* [unpublished].

⁴⁰ *Supra* note 14; *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, UN SCOR, 48th Sess., UN Doc. S/25704 (1993) 10 at para. 40.

The *Tadić* indictment did include charges of rape. But the feminist concern is not satisfied simply by including rape and sexual violence. The question of how it is charged is equally significant. We were concerned that sexual violence be reconceptualized as a form of torture, and not as humiliating and degrading treatment, or even as the grave breach of wilful infliction of great suffering. This did not happen right away. The original *Tadić* indictment used torture very sparingly in general and charged as torture only the forced sexual mutilation of a male prisoner. This example of sexual violence against a man became the signature of the case in the press, while the rape of women did not carry the same weight. Although rape was charged as the grave breach of “wilful infliction of great suffering”, there was resistance among some members of the OP staff to applying the word “torture” to rape.⁴¹ Ultimately the rape charges were dropped because the witness was unwilling to testify without full protection.

Justice Goldstone used his authority, however, to make clear in a number of ways and over time that the integration of gender was a priority matter. He participated in the training sessions that addressed these questions; he attended—not just for the few moments of his own presentations but to learn—international women’s conferences addressed to gender issues; and he made clear his respect for the gender legal adviser. On the eve of the Beijing Conference, he committed the OP to the position that “sexual assaults ... provide the basis for justiciable charges of torture” and to reviewing the characterization of rape in the previous indictments.⁴² Later, the FOCA indictment was the first to charge rape as torture and enslavement and other forms of sexual violence, such as forced nudity and sexual entertainment, as inhumane treatment.⁴³

⁴¹ For fuller discussion of the history and significance of characterizing rape as torture, see R. Copelon, “Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law” (1994) 5 *Hastings Women’s L.J.* 243 at 249-57; D.Q. Thomas & R.E. Regan, “Rape in War: Challenging the Tradition of Impunity” (1994) 14 *SAIS Rev.* 81; T. Meron, “Rape as a Crime under International Humanitarian Law” (1993) 87 *A.J.I.L.* 424; D. Blatt, “Recognizing Rape as a Method of Torture” (1992) 19 *N.Y.U. Rev. L. & Soc. Change* 821.

⁴² Letter from Justice R. Goldstone, Prosecutor, UN International Criminal Tribunals for the Former Yugoslavia and Rwanda, to Prof. R. Copelon, Professor of Law and Director, International Women’s Human Rights Law Clinic, City University of New York (8 September 1995) [on file with author], cited in *Shattered Lives*, *supra* note 15 at 32.

⁴³ See *Prosecutor v. Gagovic et al.*, Indictment, ICTY Trial Chamber (26 June 1996), Case No. IT-96-23/2 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/indictment/english/foc-ii960626e.htm>> (date accessed: 27 September 2000); see Counts 1, 3, 4, incorporating the facts alleged in paras. 5.3-5.7, for reference to rape as torture in the context of interrogation (*ibid.*); see also Counts 13, 15, 16, incorporating the facts alleged in paras. 6.6-6.11, for reference to rape as torture, in the context of interrogation. See also *Prosecutor v. Gojko Jankovic et al.*, Amended Indictment, ICTY Trial Chamber (7 October 1999), Case No. IT-96-23-PT (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/indictment/english/foc-1ai991007e.htm>> (date accessed: 4 October 2000); see Counts 45-48, incorporating the facts alleged in paras 8.1-8.7, for reference to enslavement. This followed upon the landmark decision of the Inter-American Commission

The ICTY has to date devoted substantial resources to the prosecution of rape and to its explicit recognition, in the jurisprudence, as torture. The case against Anton Furundzija focussed on the rape/torture of one woman prisoner occurring during the process of interrogation. The *Furundzija* judgment recognizes rape in interrogation as a “means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or confession, from the victim or a third person.”⁴⁴ In addition, the *Delalic* or “Celibici” case, named after the prison where the atrocities occurred, convicted certain defendants on charges of torture for having committed rape of women prisoners not only in the context of interrogation. The judgment reviews many of the precedents and recognizes that rape inflicts severe physical and psychological suffering, and that in situations of armed conflict, when it occurs with the consent or acquiescence of an official, rape “inherently” meets the purpose element of torture—that it involves punishment, coercion, discrimination, or intimidation.⁴⁵

As a result, the ICTY has built a very significant body of jurisprudence that recognizes rape and sexual violence as forms of egregious violence. The ICTR’s *Akayesu* judgment contributed most significantly to this process in recognizing rape as an act of genocide where the requisite intent is proven, and in identifying rape as a form of torture and subtly chiding the ICTR prosecutors who had declined to charge it as such. The ad hoc tribunals’ jurisprudence proved to be a most important foundation for the codification of sexual violence as part of the substantive jurisdiction of the International Criminal Court.

