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## How Will The Negotiation History Of The Rome Conference And Jurisprudence Of Ad Hoc Tribunals Aid The International Criminal Court In Its Interpretation Of The Gender-Related Provisions Unique To The Rome Statute?

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**CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB**

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**MEMORANDUM FOR THE  
INTERNATIONAL CRIMINAL COURT**

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**ISSUE: HOW WILL THE NEGOTIATION HISTORY OF THE ROME  
CONFERENCE AND JURISPRUDENCE OF AD HOC TRIBUNALS AID THE  
INTERNATIONAL CRIMINAL COURT IN ITS INTERPRETATION OF THE  
GENDER-RELATED PROVISIONS UNIQUE TO THE ROME STATUTE?**

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**Prepared by Joshua Joseph  
Fall 2005**

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## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issues<sup>1</sup>**

This memorandum identifies and examines the gender-related provisions of the International Criminal Court's (the "ICC") Rome Statute (the "Statute"). The memorandum begins by exploring the manner in which the term "gender" became incorporated into the Statute. The bulk of the memorandum, however, is devoted to an examination of the individual crimes. The elements of crime, negotiation history, and relevant jurisprudence from other international tribunals are analyzed for each enumerated crime in order to provide a comprehensive reference guide to the prosecution of sexual violence within the ICC. The final section of the memorandum looks at the gender-specific structural mechanisms unique to the ICC.

### **B. Summary of Conclusions**

- 1. Nearly all of the gender-related provisions in the Rome Statute are unique to the International Criminal Court and/or represent a reformulation of previously non-codified law.**

The Statute is the first international law treaty to recognize a broad spectrum of gender-related violence. The Statute codifies the following crimes of sexual violence: "rape, sexual slavery, trafficking, forced pregnancy, forced prostitution, enforced sterilization, and any other form of sexual violence" as both crimes against humanity and war crimes.<sup>2</sup> In addition, the Statute states that persecution against any identifiable group or collectivity on the grounds of gender, if committed in connection with any other crime

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<sup>1</sup> Issue: How will the negotiation history of the Rome Conference and the jurisprudence of the ad hoc tribunals aid the International Criminal Court in its interpretation of the gender-related provisions unique to the Rome Statute?

<sup>2</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Arts. 7(1)(g); 8(2)(b)(xxii) and 8(2)(e)(vi) (1998). [hereinafter Statute]. [Reproduced in the accompanying notebook at Tab 1]

within the jurisdiction of the ICC, is a crime against humanity.<sup>3</sup> While some of these crimes, namely rape, have been included in the statutes of the International Criminal Tribunal for the Former Yugoslavia (the “ICTY”)<sup>4</sup> and the International Criminal Tribunal for Rwanda (the “ICTR”)<sup>5</sup>, neither have as expansive a list of the ICC. In addition, for the first time the elements of each crime are specifically delineated in the adjoining Elements of Crime Annex (the “EOC Annex”).<sup>6</sup> Finally, the Statute mandates special protections for victims and witnesses of gender-related violence<sup>7</sup>; allows their participation in the proceedings<sup>8</sup>; and authorizes reparations for such victims<sup>9</sup>. While the statutes of the ad hoc tribunals carved out mechanisms for the protection of witnesses and victims, the ICC is the first to explicitly acknowledge the rights of victims of sexual-violence, as well as authorize their participation in the proceedings.

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<sup>3</sup> *Id.* at art. 7(1)(h).

<sup>4</sup> Statute for the Int’l Criminal Trib. For the Former Yugoslavia, U.N.S.C. Res 827, UN SCOR, 48<sup>th</sup> Sess., 3217<sup>th</sup> mtg., at srt. 3, U.N. Doc S/RES/827 (1993), amended by UNSC Res. 1166, UN SCOR, 53<sup>rd</sup> Sess., 3878<sup>th</sup> mtg. UN Doc. S/RES/1166 (1998), at art(5)(g) [hereinafter ICTY Statute] [Reproduced in the accompanying notebook at Tab 4]

<sup>5</sup> Statute for the Int’l Criminal Trib. For Rwanda, UNSC Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453<sup>th</sup> mtg., at art 3, U.N. Doc S/RES/955 (1994). [hereinafter ICTR Statute] [Reproduced in the accompanying notebook at Tab 5]

<sup>6</sup> Pursuant to Art. 9 of the Statute. The Elements of Crimes are published in the report of the first session of the Assembly of States Parties: ICC-ASP/1/3, pp. 108-55 [hereinafter EOC Annex] [Reproduced in the accompanying notebook at Tab 2]

<sup>7</sup> *Id.* at art. 64(6)(e).

<sup>8</sup> *Id.* at art 68(3).

<sup>9</sup> *Id.* at art. 75.

**2. The recent jurisprudence of the ad hoc tribunals will be able to assist the International Criminal Court in much of its decision-making for many, but not all of the gender-related crimes.**

The EOC Annex is not intended to bind the ICC; rather, it is included to place less of a burden on the judges in developing such standards on their own.<sup>10</sup> In addition, much of the EOC Annex builds on the opinions of the other tribunals. Accordingly, the decisions of the ad hoc tribunals with regards to sexual violence will be helpful to the ICC. In particular, there is excellent precedent from both the ICTY and ICTR with regards to the crime of rape, sexual slavery, and enforced prostitution. Some of the case law, however, especially with regards to rape, might present something of a challenge to the ICC because the elements of crime vary widely from court to court. The ICC should consider the EOC Annex in conjunction with jurisprudence from the ad hoc tribunals in its decision-making process. Other crimes, such as enforced sterilization, persecution of gender, and enforced pregnancy find little basis in common law. For these crimes, the EOC annex in combination with the negotiation history may play a larger role in the ICC's interpretation. It may be difficult for the ICC to consider case law from national courts, since in many cases, the crimes of sexual and gender violence included in the Statute and the EOC Annex are far more progressive than the definitions in the statutes of national courts.

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<sup>10</sup> Andreas L. Paulus, *Legalist Groundwork for the International Criminal Court: Commentaries on the Statute of the International Criminal Court*, 14 EUR. J. OF INT'L L., 843, 848 (2003). [Reproduced in the accompanying notebook at Tab 26]

**3. The Negotiation process during both the Rome Conference and the Elements of Crime Annex drafting may be an essential element of the Court's interpretation of many of the gender-related provisions.**

In 1998, delegates from 161 countries, as well as various non-governmental organizations (NGO's) convened in Rome for a five-week diplomatic conference which finalized the treaty that lead to the establishment of the ICC.<sup>11</sup> Six Preparatory Commission (the "PrepCom") sessions preceded the Diplomatic Conference to draft the initial statute which was sent to Rome.<sup>12</sup> The NGO's became a constant presence at the PrepComs.<sup>13</sup> Of particular relevance to this memorandum is the participation of the Women's Caucus to Gender Justice (the "Caucus") formed when it became apparent that women's issues were not being included in the discussions.<sup>14</sup> Feminist NGO's from all over the world worked together to push for the inclusion of gender crimes in the Statute and create special protection measures for victims of sexual violence.<sup>15</sup>

The negotiation process did not always run smoothly because the delegates had unique and often differing perspectives on important issues. Many delegates had little understanding of gender-related issues, and did not look favorably upon the inclusion of

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<sup>11</sup> Porter, Keith, *The New Court*, Courier Online, (Nov. 1998), available at <http://www.stanleyfoundation.org/courier/articles/1998fall1.html>. [Reproduced in the accompanying notebook at Tab 16]

<sup>12</sup> Bedont, Barbara, *Negotiating for an International Criminal Court*, Peace Magazine, Sept-Oct 1998 at 21, available at <http://www.peacemagazine.org/archive/v14n5p21.htm>. [Reproduced in the accompanying notebook at Tab 12]

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

such provisions in the statute.<sup>16</sup> Of particular contention was the definition of “gender” included in the Statute, the provision on forced pregnancy, and the definition of rape.<sup>17</sup> As a result, much of the language included in the statute appears to represent a compromise between opposing factions at the Rome Conference (the “Conference”), with the thrust ultimately favoring feminist groups and pro-women states. Because the EOC Annex utilizes some vague language and is non-binding on the ICC, an examination of the Negotiation process will prove fruitful in interpreting the Statute.

## **II. The Definition of Gender within the Statute**

### **1. Introduction**

The appearance of the term “gender” within the Statute in nine distinct places represents a novel occurrence in international law.<sup>18</sup> The initial draft of the Statute written by the International Law Commission did not contain the word “gender.”<sup>19</sup> Its inclusion was the result of extensive negotiations between diverse and sometimes opposing factions during the Conference.<sup>20</sup> The incorporation of the term resulted from a substantial lobbying effort by women’s rights activists, primarily the Caucus, who

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<sup>16</sup> See e.g., *Who's Obstructionist? Arabs Ask*, Terraviva, (The Conference Daily Newspaper), (July 2, 1998), available at <http://www.ips.org/icc/tv0207.htm> [Reproduced in the accompanying notebook at Tab 27]

<sup>17</sup> See generally, CATE STEAINS, “GENDER ISSUES” IN THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (ED.) ROY S. LEE (1999) at 372-373. [Reproduced in the accompanying notebook at Tab 28]

<sup>18</sup> See Valerie L. Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 55 HARV. HUM. RTS. J.432, 436 (2005). [Reproduced in the accompanying notebook at Tab 29]

<sup>19</sup> See Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 10 art. 20, at 70-73, U.N. Doc. A/49/10 (1994). [Reproduced in the accompanying notebook at Tab 6]

<sup>20</sup> Oosterveld, *supra* note 18, at 456. [Reproduced in the accompanying notebook at Tab 29]

participated in both the Conference and the subsequent PrepComs which drafted the EOC Annex and the Procedures for Rules and Evidence (the “PRE Annex”) for the ICC.<sup>21</sup> The Caucus helped assure the support of the more liberal countries—Australia, Bosnia, Canada, Costa Rica, Mexico, the Netherlands, European countries generally, South Africa for ten Southern African countries, and Sweden—for the inclusion of gender within the Statute.<sup>22</sup> The Caucus and other like-minded individuals wanted to integrate a gender perspective into the entire Statute primarily because gender-related crime has been nearly invisible in world statutes and laws,<sup>23</sup> even though such crime has occurred in nearly every society.<sup>24</sup>

A. The inclusion of gender in the Non-discrimination clause

The term “gender” is included in two key areas within the Statute. The term is explicitly referenced in the Statute’s non-discrimination clause.<sup>25</sup> Article 21(3) provides that the application and interpretation of the law must be consistent with internationally recognized human rights, and be “without any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic

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<sup>21</sup> Louise Chapelle, *Finding Space for Women’s Interests: Developments at the UN Ad Hoc Tribunals and the International Criminal Court*, Refereed paper presented to the Australasian Political Studies Association Conference University of Tasmania, Hobart (29 September – 1 October 2003) at 8 [Reproduced in accompanying notebook at tab 30]; see also Spees, Pam, *Women’s Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power*, Signs: Journal of Women in Culture and Society 2003 vol.28, no.4. [Reproduced in accompanying notebook at Tab 7]

<sup>22</sup> Jude Howell and Diane Mulligan, ed. *Gender and Civil Society*, Routledge, 2004. “Who is the Real Civil Society? Women’s Groups versus Pro-Family Groups at the International Criminal Court Negotiations,” at 5. [Reproduced in the accompanying notebook at Tab 31]

<sup>23</sup> Alda Facio, *A Word (or Two) about Gender*. THE INT’L CRIM. CT MONITOR 5 (November 1997). [Reproduced in the accompanying notebook at Tab 17]

<sup>24</sup> See ASKIN, KELLY, WAR CRIMES AGAINST WOMEN: PROTECTION IN INTERNATIONAL WAR CRIMES TRIBUNALS, 22 (1997) [Reproduced in part in accompanying notebook at Tab 32]

<sup>25</sup> Statute, *supra* note 2, Article 21(3) [Reproduced in the accompanying notebook at Tab 1]



or social origin, wealth, birth or other status.” The language is important because it makes clear that the Statute’s regulations must apply equally, without regard to gender. This clause ensures that all organs of the ICC, including judges, prosecutors, investigators, registrars, and chambers treat all individuals fairly. The non-discrimination clause not only benefits men and women, but victims and the accused as well. The inclusion of “gender” along with the other protected classes, such as race and ethnicity, was important because its exclusion might have been problematic for the ICC in prosecuting such violence. The inclusion prevents any judges from applying the Statute’s provisions indiscriminately. As such, the clause offers women and men, as well as victims and witnesses an added layer of protection.

#### B. The statutory meaning of gender

The actual definition of “gender” appears in Article 7(3), under crimes against humanity, and provides: “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 definition’s somewhat strange language reflects a tug-of-war between the various delegates present during the negotiations.<sup>26</sup> On the one hand, the Caucus and its supporters lobbied heavily for gender’s inclusion in the Statute. On the other hand, vocal and opposing voices, namely certain Arab States, the Holy See and several pro-family groups cautioned against any use of the term.<sup>27</sup> Some pro-family groups advocated abandoning the term altogether,

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<sup>26</sup> Steains, *supra* note 17, at 376. [Reproduced in the accompanying notebook at Tab 28]

<sup>27</sup> See Howell & Mulligan, *supra* note 22, at 6. [Reproduced in the accompanying notebook at Tab 31]

while States such as the Holy See argued for a carefully worded definition that would narrow the scope of the term's meaning.<sup>28</sup>

Interestingly, the main concern of the groups opposing the inclusion of "gender" as a protected class was not that the term would be used to protect women, but that it might be interpreted to include other groups. Some states were expressly hostile to the term.<sup>29</sup> Many of the conservative delegates to the convention expressed concern that the term could be interpreted to include sexual orientation.<sup>30</sup> One of the pro-family groups expressed concern that it might "provide protection for "other genders" including homosexuals, lesbians, bisexuals, transgendered, etc."<sup>31</sup> As a result of such strong opposition, the delegates gave thought to replacing the word "gender" with the word "sex," in an effort to prohibit any interpretation of "gender" as a social construction that might encompass sexual orientation.<sup>32</sup> The Caucus opposed any such change, specifically because the usage of "sex" would amount to a biological restriction of the differences between men and women, whereas "gender" might incorporate socially-constructed differences between men and women.<sup>33</sup> To make its claim, the Caucus produced documents establishing that the term gender was in general use throughout

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<sup>28</sup> *See id.*

<sup>29</sup> The states that made statements opposing the term "gender" included: Qatar, Libya, Egypt, Venezuela, Guatemala (but flexible), United Arab Emirates, Saudi Arabia, Kuwait, Syria, Turkey, Sudan, Bahrain, Iran, Yemen, Brunei, and Oman. The delegates who led the negotiations for this group were from Syria and Qatar.

<sup>30</sup> *See e.g.*, Oosterveld, *supra* note 18, at 456. [Reproduced in the accompanying notebook at Tab 29]

<sup>31</sup> REAL Women of Canada. 1998. *Canada Courts Disaster With World Court*, REALity Newsletter, (16/10 July/August). [Reproduced in the accompanying notebook at Tab 33]

<sup>32</sup> *See* , CYNTHIA ROTHSCHILD, WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING 115 (2000). [Reproduced in the accompanying notebook at Tab 34]

<sup>33</sup> *See* Valerie L. Oosterveld, *The Making of a Gender-Sensitive International Criminal Court*, INT'L LAW FORUM DU DROIT INT'L, 38 (February 1991). [Reproduced in the accompanying notebook at Tab 35]

United Nations documents and should be retained.<sup>34</sup> Eventually, a majority of delegates sided with the Caucus that there was a need to retain the earlier definition, implicitly recognizing the need for the sociological aspects of the term to be incorporated into the Statute.<sup>35</sup>

The PrepCom's decision against replacing "gender" with "sex," has received mixed reviews from scholars. Some commentators have asserted that the definition of gender within the statute is a direct reflection of Holy See and Arab fears that sexual orientation would be read into the language.<sup>36</sup> Annex IV to the Beijing Platform for Action, which was distributed to the delegates, states that for the purposes of that document, the word "gender" was intended to be interpreted as it was in ordinary, generally accepted usage.<sup>37</sup> Such a definition might have proved more in line with feminist goals, as "gender" is typically understood as having more abstract a meaning than the term "sex".

In order to pacify those arguing for the term's exclusion, the phrase "within the context of society" was added to the definition, as well as the seemingly redundant final sentence of the paragraph: "The term 'gender' does not indicate any meaning different

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<sup>34</sup> Steains, *supra* note 21, at 374. [Reproduced in the accompanying notebook at Tab 7]

<sup>35</sup> *Id.*

<sup>36</sup> See Ruth b. Phillips, *Too close to home?: International Criminal Law, War crimes and Family Violence*, 24 T. JEFFERSON L. REV., 229, 233 (2002). [Reproduced in accompanying notebook at Tab 36]

<sup>37</sup> Report of the Fourth World Conference on Women, UN Doc. A/CONF.177/20, (17 October 1995), "Annex IV: Statement by the President of the Conference on the Commonly Understood Meaning of the Term 'Gender.'" Paragraphs 2 and 3 state: "Having considered the issue thoroughly, the contact group noted that: (1) the word 'gender' had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action. Accordingly, the contact group reaffirmed that the word 'gender' as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage." [Reproduced in the accompanying notebook at Tab 9]

from the above.”<sup>38</sup> Such a definition is unique to the ICC. It makes clear that the Statute does not provide a universal and easily adoptable definition of gender. The wording suggests that the definition of “gender” will vary from case to case. This may require an ICC judge, in any given case, to examine the usage of the term within a particular society before rendering a judgment, since there is no “universal” society of people. A Scandinavian country, for example, might have a nuanced understanding of the word, whereas an Arab country might view it as merely referring to “male” and “female”.

## **2. Conclusion**

Many commentators have taken the view that the adopted language allows the ICC a wide breadth of leeway in interpreting gender. Recent scholarship, for example, has concluded that the statutory definition allows the ICC to “include persecution based on sexual orientation” and “differing gender identities.”<sup>39</sup> One scholar, while acknowledging that there is an argument for excluding sexual orientation from the definition, concludes that because conceptions of “gender” and sexual orientation are intertwined, and not easily separable, the terminology gives the ICC implied authority to prosecute crimes against gays and lesbians, as well as other gender nonconformist groups.<sup>40</sup> Other commentators, however, have asserted that the negotiation history, in combination with the commonly accepted meaning of “gender” make it clear that the word refers only to the two sexes and nothing else.<sup>41</sup> While the exact meaning of

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<sup>38</sup> Statute, *supra* note 2, at art 16. [Reproduced in the accompanying notebook at Tab 1]

<sup>39</sup> Spees, *supra* note 21, at 1244. [Reproduced in the accompanying notebook at Tab 7]

<sup>40</sup> Oostervald, *supra* note 18, at 75. [Reproduced in the accompanying notebook at Tab 29]

<sup>41</sup> HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 335 (2000). [Reproduced in the accompanying notebook at Tab 37]

“gender” and what it shall include will ultimately rest with the ICC judges, its inclusion marks a clear victory for women’s rights advocates who fought hard for its recognition in the Statute. Furthermore, its inclusion “cleared the path for several other gender-related provisions in the statute.”<sup>42</sup>

## **II. Overarching Crimes falling under the Statute’s jurisdiction**

### **1. Introduction**

Before analyzing the elements of the individual crimes, it is necessary to explore gender’s relation to the broader categories of crime included in the Statute. The Statute gives the ICC broad jurisdiction over four major areas: (1) the crime of genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression.<sup>43</sup> However, gender-related violence is only explicitly included in the articles concerning crimes against humanity and war crimes. The provision on genocide does not include sexual violence and is defined as a list of prohibited acts, such as killing or causing serious harm, committed with intent to destroy, in whole or in part, a *national, ethnical, racial or religious* group.<sup>44</sup> Hence, the exclusion of “gender” as a protected class indicates that the ICC does not have jurisdiction over gender-related genocide. Accordingly, this memorandum will examine sexual violence only in the context of crimes against humanity and war crimes. While the specific elements of each crime included in the EOC annex are nearly identical whether applied to war crimes or crimes against humanity; the broader context of the crime determines whether it is tried as a crime against humanity or war crime.

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<sup>42</sup> Steains, *supra* note 17, at 375. [Reproduced in the accompanying notebook at Tab 28]

<sup>43</sup> Statute, *supra* note 2, art. 5. [Reproduced in the accompanying notebook at Tab\_\_]

<sup>44</sup> *Id.* at art. 5. (emphasis added).

## 2. The Role of the EOC Annex

After the adoption of the Statute, negotiations for the EOC Annex began in order to provide more specificity as to the criminal conduct.<sup>45</sup> During the Conference, certain states argued that a document elaborating the specific elements of each crime was necessary for providing clarity and certainty to judges on the ICC.<sup>46</sup> The US, in particular, insisted upon an EOC Annex.<sup>47</sup> Other states, however, were concerned that such a document would place undue restrictions on the judges, limiting their discretion over crimes.<sup>48</sup> Eventually, the PrepCom was charged under Resolution F of the Final Act of the diplomatic conference with preparing a draft of the elements of crimes for consideration and adoption by the Assembly of States Parties.<sup>49</sup> The PrepCom decided to draft the specific material and mental elements for gender crimes essentially in the same way for the war crimes under Art. 8(2)(b) in international armed conflicts and Art. 8(2)(e) in non-international armed conflicts as well as crimes against humanity under Art. 7.<sup>50</sup> There are only minor variations in some provisions which will be explained as appropriate.