The practice before the tribunals also illuminated a number of issues of implementation arising out of advertent and inadvertent discriminatory treatment of women in the process, as well as the need for gender-sensitive protective measures for women victims and witnesses and reliable support to minimize the risks and potential retraumatization of testifying. Thus, for example, *Tadić* produced a landmark decision outlining the criteria for keeping the identities of witnesses confidential from the public and, under special circumstances, anonymous even to the defence. On these issues, several feminist amicus briefs were filed, largely supporting the OP’s motion for pro-

on Human Rights in its *Report on the Situation of Human Rights in Haiti* to recognize rape in non-prison or interrogation contexts as a form of torture (OR OEA/Ser.L/V/11.88/Doc. 10, rev. (1995) at paras. 133, 134); see also *Aydin v. Turkey*, App. No. 23178/94 (1997), 25 Eur. H.R. Rep. 251 at 295-96.

⁴⁴ *Prosecutor v. Anto Furundzija*, Judgment, ICTY Trial Chamber II (10 December 1998), Case No. IT-95-17/1 at paras. 163, 266 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: United Nations <<http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.htm>> (date accessed: 24 September 2000) [hereinafter *Furundzija*].

⁴⁵ See *Prosecutor v. Zejnil Delalic*, Judgment, ICTY Trial Chamber II (16 November 1998), Case No. IT-96-21 at paras. 480-96 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II), online: United Nations <<http://www.un.org/icty/celebici/trialc2/decision-e/311096.htm>> (date accessed: 24 September 2000).

tective measures.⁴⁶ In *Furundzija*, the defence questioned the credibility of the raped woman on the ground that she suffered post-traumatic stress disorder (“PTSD”). After hearing experts and, I believe, unnecessarily permitting the defence to recall the witness, the chamber rejected the defence contention that PTSD renders a victim unreliable.⁴⁷ Again, the tribunal had the benefit of two feminist amicus briefs.⁴⁸ In *Celebici*, the defence was inadvertently allowed to circumvent Rule 96 (prohibiting the introduction of prior sexual conduct evidence) in questioning the witness about a prior abortion. The chamber reaffirmed the rule upon a motion to expunge the testimony from the record.⁴⁹

At the same time as the progressive gender jurisprudence of the ad hoc tribunals has been very significant, their defalcations in the realm of gender crimes, witness protection, and participation of the survivor communities have also illuminated some of the prerequisites of a fully gender-integrated process. For example, notwithstanding the landmark *Akayesu* judgment, the ICTR prosecutor has been slow to incorporate charges of sexual violence consistently and in accordance with their deserved gravity. There is an apparent absence of both a clear policy that gender is a priority concern and of a gender expert, with oversight authority, on-site. Issues of witness protection, the gender-sensitivity of investigations, and community relations have been equally

⁴⁶ *Prosecutor v. Duško Tadić*, Decision of the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, ICTY Trial Chamber (10 August 1995), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org.icty/tadic/trialcz/decision-e/100895pm.htm>> (date accessed: 27 September 2000). This opinion references the two amicus briefs at the outset: one amicus brief was filed by Prof. Christine Chinkin, Dean and Professor of International Law, University of Southampton, United Kingdom, and a joint brief was filed by Rhonda Copelon, Felice Gaer, Jennifer M. Green, and Sara Hossain on behalf of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, the Center for Constitutional Rights, the International Women’s Human Rights Clinic, the Women Refugees Project of the Harvard Immigration and Refugee Program, and Cambridge and Somerville Legal Services (*ibid.*).

⁴⁷ *Supra* note 44 at paras. 108, 109.