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<sup>45</sup> Bartram S. Brown, *U.S. Objections to the Statute of The International Criminal Court: A Brief Response*, N.Y.U. J. OF INT'L L. & POL., 860, 864 (1999). [Reproduced in the accompanying notebook at Tab 38]

<sup>46</sup> KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 8 (2003). [Reproduced in the accompanying notebook at Tab 38]

<sup>47</sup> The United States first proposed Elements to the Preparatory Committee late in its work in New York. U.N. Doc. A/AC.249/1998/DP.11 of 2 April 1998. [Reproduced in the accompanying notebook at Tab 39]

<sup>48</sup> Dormann, *supra* note 46, at 8. [Reproduced in the accompanying notebook at Tab 38]

<sup>49</sup> The International Criminal Court, *Fundamental principles concerning the elements of genocide Amnesty International*, AI Index: IOR 40/01/99 (February, 1999). [Reproduced in the accompanying notebook at Tab 13]

<sup>50</sup> Dormann, *supra* note 46, at 8. [Reproduced in the accompanying notebook at Tab 38]

It is essential to understand the role of the EOC Annex before examining any of the articles. Article 9 indicates that the EOC Annex is meant to “assist the Court in the interpretation and application of articles 6, 7, and 8.” This language indicates that, while helpful to the ICC, the EOC annex is not meant to be authoritative. However, Article 21(a) of the Statute provides that “[t]he Court shall apply . . . (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence,” perhaps an indication that the EOC Annex should play an important role in the ICC’s analysis of crimes. While the exact authoritative force of the EOC Annex is debatable, it is clear that the elements appear to derive their sources in large part from existing case law.

### **3. Crimes Against Humanity**

The Statute recognizes a wide variety of acts of sexual violence which qualify as crimes against humanity. Article 7 on crimes against humanity begins with an introductory paragraph stating: “For the purposes of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>51</sup> The Article enumerates a list of eleven acts constituting crimes against humanity. This memo will focus solely on the substantial enumeration of gender-related crimes listed as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”<sup>52</sup> Article 7(1)(h) also lists “persecution” against any identifiable group or collectivity, including

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<sup>51</sup> Statute, *supra* note 2, art. 7(1) [Reproduced in the accompanying notebook at Tab 1].

<sup>52</sup> *Id.* at art 7(1)(g).

“gender” as a crime against humanity. In addition, the final crime in Article 7(1)(k) refers to “other inhumane acts” indicating that the enumerated list is not meant to be exhaustive. The only requirement for the “other inhumane acts” acts is that they be “of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.”<sup>53</sup>

#### A. Relation to Gender

The chapeau to crimes against humanity recognizes three specific elements that must be present in a crime against humanity. The crime must be (1) “committed as part of a widespread or systematic attack”; (2) directed against any civilian population; and (3) occur “with knowledge of the attack”. There are several things about the language of the Article that will prove important to women and the prosecution of gender-related violence. First, a crime against humanity is defined as any of the list of acts when committed as part of a *widespread or systematic* attack. The Article qualifies this requirement in the definitional section, by asserting that the attack must be in pursuance or in furtherance of a “State or organizational policy” and that there must be multiple acts.<sup>54</sup> This language acknowledges that both state actors *and* private individuals may be held liable for such acts.<sup>55</sup> These crimes can be committed by state agents or by persons acting at their instigation or with their consent or acquiescence.<sup>56</sup> Crimes against humanity can also be committed pursuant to policies of organizations, such as rebel

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<sup>53</sup> *Id.* at art. 7(1)(k).

<sup>54</sup> *Id.* at art 7(2)(a).

<sup>55</sup> EOC Annex, *supra* note 6, art. 7 [Reproduced in the accompanying notebook at Tab 2]

<sup>56</sup> Amnesty International, The International Criminal Court, Fact Sheet 4, *Prosecuting Crimes Against Humanity*, available at <http://www.iccnw.org/pressroom/factsheets/FS-AI-ProsCrmsAgnstHum.pdf>. [Reproduced in the accompanying notebook at Tab 11]



groups, which have no governmental connection.<sup>57</sup> The inclusion of this phrase represents a desire of many of the delegates to incorporate the ICTY's groundbreaking decision in *Tadic*.<sup>58</sup> Hence the "State or organizational policy" language is a victory for women because it indicates that prosecution of violence will not be limited to acts furthered by the government. This is important because women are "most often the victims of non-state, as opposed to state violence in civil society as well as war."<sup>59</sup> Without Article 7(2)(a)'s clarification of the widespread or systematic requirement it might have been difficult for the ICC to prosecute sexual violence when committed by a non-state agency or rebel group.

Also important to women is the chapeau's recognition that crimes against humanity can be committed against a civilian population both in times of war, as well in times of peace.<sup>60</sup> This is important because many crimes of sexual violence occur in peacetime. Some of the conservative delegates were concerned that crimes against humanity would apply not only to rape in war, but also to widespread or systemic sexual and gender crimes in everyday life.<sup>61</sup> Accordingly, eleven Arab states sought explicitly

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<sup>57</sup> *See Id.*

<sup>58</sup> HERMAN VON HEBEL & DARRYL ROBINSON, "CRIMES WITHIN THE JURISDICTION OF THE COURT" IN THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (ED.) ROY S. LEE (1999) [Reproduced in the accompanying notebook at Tab 44]; *see also The Prosecutor v. Tadic*, Trial Chamber I, Opinion and Judgment, No IT-94-1-T, para. 654-655 (May 7, 1997) (holding that a State policy is no longer required and that non-State actors are possible perpetrators of crimes against humanity) [Reproduced in the accompanying notebook at Tab 45]

<sup>59</sup> Rhonda Copelan, *Gender crimes as war crimes: integrating crimes against women into international criminal law*, CRIM L. FORUM 230, 236 (1999). [Reproduced in the accompanying notebook at Tab 40]

<sup>60</sup> Statute, *supra* note 2, art. 8. [Reproduced in the accompanying notebook at Tab 1]

<sup>61</sup> Copelan, Rhonda, *Rape and Gender Violence: From Impunity to Accountability in International Law Human Rights Dialogue*, (Fall 2003): "Violence Against Women" available at <http://www.cceia.org/viewMedia.php/prmID/1052>. [Reproduced in the accompanying notebook at Tab 14]

to immunize rape, sexual slavery, and other sexual violence when committed in the family or as part of religion, tradition, or culture.<sup>62</sup> In addition, a handful of states, including China and a number of Middle Eastern states, argued that crimes against humanity must be committed in the context of an international armed conflict.<sup>63</sup> The PrepCom ultimately decided against these measures, making it clear that these acts are prohibited whenever widespread or systematic and done by a state or non-state party, during war or during peace. In doing so, the PrepCom has ensured greater protection of women from sexual violence.

The closing phrase of the chapeau of Article 7(1) makes it clear that a person or group of persons cannot be guilty of a crime against humanity absent the requisite mens rea of knowledge.<sup>64</sup> Accordingly, an individual who participates in one of the enumerated acts, but has no knowledge that it is part of a widespread or systematic attack on a civilian population cannot be convicted by the ICC for crimes against humanity. The exact degree of knowledge required by the Statute has been the subject of debate, but one scholar has suggested that: “The perpetrator of a crime against humanity must have knowledge of the connection between his or her act and the broader attack but need not realize that the attack itself is the result of a policy. Nor must the perpetrator have any *detailed* knowledge of the policy behind the attack.”<sup>65</sup> This requirement, however, has disturbed some feminist scholars. One academic, for example, has noted that it has no

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<sup>62</sup> *Id.*

<sup>63</sup> Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, HUM. RTS. Q. 380, 381. [Reproduced in the accompanying notebook at Tab 41]

<sup>64</sup> Statute, *supra* note 2, art. (7)(1). [Reproduced in the accompanying notebook at Tab 1]

<sup>65</sup> McAuliffe de Guzman, *supra* note 63, at 381. [Reproduced in the accompanying notebook at Tab 41]

foundation in the fifty-three year legislative history and customary usage of crimes against humanity and that its inclusion may make it more difficult to prosecute such crimes.<sup>66</sup> However, there are some limitations on this requirement. The EOC Annex, for instance, does not require “that the perpetrator have knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.” Thus, while there must be some showing of knowledge, the requirement is not overly burdensome. In addition, the negotiators agreed that the point is nearly moot because it is difficult to conceive of a situation whereby an accused commits such an act as part of a widespread or systematic attack, but can come to have been truly unaware of the attack.<sup>67</sup> Finally, it should be fairly easy for the ICC to infer knowledge from the surrounding circumstances, even if such knowledge is not explicit. Accordingly, the mens rea requirement may not prove as a big a burden to the prosecution of gender-related as some scholars have suggested.

#### **4. War Crimes**

War Crimes are defined in Article 8 of the Statute, which begins by granting the ICC jurisdiction over such crimes “in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>68</sup> The provision gives the ICC jurisdiction over gender-related war crimes in international and internal war.<sup>69</sup> It effectively repeats the list of sexual violence crimes contained in Article 7, with the

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<sup>66</sup> Askin, Kelly D., *Crimes Within The Jurisdiction of the International Criminal Court*, CRIM. L.F., 38, 43 (1999). [Reproduced in the accompanying notebook at Tab 42]

<sup>67</sup> WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 98 (2004). [Reproduced in the accompanying notebook at Tab 43]

<sup>68</sup> Statute, *supra* note 2, art. 8(2)(1). [Reproduced in the accompanying notebook at Tab 43]

<sup>69</sup> *Id.* at arts. 8(2)(b)(xxii); Art. 8(2)(e)(vi).

addition of “...any other form of sexual violence also constituting” either “grave breaches” or violations of Common Article 3 of the Geneva Conventions. This is slightly different than the crimes against humanity statute which punishes other forms of sexual violence of a “comparable gravity” to the other enumerated forms of sexual violence. Many scholars have called this a “watershed moment” because it is the first time that sexual violence has been associated with grave breaches of the Geneva Convention.<sup>70</sup>

The war crimes article will prove important to the prosecution of gender-related violence for several reasons. First, it expands significantly on the list of traditionally accepted war crimes. The statute of the ICTY recognizes rape only as a crime against humanity, but does not include it as a war crime.<sup>71</sup> The ICTR statute goes further, but still has a limited enumeration of sexual violence under its war crime statute, recognizing only “rape, enforced prostitution, and any form of indecent assault” as outrages upon personal dignity.<sup>72</sup>

#### A. Relation to Gender

The Statute’s hefty list of sexual violence crimes is important because it removes the moralistic element from the range of previously recognized war crimes.<sup>73</sup> Even more important to women, however, is the fact that war crimes do not have the quantitative dimension required by the widespread or systematic qualification of crimes against

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<sup>70</sup> Askin, *supra* note 66, at 53. [Reproduced in the accompanying notebook at Tab 42]

<sup>71</sup> ICTY Statute, *supra* note 4, art (5)(g). [Reproduced in the accompanying notebook at Tab 2].

<sup>72</sup> ICTR Statute, *supra* note 5, arts. (3)(g) and (4)(e), respectively. [Reproduced in the accompanying notebook at Tab 3]

<sup>73</sup> Copelan, *supra* note 59, at 234. [Reproduced in the accompanying notebook at Tab 40]

humanity. Whereas the ICC would be prohibited from prosecuting a single instance of rape as a crime against humanity, Article 8 grants it the authority to prosecute such as a war crime.<sup>74</sup> The chapeau of Article 8 provides that “The Court shall have jurisdiction in respect of war crimes *in particular* when committed as a part of a plan or policy or as a part of a large scale commission of crime.”<sup>75</sup> While the inclusion of the phrase “in particular” appears to suggest that there *is* a quantitative dimension to the war crimes article, it is not necessarily indicative of such. The wording represents a compromise between the delegates during the PrepCom concerning the jurisdiction of the ICC.<sup>76</sup> Certain delegates made it clear that they did not want the ICC to have jurisdiction over isolated crimes. First, giving the ICC such jurisdiction might overburden its capabilities.<sup>77</sup> Second, and more importantly, some delegates feared that it would subject them to unwanted liability.<sup>78</sup> While, the vast majority of delegates supported having no threshold requirement at all (i.e., completely deleting any requirement of a relation to plan or policy), a minority faction argued for a high threshold for such crimes, by limiting jurisdiction to “only” crimes which had been committed pursuant to a policy or plan.<sup>79</sup> Eventually, however, a compromise was reached whereby “in particular” was included to appease the minority faction who wanted the ICC to have limited jurisdiction over such crimes. Most commentators have concluded that the language should not be taken as any

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<sup>74</sup> Schabas, *supra* note 67, at 55. [Reproduced in the accompanying notebook at Tab 43]

<sup>75</sup> Statute, *supra* note 2, Art. 8 (1). (emphasis added). [Reproduced in the accompanying notebook at Tab 1]

<sup>76</sup> Von Hebel, *supra* note 58, at 108. [Reproduced in the accompanying notebook at Tab 44]

<sup>77</sup> *Id.* at 107.

<sup>78</sup> *Id.*

<sup>79</sup> Askin, *supra* note 66, at 50. [Reproduced in the accompanying notebook at Tab 42]

new restriction on the customary definition of war crimes, but rather as a technique to limit the jurisdiction of the court.<sup>80</sup> That is, the words “in particular” do not bar the ICC from investigating and prosecuting single acts of violence as war crimes. In principle, the ICC should be able to prosecute isolated acts of sexual violence as war crimes whether committed in international or internal war.

#### **IV. Enumerated Crimes of Sexual Violence Falling Under the ICC’s Jurisdiction**

This portion of the memorandum is devoted to an examination of each enumerated crime of sexual violence as defined in the Statute. Particular attention is given to the negotiation history, elements of crime, as well as relevant jurisprudence of each tribunal. The goal is to provide a framework for the ICC when faced with these crimes in practice. The memorandum will not provide absolute conclusions, but will highlight areas of importance and make conclusions on options that the ICC has in interpreting such acts of violence.

##### **1. Rape**

Similar to the statutes of the ICTY and ICTR, rape is codified in the Statute. The ICC, however, significantly expands rape by including it as both a crime against humanity and a war crime.<sup>81</sup> Because the two ad hoc tribunals did not have an EOC Annex to aid them in defining the criminal elements of rape, the ICTY and ICTR were forced to examine the crime in other world legal systems. In its examination of recent jurisprudence, the ICC judges should be aware that rape has been interpreted differently

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<sup>80</sup> Schabas, *supra* note 62, at 25. [Reproduced in the accompanying notebook at Tab 1]

<sup>81</sup> Statute *supra* note 2, Arts., 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi). [Reproduced in the accompanying notebook at Tab 1]

by the two tribunals. The ICTY has been focused more on a detailed description of the act, while the ICTR has relied less on such details.

#### A. Elements of Rape

##### i. Summary of elements

Rape is defined as the invasion of a person's body by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion must have been committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.<sup>82</sup>

##### ii. Specific Provisions & Negotiations

*Gender-neutrality.* The definition of rape included in the Statute is gender-neutral. According to the EOC Annex, both the perpetrator and the victim of rape can be either male or female. Element 1 uses such gender-neutral language as “perpetrator” and “person”, instead of the typical feminine pronouns included in many rape laws. In this way, the statute acknowledges that men and boys can be victims of rape<sup>83</sup> and that

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<sup>82</sup> EOC Annex, supra note 6, “rape”. [Reproduced in the accompanying notebook at Tab 2]

<sup>83</sup> See Amnesty International, The International Criminal Court, Fact sheet 7, *Ensuring justice for women*, (12 April 2005) (AI Index : IOR 40/006/2005) at 2. [Reproduced in the accompanying notebook at Tab 15]

women can act as the perpetrators of such violence. The Caucus and other groups worked vigorously for this gender-neutral language.<sup>84</sup> In order to make certain that this was clear in the Statute, the Caucus lobbied for a footnote to the word “invaded” in element 1 of the crime, which reads, “The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.”<sup>85</sup> This is a groundbreaking development because older definitions of rape confined its prosecution to a male aggressor upon a female victim, causing some instances of rape to go unpunished.

*Penetration.* During the negotiations, the Caucus was particularly adamant that the definition of rape focus on certain essential elements defined, in part, by the jurisprudence of the ad hoc tribunals. The first element makes clear that the crime of rape involves “invas[ion]” of any part of the victim’s body with any “object” *or* “part of the body”. It is not a requirement of the crime of rape that a man’s penis enter the genital cavity of a woman. Instead, rape is defined broadly to include situations where someone might use, say, a stick to penetrate a person’s anus. Furthermore, full penetration is not a requirement; any invasion, “however slight” may constitute rape. This is an important development because past definitions of rape required full penetration of a man’s sexual organs on an unwilling woman. In addition, the usage of the phrase “part of the body” indicates that oral penetration may constitute an act of rape.

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<sup>84</sup> See David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Remarks, Fordham University New York, October 29, 1999 *Rape as a War Crime*, available at <http://www.converge.org.nz/pma/arape.htm>. [Reproduced in the accompanying notebook at Tab 21]

<sup>85</sup> See Women And The ICC: Full Citations from the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence. [Reproduced in the accompanying notebook at Tab 18]



*Coercion.* The Caucus was adamant that the focus in rape be shifted away from the victim, and onto the actions and intent of the perpetrator.<sup>86</sup> Accordingly, the second element of the crime focuses on the “force, threat of force or coercion” that was used by the perpetrator to instill “fear of violence, duress, detention, psychological oppression or abuse of power” in the victim. Thus, the Statute focuses on the force or coercion used by the perpetrator, rather than the consent or lack of consent of the victim. The language is worded carefully to make clear that the inquiry is not whether the victim felt fear, but whether or not the perpetrator *induced* the person to be fearful. In addition, the Caucus felt it important that the force element was defined broadly enough to encompass the non-physical elements that are an important part of rape.<sup>87</sup> It is not necessary to show that the perpetrator employed physical force to establish that rape occurred (as is the case in some national jurisdictions); mental coercion will suffice.

*Consent.* In the same vein as coercion, the issue of consent emerged as a point of contention during the negotiations.<sup>88</sup> The Caucus felt strongly that lack of consent should not be an element because a person could consent without intension or be coerced to do so.<sup>89</sup> Accordingly, the following footnote was included in the definition: “It is understood that a person may be incapable of giving genuine consent if affected by

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<sup>86</sup> See Women’s Caucus for gender Justice in the International Criminal Court. 1999-2000. *Advocacy Papers Submitted to the Preparatory Commission for the International Criminal Court*. New York: Women’s Caucus for Gender Justice, available online at <http://www.iccwomen.org/icc/pcindex.htm> [Reproduced in the accompanying notebook at Tab 46]

<sup>87</sup> See Women’s Caucus for Gender Justice *Summary of Recommendations, Elements of Crime*, June 12 – 30, 2000, available at <http://www.iccwomen.org/icc/pc200006>. [Reproduced in the accompanying notebook at Tab 47]

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

natural, induced or age-related incapacity.”<sup>90</sup> That is “a victim’s lack of consent is not part of the elements. Rather, the perpetrator’s violation of a victim’s physical and sexually autonomy is emphasized.”<sup>91</sup>

### B. Recent Jurisprudence on Rape

In general, the drafters of the EOC Annex utilized the ICTR and ICTY decisions in *The Prosecutor v. Anto Furundzija*<sup>92</sup> and *The Prosecutor v. Akayesu*<sup>93</sup> to develop a definition of rape for the ICC.<sup>94</sup> Drafting a definition for rape presented the PrepCom with a difficult task because there is little case law on the subject, and the existing case law varies widely in its definition of the crime.<sup>95</sup> Women’s rights groups worked vigorously to produce a broad and progressive definition of rape in the Statute,<sup>96</sup> most likely because they knew that crimes of mass rape are likely to come before the ICC. The ICC is investigating mass rape situations in Darfur.<sup>97</sup>

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<sup>90</sup> Statute, *supra* note 2, art. 7(1), fn 21. [Reproduced in the accompanying notebook at Tab 1]

<sup>91</sup> Spees, *supra* note 21, at 1241. [Reproduced in the accompanying notebook at Tab 7]

<sup>92</sup> ICTR, Judgment, *The Prosecutor v. Akayesu*, ICTR-96-4-I, (Sept. 2 1998) [Reproduced in the accompanying notebook at Tab 1]

<sup>93</sup> ICTY, Judgment, *The Prosecutor v. Anto Furundzija*, IT-95-17 (Dec 10, 1998) [Reproduced in the accompanying notebook at Tab 1]

<sup>94</sup> Dormann, *supra* note 46, at 327. [Reproduced in the accompanying notebook at Tab 38]

<sup>95</sup> *Id.*

<sup>96</sup> Louise Chapell, *Women, Gender and International Institutions: Exploring New Opportunities at the International Criminal Court*, (Refereed paper presented to the Australasian Political Studies Association Conference University of Tasmania, Hobart) (29 September – 1 October 2003) at 10. [Reproduced in the accompanying notebook at Tab 50]

<sup>97</sup> See *Relief as Darfur war crimes are referred to ICC*, Afrol News, November 25, 2005, available at <http://www.afrol.com/articles/16042>. [Reproduced in the accompanying notebook at Tab 51]

i. The influence of the ICTY

The first element of the definition of rape in the EOC Annex, addressing invasion and penetration, is based on the ICTY Trial Chamber's definition of the crime in its 1999 *Furundzija* judgment. This judgment relied heavily on a detailed description of objects and body parts in defining the act of rape.<sup>98</sup> The Trial Chamber looked to national legislation and noted that an emerging State trend had begun to recognize acts once considered less serious offenses, as being paramount to rape.<sup>99</sup> It noted that "the stigma of rape now attaches to a growing category of sexual offenses, provided of course that they meet certain requirements, chiefly that of sexual penetration."<sup>100</sup> The Trial Chamber also found that most states considered rape to be "the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus"<sup>101</sup> (note the gender-specific terminology that most states use, something the Statute's drafters sought to avoid). It also noted that forced oral penetration considered rape only in some states, was significantly "humiliating" and "degrading" enough upon human dignity to qualify as rape.<sup>102</sup> In making the determination, the Trial Chamber reasoned that the entire corpus of international law was

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<sup>98</sup> *Furundzija*, *supra* note 93, at 179. [Reproduced in the accompanying notebook at Tab 49]

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 181.

<sup>101</sup> *Id.* at 183.