⁴⁸ *Ibid.* at para. 107; see *Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted by the Center for Civil and Human Rights, Notre Dame Law School* [unpublished]; *Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting That the Tribunal Reconsider Its Decision Having Regard to the Rights of Witness A to the Equality, Privacy, and Security of Person and to Representation by Counsel, Submitted by Joanna Birenbaum et al* [unpublished].

⁴⁹ *Prosecutor v. Zejnil Delalic*, Decision on the Prosecution’s Motion for the Redaction of the Public Record, ICTY Trial Chamber (5 June 1997), Case No. IT-96-21 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/celebici/trialc2/decision-e/60605MS2.htm>> (date accessed: 24 September 2000). For fuller treatment of the tribunals’ jurisprudence affecting the prosecution of gender crimes, see K.D. Askin, “Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status” (1999) 93 A.J.I.L. 97.

significant.⁵⁰ Perhaps someday the integration of and respect for gender expertise will become routine, dispensing with the need for continued monitoring by feminist attorneys and activists. That day is still far off.

V. The International Criminal Court: Codifying Gender Justice

The existence of the ad hoc tribunals, the proliferation of wars, and the unseating of many brutal dictatorships in these last decades reignited the effort to create a permanent international criminal court. Feminists in different parts of the world recognized the existence of the ICC negotiations as an opportunity to codify the integration of gender in international criminal law, as well as work to ensure a court independent of the powerful nations, particularly the United States and the P5. This was the task assumed by the Women's Caucus for Gender Justice, created in 1997. Women brought to the caucus many different experiences and perspectives. These were informed by regional diversity and a broad range of experience of advocacy in domestic courts and legislatures, meeting at international conferences, monitoring the ad hoc tribunals, and working with survivors of sexual violence.

Like the Women's Caucuses at the World Conferences, the ICC Women's Caucus met with two kinds of opposition. On the one hand, we faced increasingly fierce misogynist opposition from the Vatican, the islamist-oriented⁵¹ Arab League countries, and North American right wing groups such as the U.S.-based International Human Life Committee, the David M. Kennedy Center, and Canada's JMJ (Jesus, Mary and Joseph) Children's Fund and R.E.A.L. Women. On the other hand, we also had to start from scratch with many delegates who did not see a need for a specific gender perspective and rued the time that introduction of our issues would take. Thanks to the expertise and commitment of a small group of delegates—both women and men—and the openness, albeit sometimes reluctant, of the overwhelming majority of delegates, the *Statute of the International Criminal Court*⁵² is a landmark. It has codified not only crimes of sexual and gender violence as part of the jurisdiction of the Court, but also a range of structures and procedures necessary to ensure that these crimes and those victimized by them will remain on the agenda and be properly treated in the process of justice. I am not going to canvass all the gender aspects of the *Rome Statute*, but rather will point out a few of the caucus's major goals and accomplishments.

⁵⁰ C. Walsh, "Witness Protection, Gender and the ICTR", online: International Centre for Human Rights and Democratic Development <<http://www.ichrdd.ca/111/english/commndoc/publications/womtrirw.html>> (last modified: 27 September 2000).

⁵¹ I use the word "islamist" instead of "Islamic" advisedly because the positions taken do not reflect the religion Islam, but rather its politicization and transmutation, albeit inconsistent, into anti-woman policies.

⁵² 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 (not entered into force) [hereinafter *Rome Statute*].

As to the ICC's substantive jurisdiction over crimes, the Women's Caucus had two goals. One was to codify explicitly a range of serious sexual violence crimes in order to ensure that they are always on the checklist and always understood as crimes in themselves. The second was to incorporate, as a principle, what had developed in the customary law and jurisprudence of the tribunals, that sexual violence must be seen as part of, and encompassed by, other recognized egregious forms of violence, such as torture, enslavement, genocide, and inhumane treatment.

But, many asked, why both? If the sexual violence crimes are listed, and therefore squarely on the prosecutor's checklist, why does gender integration matter? The answer is that despite all the public hand-wringing about rape, history teaches that there is an almost inevitable tendency for crimes that are seen simply or primarily as crimes against women to be treated as of secondary importance. It makes a difference, to the elements that must be proved, to the penalty imposed, and to the larger cultural understanding of violence against women, to treat rape as torture rather than humiliation. So we needed to insist, as a matter of the principle of non-discrimination, that sexual violence be treated as constituting any of the recognized crimes so long as it met their elements, at the same time as it was necessary to name the sexual violence crimes specifically. And the *Rome Statute* represents a significant step in this direction.

Article 8 of the *Rome Statute*, which delineates the jurisdiction of the Court over war crimes in international and internal war, explicitly lists "rape, sexual slavery, enforced prostitution, forced pregnancy ... enforced sterilization or any other form of sexual violence also constituting" either "grave breaches" or violations of Common Article 3 of the *Geneva Conventions*.⁵³ This expanded significantly on, as well as removed, the moralistic element from the range of previously recognized war crimes—*i.e.* rape, enforced prostitution, and other indecent assault. The "also constituting" language was primarily intended to codify the principle of gender integration and to make clear that sexual violence is a grave breach, equivalent in gravity to other crimes subject to universal jurisdiction.⁵⁴ Indeed, in an historic debate at the December Prep-Com, the delegates assembled rejected, with one opposition and two abstentions, placing rape and sexual violence under the rubric of humiliating and degrading treatment rather than that of grave breaches and serious violations. In this list of crimes, the definition of forced pregnancy was the last to be resolved, as the Vatican, supported by the Islamic countries, sought unsuccessfully to eliminate any suggestion that obstructing a woman's access to abortion could be a crime.⁵⁵

⁵³ *Ibid.*, arts. 8(2)(b)(xxii), 8(2)(e)(vi).

⁵⁴ A minority of delegations thought it also provided a threshold of severity. The dominant purpose of that language is illustrated, however, by the fact that, at the insistence of the Women's Caucus, "also constituting" replace "also amounting to" in an earlier proposal.

⁵⁵ For the purposes of the *Rome Statute*, *supra* note 52, forced pregnancy is defined in art. 7(2)(f) as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." It is im-

Article 7, delineating crimes against humanity, adopts the same list of sexual and reproductive violence crimes, qualifying them, at the last minute, by the phrase “of comparable gravity”, which logically calls for comparison with all crimes against humanity. The crime against humanity of enslavement explicitly includes trafficking, with particular but not exclusive attention to women and girls.

Among the most contentious issues was the expansion of the crime of persecution beyond the previously accepted grounds of race, ethnicity, nationality, religion, and politics to include persecution based on “gender” as well as against other social groups. The statute incorporates a definition of “gender”, and defines other grounds as those “that are universally recognized as impermissible under international law.” I’ll return to this in a minute. In a futile effort by the United States to exclude institutionalized discrimination, the crime of persecution also requires proof of an act of violence, such as killing, torture, or inhumane treatment, or a war crime or genocide.

As an overarching matter, the chapeau to crimes against humanity recognizes that crimes of this dimension can be perpetrated against any civilian population, in time of peace as well as war, and by private as well as state actors. This is particularly important for women, as we are most often the victims of non-state as opposed to state violence in civil society as well as war. The statute does not adopt the full range of crimes against humanity under international law, however, insofar as it compromises the customary threshold requirement that the crimes be “widespread or systematic”. In a definitional section, the *Rome Statute* explains that a policy to commit a widespread or systematic attack must involve relation to a state or organizational policy and multiple acts.⁵⁶ This should not be too troublesome in the future, so long as, consistent with international law, the failure to prevent qualifies as policy.

The one exception to the explicit codification of gender crimes is article 6, which defines genocide exactly as does the *Genocide Convention*. When the Women’s Caucus entered the process, the genocide definition was considered settled. The subsequent *Akayesu* judgment had a tremendous effect. Prior to *Akayesu*, there were delegates who contended that rape was not the same as genocide, whereas afterwards, the role of sexual violence was accepted even though the text of the statute did not change. This is then a matter for the negotiations of Elements of Crimes.⁵⁷

portant that this definition is limited because its purpose is to define a crime under international customary law, which does not yet criminalize the withholding of abortion. This definition, however, is not an appropriate definition for purposes of reproductive health care policy or of respecting and ensuring the human rights of women.

⁵⁶ *Ibid.*, art. 7(2)(a).