<sup>102</sup> *Id.*

the respect for human dignity. This principle meant that “such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”<sup>103</sup>

Indeed, in the *Prosecutor v. Kunarac*, decided after the adoption of the EOC Annex, the Court expressed concern that the Trial Court’s judgment in *Furundzija* was too restrictive, stating that it “was more narrowly stated than is required by international law.”<sup>104</sup> It felt *Furundzija*’s definition was too limiting because it required the relevant act of penetration to be accompanied by coercion or force, reasoning that other factors besides coercion or force could render an act of sexual penetration non-consensual.<sup>105</sup> Accordingly, the Court defined rape as a violation of sexual autonomy, and held that such autonomy was “violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.”<sup>106</sup> The Appeals Chamber also provides examples of coercive circumstances used by perpetrators, including detention in prisons, military headquarters, detention centers and apartments maintained as soldiers’ residences, where there would be a presumption that the act was not voluntary or consensual.<sup>107</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> ICTY, Judgment, *The Prosecutor v. Dragoljub Kunarac and the Others*, IT-96-23 and IT-96-23/1-T, para. 438. [Reproduced in the accompanying notebook at Tab 52]

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 393, 409.

<sup>107</sup> ICTY, Appeals Chamber: *Prosecutor v. Kunarac, et al.*, IT-96-23 & IT-96-23/1-A (June 12, 2002) at para.132. [Reproduced in the accompanying notebook at Tab 53]

ii. The influence of the ICTR

Interestingly, element 2 of the crime of rape appears to be a codification of the ICTR's findings in the *Akayesu* case. In contrast, to *Furundzija*'s mechanical description of rape, the ICTR's *Akayesu* judgment takes a much more conceptualized view of the crime and focuses on the element of coercion involved in such an act. Like the ICTY, the ICTR in *Akayesu* looked to national jurisdictions and found no universal definition of rape.<sup>108</sup> The Trial Chamber defines rape as "any act of a sexual nature, committed on a person under circumstances which are coercive." It discounted the notion that there needed to be a showing of physical force in order to demonstrate coercion. Instead, it suggested that "[t]hreats, intimidation, extortion and other forms of duress" could constitute coercion.<sup>109</sup> According to *Akayesu*, coercion is implicit in any environment of armed conflict.<sup>110</sup> Thus, the ICTR's definition leaves open a wider door for acts constituting rape. In January 2000, the ICTR upheld this definition in the case of *Prosecutor v. Musema* stating that "the essence of rape is not in the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."<sup>111</sup> It is worth noting that in the *Delalic* case, the ICTY judges reexamined the elements of rape and sided with the more open-ended definition used by the ICTR.<sup>112</sup>

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<sup>108</sup> *Akayesu*, *supra* note 92, at 452. [Reproduced in the accompanying notebook at Tab 48]

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> ICTR, Trial Chamber, *Prosecutor v. Musema*, ICTR-96-13-A (January 27, 2000) para. 226 [Reproduced in the accompanying notebook at Tab 54]

<sup>112</sup> ICTY, Judgment, *The Prosecutor v. Zejnal Delalic and Others*, IT-96-21-T paras. 478 [Reproduced in the accompanying notebook at Tab 55]

### C. Conclusion

The EOC Annex of the ICC statute appears to take a middle road between the *Furundzija* and *Akayesu* approach. On the one hand, the first element includes a detailed description of body parts which must be involved in rape (adopted almost wholesale from the *Furundzija* judgment). On the other hand, the second element focuses on the issues of coercion and force. The ICC judges may decide to continue the trend of expanding rape's definition, by focusing on the element of coercion. Alternatively, they may adopt the more restrictive standard of the *Furundzija* Court. However, a restrictive approach would not be in line with the emerging trend of expansion. In addition, the language "a variety of other specified circumstances" of element 2 appears to leave discretion with the ICC to decide which accompanying circumstances might combine with a sexual act to qualify as rape.

### **2. Forced Pregnancy**

When faced with a case involving an allegation of forced pregnancy, the ICC judges should consider that they are more bound by the statutory language, than is the case with the other crimes. Unlike the other crimes, the definition of forced pregnancy is included in both the Statute and the EOC Annex. This distinction is highly indicative of intent to restrain the ICC in its interpretation of the crime because statutory language is usually binding on a court. The main concern of the negotiators was that the provision could be used to punish states for outlawing abortion. Accordingly, any such interpretation is expressly prohibited. Most importantly, the ICC should ensure that actual pregnancy, confinement, and intent to affect the ethnic population are present.

## A. Elements of Forced Pregnancy

### i. Summary of elements

Forced pregnancy is defined as a perpetrator or third person committing the crime of raping a woman with the intent of impregnating. Additionally, the perpetrator must have confined or deprived the pregnant woman of liberty with the goal of preventing her from ending the pregnancy. Finally, this crime must have the intent of affecting the ethnic composition of the population (of the victim) or carrying out other grave violations of international law.<sup>113</sup>

### ii. Negotiations

The forced pregnancy article raised concern among many groups. Several Catholic and Arab countries that outlaw abortion expressed fear that the crime of forced pregnancy could be used to prosecute them for prohibiting abortion or be used to coerce them into providing abortion services.<sup>114</sup> Pro-family groups sided with the Vatican, arguing that it was an attempt to criminalize any denial to a right of abortion.<sup>115</sup> Accordingly, the Holy See and the Vatican demanded modification of the language,<sup>116</sup> while pro-family groups advocated abandoning it altogether.<sup>117</sup> The Holy See, for example, initially proposed, and later tabled, replacing the term “forced pregnancy” with

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<sup>113</sup> EOC Annex, *supra* note 6, “forced pregnancy” [Reproduced in the accompanying notebook at Tab 2]

<sup>114</sup> Steains, *supra* note 17, at 366. [Reproduced in the accompanying notebook at Tab 33]

<sup>115</sup> C-FAM (Catholic Family and Human Rights Institute), *Rome Conference Ends Without Consensus For Creating International Criminal Court*, *Friday Fax*, 1/40. (18 July 1998), available at [http://www.c-fam.org/FAX/fax\\_1998/faxv1n40.html](http://www.c-fam.org/FAX/fax_1998/faxv1n40.html). [Reproduced in the accompanying notebook at Tab 25]

<sup>116</sup> Tauran, H.E. Mons. Jean-Louis, *The Defence of Life in the Context of International Policies and Norms*, (Speech of Archbishop Jean-Louis Tauran to Pontifical Academy for Life) (February 11, 2000) available at <http://www.holyseemission.org/11feb2000.html>. [Reproduced in the accompanying notebook at Tab 22]

<sup>117</sup> Steains, *supra* note 17, at 366. [Reproduced in the accompanying notebook at Tab 33]

the more limited “forcible impregnation.”<sup>118</sup> Conservative delegates felt this would be better because it emphasized that the criminality was in forcibly impregnating a woman, as opposed to coercing the woman to carry the baby to full term.<sup>119</sup> On the opposing side, states like Bosnia, Rwanda, and some Muslim states such as Azerbaijan and Turkey, joined with various western states in trying to convince these conservative delegates that it was not meant to force states into permitting abortion, but was necessary for punishing the heinous and terrible crime.<sup>120</sup> In addition, they asserted that the phrase “forcible impregnation” would not cover certain situations such as the one in Bosnia, where women were raped and detained in order to force them to bear “Serb” babies.<sup>121</sup> Bosnia issued a paper documenting the practice and calling for retention of enforced pregnancy as a separate crime in the Statute.<sup>122</sup>

After three weeks in Rome, an informal working group was formed to bring the opposing groups closer together and try to define forced pregnancy in a mutually satisfactory way.<sup>123</sup> In order to appease the dissenting conservative voices, the following sentence was added to the definition of forced pregnancy: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”<sup>124</sup> The second sentence was clearly inserted to protect the anti-abortion laws of the objecting countries. Additionally, the phrase “intent to affect the ethnic composition” of

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 367.

<sup>121</sup> *Id.* at 366.

<sup>122</sup> Oosterveld, *supra* note 18, at 33 [Reproduced in the accompanying notebook at Tab 29]

<sup>123</sup> Howell, *supra* note 22, at 36. [Reproduced in the accompanying notebook at Tab 31]

<sup>124</sup> Statute, *supra* note 2, art 7(3). [Reproduced in the accompanying notebook at Tab 1]



the population was incorporated into the elements of crime to allay the fears of those opposed to the incorporation of forced pregnancy into the statute.

### iii. Specific Provisions

Forced pregnancy is the only act of sexual violence that is explicitly defined in both the Statute and the EOC Annex. The definition contained in the actual Statute is identical to the definition contained in the EOC Annex. Because it is defined in the Statute itself, the definition is binding on the ICC. Three important features of the crime of forced pregnancy present. First, the definition requires that the woman be physically pregnant; the definition is not broad enough to cover attempts to make her pregnant.<sup>125</sup> Second, the woman must be detained or confined during the time she is pregnant.<sup>126</sup> Third, the crime incorporates a high internal intent requirement: the perpetrator must bring about the forced pregnancy with the intent to affect the ethnic composition of a population or to commit other grave violations of international law.<sup>127</sup> The legal harm in forced pregnancy is that women are kept pregnant by means of confinement, violating their rights to bodily integrity and privacy.<sup>128</sup> The effect of this condition is that these women are forced to carry and give birth to babies of a different ethnic group, or that they suffer inhuman treatment such as severe mental and bodily harm.<sup>129</sup>

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<sup>125</sup> Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUMAN RIGHTS L. REV. 625 (2003). [Reproduced in the accompanying notebook at Tab ]

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

## B. Recent Jurisprudence

There appears to be little specific case law from any of the ad hoc tribunals that explicitly examines the crime of forced pregnancy in a manner sufficient to help the ICC interpret the statutory language. In dicta, the *Akayesu* Court noted that measures intended to prevent births within the group would include such acts as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages were prohibited under Article 2 of the ICTR statute.<sup>130</sup> The ICTR also included deliberate impregnation in this list, if committed against a member of a patriarchal society where membership of a group is determined by the identity of the father.<sup>131</sup> In such a case, a woman of a particular group might be raped in order to deliberately impregnate her with a child who would consequently not belong to its mother's group. Other bodies have addressed forced pregnancy, including the World Health Organization,<sup>132</sup> Human Rights Watch,<sup>133</sup> and legal scholarship regarding access to abortion.<sup>134</sup>

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<sup>130</sup> *Akayesu*, *supra* note 92, at 507. [Reproduced in the accompanying notebook at Tab 48]

<sup>131</sup> *Id.* at para. 507.

<sup>132</sup> World Health Organization, Department of Reproductive Health and Research, *Considerations for Formulating Reproductive Health Laws*, Doc WHO/RHR/00.1 available at [http://www.who.int/reproductive-health/publications/RHR\\_00\\_1/RHR\\_00\\_1\\_contents.htm](http://www.who.int/reproductive-health/publications/RHR_00_1/RHR_00_1_contents.htm). *Human Rights and Reproductive Self-Determination*, Part I ("Forced pregnancy occurs when abortion following rape is legally denied, practically obstructed or unacceptable to victims themselves on religious or cultural grounds"). [Reproduced in the accompanying notebook at Tab 16]

<sup>133</sup> Human Rights Watch Press Release, *Kosovo Backgrounder: Sexual Violence as an International Crime*, May 10, 1999 available at [www.hrw.org/backgrounder/eca/kos0510.htm](http://www.hrw.org/backgrounder/eca/kos0510.htm). Defining forced pregnancy as "impregnation with the intent of forcing a woman to give birth to the rapist's child." [Reproduced in the accompanying notebook at Tab 23]

<sup>134</sup> Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion* 84 NW. U. L. REV. 484 (1990) ("Abortion prohibitions violate the [13th] amendment's guarantee of personal liberty, because forced pregnancy and childbirth, by compelling the woman to serve the fetus, creates 'that control by which

### C. Conclusion

Without a doubt, Forced Pregnancy is the most contentious provision included in the Statute. However, the contentious nature of the crime will be of little relevance to the ICC. It seems absurd to assume that the ICC would have used the Statute to punish states for criminalizing abortion. The mere inclusion of the article, however, will make it easier for the ICC to punish such heinous crimes. This crime is more prevalent than it might appear at first blush. It has occurred not only in Bosnia, but also in Yugoslavia where women were forced to bear children of a different ethnicity.<sup>135</sup> Women were held in rape camps and repeatedly raped until they became pregnant.<sup>136</sup> The inclusion of forced pregnancy was a clear victory for the Caucus and other such groups. The intent of the Caucus was not to impose sanctions on countries for disallowing abortions, but to prosecute the abuse of women. As such, this provision was a win-win situation for women and the ICC.

### 3. Sexual Slavery

In deciding if an act meets the criteria for sexual slavery, the ICC should be particularly concerned with locating evidence of a commercial exchange. While the Statute does not absolutely require a commercial transaction, the language and negotiation history strongly imply that it is an important element. Interestingly, however, past jurisprudence, found that a commercial transaction was not a requirement of sexual

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the personal service of one man [sic] is disposed of or coerced for another's benefit which is the essence of involuntary servitude.""). [Reproduced in the accompanying notebook at Tab 58]

<sup>135</sup> See generally, BEVERLY ALLEN, RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA (1996). [Reproduced in the accompanying notebook at Tab 59]

<sup>136</sup> *Id.*

slavery. The ICC may wish to follow this past jurisprudence, instead of the EOC Annex if it deems a commercial transaction unnecessary. The ICC should also look for evidence of a perpetrator exerting absolute control over a person, and that at least one act of a sexual nature occurred. Past jurisprudence indicates that an element of physical or psychological control must be present in order to make a finding of sexual slavery.

#### A. Elements of Sexual Slavery

##### i. Summary of elements

Sexual slavery recognizes that the perpetrators may be two or more people with a common criminal intent. The perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or all of the above, or by imposing on them a similar deprivation of liberty, such as forced work or by reducing a person to a servile condition. This conduct includes trafficking in persons, in particular of women and children. It also requires that the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>137</sup>

##### ii. Negotiations and specific provisions

The first element of the crime was influenced in large part by the definition of slavery used in the 1926 Slavery Convention.<sup>138</sup> The 1926 Convention defines slavery as

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<sup>137</sup> EOC Annex, *supra* note 6, “sexual slavery” [Reproduced in the accompanying notebook at Tab 2]

<sup>138</sup> Caucus, *supra* note 86 [Reproduced in the accompanying notebook at Tab 59]

“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>139</sup> The PrepCom, however, eventually decided that this definition was outdated and narrow.<sup>140</sup> The Caucus, in particular, objected to a full adoption of this definition because it required that women be treated as “chattel”<sup>141</sup> It asserted that adopting the definition wholesale would be inconsistent with the definition of Slavery in Article 7(2)(c) of the Statute, which did not require that the victim be reduced to chattel.<sup>142</sup> The PrepCom eventually conceded that the two definitions of enslavement and sexual slavery needed to be identical.<sup>143</sup>

In order to simplify and clarify, the definition contains the following list in element 1: “purchasing, selling, lending, or bartering” of a person might constitute sexual slavery. This list, however, is meant to be non-exhaustive and other crimes might also constitute sexual slavery.<sup>144</sup> Some delegations objected vehemently to this list because they thought it might restrict the crime of sexual slavery to those specific enumerated acts.<sup>145</sup> In particular, they objected because all of the enumerated acts carried with them

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<sup>139</sup> See Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 U.N.T.S. 253, Art 1. [Reproduced in the accompanying notebook at Tab 10]

<sup>140</sup> Steains, *supra* note 17, at 366. [Reproduced in the accompanying notebook at Tab 28]

<sup>141</sup> Women’s Caucus For Gender Justice, Women’s Caucus Advocacy in ICC Negotiations, *Priority Concerns Related to the Elements Annex* (Submitted to the 16-26 February 1999 Preparatory Committee for the International Criminal Court) [www.iccwomen.org/archive/icc/iccpc/021999pc/pconcerns.htm](http://www.iccwomen.org/archive/icc/iccpc/021999pc/pconcerns.htm) [Reproduced in the accompanying notebook at Tab 72 ]

<sup>142</sup> See *id.*

<sup>143</sup> Dormann, *supra* note 46, at 328. [Reproduced in the accompanying notebook at Tab 38]

<sup>144</sup> See *id.*

<sup>145</sup> NGO joint statement, *Maintain the Integrity of the Rome Statute*, available at <http://www.ngo.working.org>. [Reproduced in the accompanying notebook at Tab 60]

commercial connotations,<sup>146</sup> noting that the Nuremberg Tribunal had characterized some non-commercial situations as enslavement.<sup>147</sup> This broader approach was contested by several delegations during the negotiations.<sup>148</sup> As a compromise, footnote 53 was added on to the end of the Article.<sup>149</sup> The footnote states that in some situations “such deprivation of liberty” might constitute “forced labour or otherwise reducing a person to servile status...” The inclusion of the phrase “such as” before “purchasing, selling, lending, or bartering” gives the ICC a degree of discretion in deciding which crimes fall under the heading of sexual slavery. The primary focus, however, appears to be on a commercial exchange, as these are the only situations included within the article itself (as opposed to in the footnote). In addition, the language immediately following the enumerated list indicates that other such “similar deprivations of liberty” may be considered forms of sexual slavery. Accordingly, the emphasis is clearly on the commercial trade aspects of the crime, rather than on the “slavery” aspect. The footnote does indicate that the ICC may consider other non-commercial examples, but only in “some situations.” A separate footnote states that the crime may be committed by more than one person.<sup>150</sup> In other words, the deprivation of liberty can be committed by one

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<sup>146</sup> *See id.*

<sup>147</sup> *See id.*

<sup>148</sup> Dormann, *supra* note 46, at 328. [Reproduced in the accompanying notebook at Tab 38]

<sup>149</sup> *Id.*

<sup>150</sup> EOC Annex, *supra* note 6, FN 17, Art. 7(1)(2) (“Given the Complex nature of the crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose”) [Reproduced in the accompanying notebook at Tab 2]

person, and the sexual acts by another, such that both parties are responsible for the single crime of sexual slavery.<sup>151</sup>

#### B. Relevant Jurisprudence

Some additional guidance for the crime of sexual slavery might be found in the ICTY judgment in the *Kunarac and Others* case where the Trial Chamber discussed the elements of the crime against humanity of enslavement.<sup>152</sup> In the case, the ICTY sentenced three ethnic Serbs to prison for their abuse of women at a “rape camp” near Foca, a small Bosnian town southeast of Sarajevo. Among other things, the defendants were charged with the crime of enslavement under the ICTY statute. This decision was the first by an international tribunal to result in convictions for enslavement as a crime against humanity. The Tribunal defined enslavement broadly as “a crime against humanity in customary international law consist[ing] of the exercise of any or all of the powers attaching to the right of ownership over a person.”<sup>153</sup> Factors to be taken into consideration in determining whether enslavement was committed included “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>154</sup> Although two of the women who testified were sold as chattels by Radomir

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<sup>151</sup> Dormann, *supra* note 46, at 329. [Reproduced in the accompanying notebook at Tab 38]

<sup>152</sup> *Kunarac*, *supra* note 52, at paras 515-43. [Reproduced in the accompanying notebook at Tab 52]

<sup>153</sup> *Id.* at 539.

<sup>154</sup> *Id.* at 543.

Kovac for 500 Deutsch Marks each, the Tribunal found that enslavement of the women did not necessarily require the buying or selling of a human being.

### C. Conclusion

Commentators have pointed out that the first element of the crime may lead to an overly restrictive interpretation of slavery.<sup>155</sup> Indeed, the examples used to demonstrate the types of activity that may amount to slavery are largely commercial in nature, potentially limiting the scope of the crime unnecessarily. However, the ICC is free to decide that in any case where women are recruited, transported, transferred, sold or purchased in order to work in the sex industry, this amounts to a crime of sexual slavery even absent a monetary exchange. ICTY jurisprudence may bolster such an assertion.

## **4. Enforced Prostitution**

While similar to sexual slavery in many ways, the ICC should note that enforced prostitution does not place as much emphasis on a commercial exchange. Although a perpetrator's expectation of an "advantage" is a requirement, it need not be monetary in nature. While a sexual act is a requirement, the definition is broad, and may include acts other than oral, vaginal, or anal sex. In addition, both the elements and the relevant jurisprudence indicate that captivity or restriction of movement should be present.

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<sup>155</sup> See, e.g., Christopher Keith Hall, *The First Five Sessions of the Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L L., 2000, p. 781. ("The replacement of the word "includes" in the Rome Statute by "such as" in the Elements of Crimes changes the broadly worded illustrative language into a more restrictive list where, if the International Criminal Court were to follow it, only conduct in the list or similar conduct, which is largely commercial in nature, would constitute enslavement. One government delegate involved in the drafting of this provision has contended that the term "such as" makes "it clear that the list is illustrative and open-ended") [Reproduced in the accompanying notebook at Tab 61]



## A. Elements of Enforced Prostitution

### i. Summary of elements

Enforced prostitution is defined as a perpetrator causing one or more persons to engage in one or more acts of a sexual nature, including any type of sexual act such as nudity or masturbation. It is not limited to acts of penetration. Prostitution as a crime against humanity is carried out by force or by threat of force or coercion, such as that caused by fear of “violence, duress, detention, psychological oppression or abuse of power,” against such person or third persons, or by taking advantage of a coercive environment or incapacity of a person or persons’ incapacity to give genuine consent. Additionally, the perpetrator or another person must have obtained or expected to obtain some type of advantage, not only pecuniary, in exchange for or in connection to the acts of a sexual nature.<sup>156</sup>

### ii. Negotiations

Of major controversy during the negotiations was distinguishing enforced prostitution from the provisions on sexual slavery and other forms of sexual violence. The Caucus noted, for example, that the Special Reporter on System Rape, Sexual Slavery and Slavery-Like Conditions During Armed Conflict noted in her June 1998 report, that nearly all situations termed “enforced prostitution” would amount to sexual

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<sup>156</sup> EOC Annex, *supra* note 2, “enforced prostitution” [Reproduced in the accompanying notebook at Tab 2]

slavery.<sup>157</sup> As such, it was difficult to convince some delegates that there was reason to place enforced prostitution in a separate category. The Caucus expressed concern that if enforced prostitution merged with sexual slavery, the latter would lose its separate identity and unique elements within the statute, hence limiting the scope of sexual slavery.<sup>158</sup> Accordingly, the Caucus set out to find a meaningful distinction between sexual slavery and enforced prostitution: “Our considered suggestion at this point is that the issue of enforced prostitution be dealt with by taking note of the problem that the term has largely been used improperly in the past as a euphemism for sexual slavery and that working out an appropriate definition should be taken up at the second round of negotiations to permit more time for analysis and discussion.”<sup>159</sup> The main distinction appears to be the lack of emphasis placed on the commercial exchange element which is so integral to the definition for sexual slavery.