⁵⁷ Afternote: The Women’s Caucus raised the issue during the PrepCom on Elements of Crimes and it was originally accepted as part of the commentary to genocide that sexual violence could constitute acts of genocide where the prerequisites were met. At a later stage, the commentaries were omitted and the final text of the Elements of Crimes notes in regard to “genocide by causing serious bodily injury or mental harm” that the conduct may include “acts of torture, rape, sexual violence or inhuman

Let me now return to the eleventh hour battle at the Rome Diplomatic Conference over the inclusion and definition of the term “gender”, which was one of the most intense and one of the last to be resolved. The Vatican and a group of Arab League countries, which together we call the “Unholy Alliance”, contested the term “gender” in regard to the crime of persecution, and in response, the United States initially suggested limiting its meaning to males and females. The Unholy Alliance also sought, sometimes successfully, to remove the word gender from the structural and procedural parts of the draft statute—*e.g.* where it referred to gender violence or gender expertise. And toward the end of the Rome Conference, it attacked, initially with the U.K. in the lead, the inclusion in article 21(3) of the phrase that precludes gender and other forms of discrimination in the interpretation and application of the statute. The attack on the non-discrimination principle, which the Women’s Caucus had nursed to acceptance through several PrepComs, soon revealed itself as an attack on the inclusion of discrimination based on “gender”, and helped to galvanize broad support for the position of the Women’s Caucus. Unquestionably, the codification of this overarching principle, modelled on the standard non-discrimination clause in humanitarian and human rights treaties, but substituting the word “gender” for “sex”, is one of the most important protections of gender justice.

The Unholy Alliance had several goals in seeking to eliminate the word gender from the *Rome Statute*. It wanted to eliminate recognition of the social construction of gender roles and hierarchy, since such recognition is inconsistent with the view that males and females are essentially different and have, therefore, different roles, status, and rights. It also sought to preclude consideration of persecution or discrimination based on sexual orientation or gender identity. By contrast, the delegations in favour of including gender, reflecting the overwhelming majority, were concerned not to preclude the progressive development of international law and thus sought to embrace the social construction of gender in an open and flexible definition.⁵⁸

In the end, the body adopted a rather peculiar and circular definition of gender applicable to every use of the term in the statute. It reads:

or degrading treatment” (*Report of the Preparatory Commission for the International Criminal Court: Addendum: Finalized draft text of the Elements of Crimes* (6 July 2000), UN Doc. PCNICC/2000/INF/3/Add.2 at 6, n. 3; the draft indicates that the final version will be UN Doc. PCNICC/2000/1). The general introduction incorporates the broader concept of gender integration—that sexual violence conduct may constitute any of the crimes within the jurisdiction so long as it meets the elements of those crimes—by noting that art. 21 applies to all the Elements and that a particular conduct may constitute one or more crimes (*ibid.* at 5, para. 1).

⁵⁸ See *e.g.* C. Steains, “Gender Issues” in R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 357 [hereinafter “Gender Issues”].

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.⁵⁹

The reference to two sexes reflected the Vatican and the islamists’ position. But the phrase “in the context of society” was explicitly intended to incorporate the sociological or social construction of gender. The last sentence, which was sought by the small group of anti-gender delegations in the hopes of excluding sexual orientation, was seen by the majority of delegations as superfluous.⁶⁰

As an effort to legitimate sexual orientation and gender identity discrimination under the statute or to eliminate persecution on these grounds as a crime, the definition of “gender” will, I believe, prove itself a failure. First, because the words do not support such an exclusion: even the accepted definition of “gender” necessarily embraces discrimination based upon a decision not to behave according to a prescribed gender role, whether it be in the realm of housekeeping, work, or sexuality. Second, it is highly dubious to argue that any ambiguity should be resolved in favor of discrimination, especially in a statute establishing the highest international institution of universal justice. And finally, as Judge Rosalie Abella commented last night, “Hatred which expresses itself in persecution must draw condemnation and punishment as a crime against humanity, otherwise hatred wins the day.”⁶¹

Thus the *Rome Statute* contains an impressive list of sexual and gender crimes and represents an important breakthrough. At the same time, this codification has not silenced those who continue to favour extending impunity to perpetrators of crimes against women. The upcoming negotiations on the Elements of Crimes, which, according to article 9 of the *Rome Statute*, are intended only to guide but not bind the Court and must be consistent with the statute, will undoubtedly be used as a second

⁵⁹ *Rome Statute*, *supra* note 52, art. 7(3).