As was the case with sexual slavery, a point of particular contention was whether the phrase “the perpetrator or another person obtained or expected to obtain pecuniary advantage in exchange for or in connection with the acts of a sexual nature” was an element of enforced prostitution or not.<sup>160</sup> Some delegates were opposed to making a commercial transaction an element of the crime.<sup>161</sup> Eventually, the PrepCom agreed to

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<sup>157</sup> Women’s Caucus For Gender Justice, Women’s Caucus Advocacy in ICC Negotiations, Priority Concerns Related to the Elements Annex (Submitted to the 16-26 February 1999 Preparatory Committee for the International Criminal Court) available at [www.iccwomen.org/archive/icc/iccpc/021999pc/pconcerns.htm](http://www.iccwomen.org/archive/icc/iccpc/021999pc/pconcerns.htm) [Reproduced in the accompanying notebook at Tab 45]

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Dormann, *supra* note 46, at 329. [Reproduced in the accompanying notebook at Tab 38].

<sup>161</sup> *Id.*

allow such a commercial requirement, but compromised to adjoin it with the phrase: “or other advantage”,<sup>162</sup> suggesting that enforced prostitution does not exist absent a transaction of some sort.

### B. Relevant Jurisprudence

While the ICTY and ICTR tribunals have not addressed the issue of enforced prostitution in great deal, case law does exist to guide the ICC in its process of interpretation. For example, Washio Awochi was tried by the Netherlands Temporary Court-Martial at Batavia for forcing Dutch women into prostitution during the Japanese occupation of Batavia.<sup>163</sup> The accused, which ran a club restaurant, was charged with enforced prostitution and found guilty.<sup>164</sup> The *acts rues* was defined in Art. 1(7) of the Statute Book Decree No. 44 of 1946 on War Crimes: “Abduction of girls and women for the purpose of enforced prostitution.” The term “enforced” was specified as follows: “[The women] had to take up residence in a part of the club shut off for that purpose and from which they were not free to move.” If they wished to quit they “were threatened with Kelpie (Japanese Military Police), which threats . . . were rightly considered as being synonymous with ill-treatment, loss of liberty and worse.”<sup>165</sup> The threats were so serious that they were “forced through them to give themselves to the Japanese visitors ...against

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<sup>162</sup> *Id.*

<sup>163</sup> Neth. Temp. Ct. Martial Batavia, *In re Awochi*, 1946, (in United Nations War Crimes Commission, 13 Law Reports of Trials of War Criminals 122 (1949). [Reproduced in the accompanying notebook at Tab 62]

<sup>164</sup> *Id.* at 326.

<sup>165</sup> *Id.*

their will.”<sup>166</sup> Thus, the element of captivity will be an important consideration for the ICC because it can be accomplished through non-physical means. The case suggests that the women were “threatened,” but does not indicate that there was any physical violence. Accordingly, the ICC may wish to interpret the element of “incapacity” in enforced prostitution as being accomplished through psychological oppression *or* physical violence.

### C. Conclusion

While the extent to which forced pregnancy might arise in a modern context remains unclear, it has been a significant crime in recent history. During World War II, hundreds of thousands of mostly Asian women were tricked or otherwise coerced into serving the Japanese army as prostitutes in the wartime brothels of Asia during the Japanese occupation of Korea, China and other parts of South East Asia.<sup>167</sup> Forced into sexual slavery by Japan and raped dozens of times daily by Japanese soldiers, the euphemistically named “comfort women” have faced lives of enduring shame.<sup>168</sup> Accordingly, it is not inconceivable that the ICC will be faced with a similar situation.

## 5. Enforced Sterilization

This crime has come up most often in the context of experiments conducted by the Nazi regime. The elements of crime show particular concern with the permanence of the birth-control measures. That is, the ICC judges should look for evidence that a perpetrator attempted to *permanently* alter the biological capacity of a woman or man,

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<sup>166</sup> *Id.*

<sup>167</sup> Kelly D. Askin, *Comfort women: Shifting shame and stigma from victims to victimizers*, 1 INT’L CRIM. L. REV., 5, 28 (2001) [Reproduced in the accompanying notebook at Tab 63]

<sup>168</sup> *Id.*

rather than just imposed a temporary restraint on a women's ability to reproduce. The ICC judges should also look for evidence that this was without the victim's genuine consent.

#### A. Elements of Enforced Sterilization

##### i. summary of elements

Enforced sterilization is defined as the perpetrator depriving one or more persons of their biological reproductive capacity. The measure used must be illegitimate and against the will of the person; the conduct must have been unjustified as a medical or hospital treatment of the victim or victims concerned or carried out without their genuine consent, which does not include consent obtained through deception.<sup>169</sup>

##### ii. Negotiation History

Part of the difficulty in adopting this article was that some states were opposed to the inclusion of any form of birth-control as enforced sterilization. China, in particular, expressed concern over a footnote included in the provision, which initially read: "this does not include birth control measures with short-term effects."<sup>170</sup> China wanted to ensure that the ICC did not have jurisdiction to affect its policy of population control.<sup>171</sup> China proposed, and the PrepCom eventually accepted, the phrase "non-permanent" instead of "short-term." Thus, in the final draft the footnote reads "does not include birth

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<sup>169</sup> EOC Annex, *supra* note 6, "enforced sterilization" [Reproduced in the accompanying notebook at Tab 2]

<sup>170</sup> Steains, *supra* note 17, at 368. [Reproduced in the accompanying notebook at Tab 28]

<sup>171</sup> *Id.*

control measures with non-permanent effects in practice,” largely as a result of China’s objection to the possibility that the provision could be read to imply that every form of birth control might amount to enforced sterilization. The footnote indicates that temporary birth control methods that do not remain in effect throughout the life of the person are not covered by this type of crime (even if they are imposed in an obligatory manner without the consent of the victim). While birth control measures with a “non-permanent effect in practice” would not qualify as enforced sterilization, repeated short-term birth control measures, which would have a permanent effect in practice would be covered by the adopted wording.<sup>172</sup>

The issue of consent also became proved troublesome during the negotiations. The Caucus was worried that “consent” was too loose a term.<sup>173</sup> In particular, the Caucus wanted to make clear that the consent must be genuine (i.e., that someone could not be tricked into consenting). Some delegations argued that “genuine consent” should be replaced with “voluntary and informed consent” to avoid the possibility that someone could be tricked into consenting.<sup>174</sup> Accordingly, a footnote indicating that “genuine consent” for this crime does not include consent obtained through deception appears in the final draft.

## B. Relevant Jurisprudence

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<sup>172</sup> Dormann, *supra* note 46, at 331. [Reproduced in the accompanying notebook at Tab 38]

<sup>173</sup> Women’s Caucus, *positionary statement*, available at [www.iccwomens.caucus.archive.html](http://www.iccwomens.caucus.archive.html) [Reproduced in the accompanying notebook at Tab 64]

<sup>174</sup> Dormann, *supra* note 46, at 331. [Reproduced in the accompanying notebook at Tab 38]

The ad hoc tribunals have not examined the material elements of enforced sterilization in any great depth. However, the issue has been addressed in some post-Second World War trials in the context of medical experiments,<sup>175</sup> although the elements of crime have never been made explicit or even examined in depth. Accordingly, the ICC should rely on the EOC Annex, as well as the negotiation history in interpreting this crime.

### C. Conclusion

While the crime of enforced sterilization may not be as pressing an issue as that of rape or sexual slavery, it is important that such conduct is outlawed in an international document such as the Statute. Clearly, the drafters did not intend to criminalize the conduct of countries like China, which has a national policy of birth control. The crime is meant to punish those who have deprived a person of his/her reproductive capacity.

## **6. Other forms of Sexual Violence**

In examining the crime of other forms of sexual violence, the ICC should be aware that this is the one crime of sexual violence defined differently by the EOC Annex as it applies to war crimes and crimes against humanity. The inclusion of the crime is important because it ensures that the ICC is not limited in its jurisdiction over crimes of sexual violence. Any non-enumerated crime of sexual violence that meets the criteria for this crime will fall under the ICC's jurisdiction.

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<sup>175</sup> *Id.* at 331.

## A. Elements of Other Forms of Sexual Violence

### i. summary of elements

Any other form of sexual violence is defined as the perpetrator committing an act of a sexual nature against one or more persons or causing such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against the victim or third persons, or by taking advantage of a coercive environment or such person or persons' incapacity to give genuine consent. Also, such conduct must be of comparable gravity to other crimes indicated in Article 7(1)(g) of the Statute, if constituting a crime against humanity, or be of comparable gravity to a grave violation of the Geneva Conventions, if constituting a war crime.<sup>176</sup>

### ii. Negotiations

The first element of the crime indicates two different situations for this broad provision. The first includes situations where the perpetrator him/herself committed a sexual act against the victim; the second for when the perpetrator forces or coerces the victim to perform sexual acts. Otherwise, it is similar in scope to the definition of other crimes, such as rape, in that the aggressor use “force” “threat of force” or “ coercion” to arouse fear in the victim in order to accomplish sexual violence.

It is essential to note that the elements are slightly different for the crime to be prosecuted as a crime against humanity than they are for a war crime. The EOC Annex

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<sup>176</sup> EOC Annex, supra note 6, “ other forms of sexual violence” [Reproduced in the accompanying notebook at Tab 2]



specifies that for crimes against humanity, the conduct must be comparable to the other crimes of sexual violence listed in the Statute. That is, it must be on par with rape, enforced prostitution, and sexual slavery to be considered an “other form of sexual violence.” In the context of war crimes, it need be comparable to that of a “grave breach of the Geneva Convention.” Considerable debates took place with regard to the war crime of sexual violence. While some delegations argued that this formulation was intended only to indicate that gender crimes could already be prosecuted as grave breaches, others thought that the conduct must constitute one of the crimes defined in Art. 8(2)(a) –the specifically named grave breaches of the Geneva Convention – and in addition involve violent acts of a sexual nature.<sup>177</sup> The majority of delegates, however, felt that the statutory formulation was meant to indicate the seriousness of the crime, and not as a factor requiring it also to be a grave breach listed in Art. 8(2)(a).<sup>178</sup> Some commentators have suggested that examples of crimes that might meet the criterion for this category are forced nudity and sexual mutilation.

#### B. Relevant jurisprudence

The ICTY and ICTR have convicted perpetrators of acts of sexual violence such as forced nudity<sup>179</sup> and sexual mutilation,<sup>180</sup> under the heading of crime against “inhumane treatment.” The elements of the crimes of forced nudity and sexual mutilation

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<sup>177</sup> Dormann, *supra* note 46, at 332. [Reproduced in the accompanying notebook at Tab 38]

<sup>178</sup> *Id.*

<sup>179</sup> Akayesu, *supra*, note 92, at para. 697. [Reproduced in the accompanying notebook at Tab 48]

<sup>180</sup> Tadić, *supra* note 53, at para. 729. [Reproduced in the accompanying notebook at Tab 45]

focus on situations where the perpetrator commits sexual acts against the victim and where the perpetrator caused the victim by force, threat of force or coercion to perform sexual acts.<sup>181</sup> In *Akayesu*, the ICTR held that:

Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence.<sup>182</sup>

Accordingly, this crime has been used to cover situations where there is no physical contact, but where “threats” and other coercive circumstances were present. As such, this crime may cover a broad scope of situations.