⁶⁰ It is necessary to note here a very significant correction in “Gender Issues” by Steains, an Australian delegate in the negotiations, *supra* note 58. The published article concludes at 374: “Although many delegates felt that the second sentence was superfluous, it was ultimately included to forestall any implication that the issue of sexual orientation could be raised in connection with Article 2[1](3).” The published version is completely inconsistent with the draft submitted by the author, which states in the pertinent part: “The second sentence was included upon the insistence of the ‘anti-gender’ delegations, despite arguments by the ‘pro-gender’ delegations that it was superfluous” (C. Steains, “Gender and the ICC” (July 1999) [unpublished draft, on file with author at CUNY, footnote omitted]; Memorandum from C. Steains to R. Lee (2 July 1999)). Footnote 53, which follows the sentence quoted above in the published text, provides further evidence against the anti-sexual orientation position. The anti-gender delegations had proposed the sentence as: “The term ‘gender’ does not indicate any meaning different from accepted prior usage.” This was rejected as obsolete (see “Gender Issues”, *ibid.* at 374).

⁶¹ For Justice Abella’s written remarks, see R.S. Abella, “The Instructive Power of Outrage: Remembering Nuremberg” (2000) 46 McGill L.J. 113.

bite at the apple.⁶² Ultimately, the knowledge and sensitivity of the judges and the oversight of NGOs will be dispositive.

In addition to ensuring the proper recognition of gender crimes within the substantive jurisdiction of the ICC, the Women's Caucus identified a number of other process-oriented concerns that are fundamental to enabling women to participate in the justice process and to whether justice is universal. Experience with the international criminal tribunals and in other advocacy situations suggested the need for the statute to establish certain basic structures and processes. Here I will give examples only.⁶³

First, as to the composition and administration of the Court, the Women's Caucus looked at who are going to be the decision-makers. We insisted upon a dual standard, one based on gender expertise and one on biology. The judges and other personnel should include gender experts at the same time as they should, following the principle of non-discrimination and, following the Beijing Platform, represent a balance of women and men. As indicated above, the presence of women judges who also had expertise in gender and of the gender legal adviser in the OP was crucial to the gender advances in the two ad hoc tribunals. At the same time, men can and should become gender experts. As against significant opposition from the Unholy Alliance, the Diplomatic Conference adopted provisions calling upon state parties to "take into account the need ... for a fair representation of female and male judges" as well as the "need to include judges with legal expertise on specific issues, including ... violence against women or children."⁶⁴ The same standards apply to staff of the prosecutor and registry.⁶⁵ While the requirement is not as strong as the caucus would have liked, political action will be necessary in any case to ensure that "fair representation" is a balance of women and men and to secure the proper representation of gender experts.

There are also provisions that seek to incorporate, improve upon, or avoid certain practices in the ad hoc tribunals. For example, the prosecutor has an obligation properly and respectfully to investigate crimes of sexual and gender violence.⁶⁶ The Court has broad authority to protect victims and witnesses, with particular attention to victims of sexual violence, and the statute codifies the need for a victims and witnesses unit, placed in the registry so as to maximize independence from the prosecutor and

⁶² Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court*, PCNICC, 2000, UN Doc. PCNICC/2000/INF/3/Add.1.

⁶³ While many provisions of the *Rome Statute*, *supra* note 52, were influenced by the Women's Caucus and have significant impact on the prosecution of gender crimes, the provisions that are specific to gender issues are the following: arts. 7(1)(g), 7(1)(h), 7(2)(c), 7(2)(f), 7(2)(g), 7(3), 8(2)(b)(xxii), 8(2)(e)(vi), 21(3), 36(8)(a)(iii), 36(8)(b), 42(9), 43(6), 54(1)(b), 54(2), 57(3)(c), 68, 69(4).

⁶⁴ See *ibid.*, arts. 36(8)(a)(iii), 36(8)(b).

⁶⁵ *Ibid.*, art. 44(2).