### C. Conclusion

When states have defined sexual violence as crimes against humanity and war crimes under national law, they have sometimes criminalized only rape and excluded other forms of sexual violence.<sup>183</sup> The inclusion of other forms of sexual violence as crimes against humanity and war crimes will allow the ICC to prosecute situations where there is no overt act of sexual violence, but where a person’s sexual autonomy has still been violated. The provision serves to broaden the ICC’s jurisdiction and is a significant victory for women.

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<sup>181</sup> *Akayesu*, *supra* note 92, at 598. [Reproduced in the accompanying notebook at Tab 48]

<sup>182</sup> *Id.* at 688.

<sup>183</sup> Martina Vandenberg, *Complicity, corruption and human rights’ trafficking in human beings*, 34 CASE W. RES. J. OF INT’L L., 310, 323. (1999)[Reproduced in the accompanying notebook at Tab 68]

## **6. Persecution based on gender**

The inclusion of persecution based on gender in the Statute is an explicit recognition that women may be subject to persecution as a class in the same way that racial and ethnic groups have been throughout history. As is the case with the definition of “gender” (as discussed above), the ICC’s most important decision in interpreting the language will be deciding whether or not the meaning of “gender” can be expanded to include persecution towards gays, lesbians, bisexuals, and transgendered people.

### **A. Elements of Persecution**

#### **i. summary of elements**

Persecution is classified only as a crime against humanity and is defined as the perpetrator targeting a person or persons by reason of their membership in a group or collectivity or targeting the group or collectivity as such, including not only politically, racially, nationally, ethnically, culturally, and religious based persecution, but also persecution for reason of gender.<sup>184</sup>

#### **ii. Negotiations**

The biggest concern about this provision was related to the definition of gender. Many conservative delegates feared the term “gender persecution” could be interpreted to include persecution over “gender nonconformist” groups or gays and lesbians (this is

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<sup>184</sup> EOC Annex, supra note 6, “persecution” [Reproduced in the accompanying notebook at Tab 2]

discussed earlier in the memorandum, and will not be repeated here).<sup>185</sup> The definition of persecution adopted makes clear that a denial of human rights is a requirement for this crime. However, not every denial of human rights of women constitutes persecution on the basis of gender. Some states were concerned that the crime of persecution was too vague, and might be interpreted to include institutionalized discrimination.<sup>186</sup> In order to placate these states, the fourth element was added to the Statute.<sup>187</sup> This element requires persecution to be connected with another serious crime within the jurisdiction of the ICC. Persecution as a crime against humanity normally exists independently of any other crime, and this has been recognized by many other legal bodies, including the ICTR and ICTY.<sup>188</sup> The fourth element, however, makes clear that this will not be the case in the ICC. Persecution based on gender alone does not constitute a crime within the ICC.

Persecution based on gender does not need to result in physical harm. Element 1 indicates that a persons must be deprived of their fundamental rights, but does not indicate that they must be subject to any physical harm. Accordingly, acts of mental, social, or economic harm could potentially qualify as an act of persecution.

## B. Recent jurisprudence

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<sup>185</sup> Oostervald, *supra* note 18, at 46 [Reproduced in the accompanying notebook at Tab 29]

<sup>186</sup> Copelan, *supra* note 59, at 217. [Reproduced in the accompanying notebook at Tab 29]

<sup>187</sup> *Id.*

<sup>188</sup> ICTY Statute, *supra* note 2, art 7; [Reproduced in the accompanying notebook at Tab 2]  
ICTR Statute, *supra* note 3, art 3. [Reproduced in the accompanying notebook at Tab 2]

While racial persecution is included in the statutes of many tribunals, there appears to be little or no case law on the specific issue of gender persecution in any of the tribunals or international legal bodies.

### C. Conclusion

Previous definitions of persecution tended to focus not on gender, but on race, ethnicity, or nationality.<sup>189</sup> Thus, the inclusion of gender emerges as a result of a growing recognition that women may be subject to persecution as a class. It may be important for the ICC to consider an expansive definition of gender in interpreting the Statute, as gays as a class are often subject to persecution.<sup>190</sup> However, the ICC may be ultimately restricted in its jurisdiction over this crime, due to the nexus requirement of the fourth element.

## **III. Structural Mechanisms for Victims and Witnesses**

Apart from the various provisions recognizing gender-related crimes, the Statute also provides special protections for victims and witnesses of gender-related violence. Ensuring proper, gender-sensitive treatment of victims and witnesses was one of the main concerns of many governments and NGOs during the Conference.<sup>191</sup> The Statute recognizes three important principles with regards to victims and witnesses: victim

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<sup>189</sup> A Widney Brown & Laura Grenfell, *The international crime of gender-based persecution and the Taliban*, 4 MELB. J. INT'L L., 340, 347 (2003). [Reproduced in the accompanying notebook at Tab 69]

<sup>190</sup> Some estimates suggest that nearly 1 million homosexuals were killed under the Nazi regime.

<sup>191</sup> Valerie Oostervald, *Integrating Gender into the International Criminal Court: Putting Theory into Practice, Status of Women Canada*, available at [http://www.swc-cfc.gc.ca/resources/gba/gba-010601-dfait\\_e.html](http://www.swc-cfc.gc.ca/resources/gba/gba-010601-dfait_e.html). [Reproduced in the accompanying notebook at Tab 70]

participation in the proceedings, protection of victims and witnesses and the right to reparations. This is particularly important for women, who may come from countries where crimes of sexual violence render a woman impure and have potential to ostracize her from her community (or worse). Without built-in mechanisms to protect and enable these women, it would be nearly impossible to prosecute many acts of sexual violence.

#### A. Protection

The statutory language indicates that the organs of the ICC should take proactive measures to provide for the care of victims, rather than just utilizing them for evidentiary purposes and then ushering them back into their environment. Accordingly, the ICC assumes some responsibility for both the trauma of testifying, as well as the trauma of the sexual violence itself. The Statutory language is carefully worded to ensure that victims are not lost in the process.

Article 43(6) provides for the establishment of a Victims and Witnesses Unit in the ICC's registry. Article 43(6) also requires that the Unit have staff with expertise in trauma related to crimes of sexual violence available at all times.<sup>192</sup> It will provide protective measures, security arrangements, counseling and "other appropriate assistance" to victims, witnesses "who appear before the Court."<sup>193</sup> The Unit will not take a passive role in the ICC process: Article 68 (4) authorizes the Unit to advise the Prosecutor and the rest of the ICC on measures related to sexual violence.

It will be important to note that these protective measures are not limited to the proceedings, as the language might indicate. Article 34 indicates that "the Court" is

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<sup>192</sup> Statute, *supra* note 2. art. 68(3). [Reproduced in the accompanying notebook at Tab 1 ]

<sup>193</sup> *Id.* at art. 43(6).

composed of: “(a) the Presidency; (b) an Appeals Division, a Trial Division and a Pre-Trial Division; (c) the Office of the Prosecutor; and (d) the Registry.” Therefore, victims and witnesses are entitled to protections during all stages. In addition, Article 43(6) indicates that the ICC must offer such protections to “others at risk.” Accordingly, the Statute protects family members and other dependants, in addition to the victims.

#### B. Participation

Article 68 allows victims and witnesses to participate in ICC proceedings during important stages. First it should be noted that victims and witnesses are entitled to legal assistance throughout the proceedings.<sup>194</sup> Article 68(3) allows for their views and concerns to be presented to the ICC “when appropriate,” as long as they are not “prejudicial to or inconsistent with the rights of the accused.” Victims have the right to apply to the Registrar in order to be admitted as participants in a given process.<sup>195</sup>

Victim participation will be allowed under three circumstances:

- (1) There is a personal interest of the victim to intervene in the proceedings,
- (2) There is no threat to the rights of the accused and to a fair and impartial trial, and
- (3) Opportunities shall be provided at appropriate stages of the proceedings for the views and concerns of the victim to be presented and considered.<sup>196</sup>

Victims shall be assisted in the proceedings by legal representatives who can pursue the best interests of the victims.<sup>197</sup> Rule 92 specifies that victims and their legal representatives must be notified of important procedural developments in their case. In

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<sup>194</sup> *Id.* at art. 68(3)

<sup>195</sup> Rules of Procedure and Evidence Annex, rule 89.[hereinafter RPE Annex] [Reproduced in the accompanying notebook at Tab 3]

<sup>196</sup> Statute, *supra* note 2, art. 68(3).

<sup>197</sup> RPE Annex, *supra* note 195, at 90 & 91.

addition, Rules 91 and 93 allow a victim's legal representative to make timely interventions on behalf of the victims, including the possibility of making opening and closing statements and posing questions to witnesses.

### C. Reparations

Article 75 of the Statute authorized the ICC to establish methods for reparations to victims, including restitution, compensation and rehabilitation.<sup>198</sup> The ICC is authorized to determine the scope and extent of any damage, loss and injury to victims, and is bound to state the principles upon which it is acting.<sup>199</sup> Rules 94 to 99 establish the procedures for making reparations to victims. The ICC may order a convicted person to pay fines to a victim.<sup>200</sup> Alternatively, the funds can be paid directly from a Trust Fund (established in Art 79) established for the benefit of the victims and their families by the ICC.<sup>201</sup> In general the ICC should consider such motions for compensation only upon request.<sup>202</sup> However, the ICC may order such reparations to be paid upon its own motion in "exceptional" circumstances.<sup>203</sup>

## IV. CONCLUSION

The ICC stands at a unique place in history because it has the power to set important precedent relating to crimes of sexual violence for years to come. The ICC

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<sup>198</sup> Statute, *supra* note 2, art. 75 (1). [Reproduced in the accompanying notebook at Tab 1]

<sup>199</sup> *Id.*

<sup>200</sup> Statute, *supra* note 2, art 75(2). [Reproduced in the accompanying notebook at Tab 1]

<sup>201</sup> *Id.* at arts. 75(2) and 79(1).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



essentially has three sources to draw from in making decisions regarding sexual violence: the EOC Annex, the negotiation history, and the precedent from other tribunals. While the use of any of these sources will prove fruitful to the ICC, none are dispositive or authoritative. The judges may pick and choose whatever they feel will be most beneficial to their interpretation.

The ICC will likely be examining some of the crimes discussed in this memorandum in the near future. ICC prosecutors have already begun investigating the crimes being alleged in Darfur, which include allegations of mass rape.<sup>204</sup> It will be important for the ICC to bear in mind that the Statute was drafted by nearly one hundred and sixty states, as well as a wide variety of NGO's and special interest groups. Accordingly, the final version represents a compromise among groups with opposing viewpoints and perspectives. In terms of "gender", however, it appears that feminist groups and their supporters were often victorious in persuading the PrepCom to adopt their perspective. As such, the ICC is free to take an expansive view of gender-specific provisions interpreting vague language with an eye towards feminist concerns.

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<sup>204</sup> Darfur, supra note 97. [Reproduced in the accompanying notebook at Tab 51]