⁶⁶ *Ibid.*, art. 54(1)(b).

staffed with experts in trauma, including trauma resulting from sexual violence.⁶⁷ The concept of a fair trial includes both the rights of the accused and the interests of victims.⁶⁸ And, borrowing an important page from the civil law system, victims have a right to participate in the proceedings directly or through a legal representative insofar as their interests are affected⁶⁹ and to have the Court declare or award reparations, including restitution, compensation, and rehabilitation.⁷⁰

Conclusion: Towards a Holistic Gender-Inclusive Approach

The ICC statute is thus revolutionary in its thoroughgoing approach to the issues of gender in international law. The Court is not only a potentially important concrete mechanism of accountability; it also establishes basic norms of gender justice that operate as an inspiration and model for political advocacy and domestic systems. The broad incorporation of the gender norms codified in the *Rome Statute* will not automatically change misogynist or sexist laws. Under the statute's principle of complementarity, states are encouraged, though not required, to incorporate the key provisions in their domestic laws. Moreover, even the *Rome Statute's* codification will not avert the danger of exclusion and impunity in the ICC or in the accountability processes—national and international—to which it should give rise. But it provides a critical new tool.

At root, the process of changing patriarchal culture and the inequality of women is a multi-faceted and urgent responsibility of both women and men. The ICC can make a contribution to this process, but we must remember Rosalie Abella's comment last night that courts and legal norms come "too late".⁷¹ With regard to crimes against women, there is unfortunately not so sharp a difference between war and everyday life. Torture and rape in conflict situations have too much in common with rape in the marital bedroom, battering in the home, and gang rape in bars and streets. Indeed, domestic or intimate violence is, in most societies, the greatest killer of women. Marital rape is widely permitted as a result of laws or practices that preclude prosecution. These are examples of egregious gender violence that is committed on a widespread or systematic scale and involves policies of legitimation, whether policies of active encouragement or policies of knowing omission, invisibilization, and toleration.

We must, of course, anticipate significant opposition to applying crimes against humanity to the gender crimes of everyday life, but it is important to press that point. We must continually make the connection between gender violence and persecution in war and conflict and, as Eleanor Roosevelt said of human rights, "in the small

⁶⁷ *Ibid.*, arts. 43(6), 68.

⁶⁸ *Ibid.*, arts. 64(2), 68(1).

⁶⁹ *Ibid.*, art. 68(3).

⁷⁰ *Ibid.*, art. 75.

⁷¹ See Abella, *supra* note 61 at 118.

places close to home," if we are to counter the culture of male entitlement to use women as property. In other words, if the ICC is successful, it will function not only to prevent atrocities in identified conflict situations, but also to sharpen the popular understanding of the atrociousness of sexual and gender violence and persecution and the relation between torture in intimate relationships and atrocities in the context of war.⁷² Also, with regard to the problem that judicial institutions are called into action after the fact, it is important to bear in mind the essential relationship between political, economic, social inequality, including gender inequality, and violence in all contexts.

In concluding, I want to take advantage of the podium to comment briefly on this morning's panel addressed to the identification of warning signals.⁷³ In addition to looking at historical and immediate signs of violence, it is necessary to look at basic economic and political conditions that generate or provide the ground for manipulation of insecurity, desperation, and rage into hatred and violence. These include issues of gender inequality as well as economic issues, and particularly the impact of economic and media globalization on those it colonizes. It was not irrelevant to the genocide in Rwanda that Hutus were stirred up to attack Tutsis because there had been a huge inflation and they were told that the Tutsi would take their cows. It was not irrelevant that Tutsi women were propagandized as treacherous and sexually enticing targets. We cannot prepare the ground for peace and security and exclude from consideration either globalization policies that breed economic insecurity and insecurity about identity, or the role of patriarchal and misogynist culture in everyday life.[†]

⁷² See R. Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 Col. Hum. Rts. L. Rev. 291.

⁷³ See D.S. Rieff, "Are Good Intentions Enough? The Limits of the New World of International Justice" (2000) 46 McGill L.J. 173; F. Bugingo, "Rwanda: Chronique d'un génocide prévisible" (2000) 46 McGill L.J. 179; S.J. Toope, "Does International Law Impose a Duty upon the United Nations to Prevent Genocide?" (2000) 46 McGill L.J. 187.

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