

RAPE AT ROME: FEMINIST INTERVENTIONS IN THE CRIMINALIZATION OF SEX-RELATED VIOLENCE IN POSITIVE INTERNATIONAL CRIMINAL LAW†

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This Article examines the work of organized feminism in the formation of new international criminal tribunals over the course of the 1990s. It focuses on the statutes establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). It offers a description of the evolving organizational style of feminists involved in the legislative processes leading to the establishment of these courts, and a description of their reform agenda read against the outcomes in each court-establishing statute. At each stage, the Article counts up the feminist victories and defeats, giving (I hope) a clear picture of how “feminist” the resulting codes really are.

The goal is to produce an assessment of the ideological/political investments that feminists brought to their work on the statutes for the international criminal tribunals (ICTs) and the ICC, and of the degree to which the statutory regimes contain rules that allow participants in adjudication under these statutes to put those ideological/political investments into action.

This Article is one of a series. In an essay recently published in the *Melbourne Journal of International Law*, I read representations of rape both in a literary text and in law reform sought by feminists in the prosecution and adjudication of actual cases in the ICTY and ICTR.¹ In yet another paper currently in draft, I examine the litigation and adjudication of the ICTs and the prosecutorial output of the ICC to date in far more detail than I attempt in the *Melbourne* essay, with the same goals that I pursue in the present Article’s examination of statutory rulemaking.²

My conclusions in this Article are two. First, feminist organizational style and capacity evolved rapidly over the course of the 1990s. Second, though there were some disagreements among the feminists involved, the organizational style was overwhelmingly coalitional, resulting in a literary “trace” of feminist work that is almost devoid of manifest internal conflict. The consensus that emerged as the feminists’ joint representation of their worldview, argument repertoire, and reform agenda was not, as one might expect, a median liberal feminist view that split the difference between conservative and leftist feminist ideologies. Instead, the manifest consensus view was an updated radical feminism, strongly committed to a structuralist understanding of male domination and female subordination. There was some tension on a few issues between structuralist and liberal-individualist feminists (a distinction I

1. Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT’L L. 78 (2008) [hereinafter Halley, *Rape in Berlin*].

2. To be entitled, *Rewriting Rape: Feminist Reforms in the Prosecution and Adjudication of Sexual Violence in Armed Conflict*.

will describe in detail below),³ but it was muted by the coalitional style adopted by feminists and compromised usually in the direction of structuralist rule choices.

INTRODUCTION TO "GOVERNANCE FEMINISM"

Chantal Thomas, Prabha Kotiswaran, Hila Shamir, and I have described a new feminist organizational style that has evolved over the course of the 1990s as Governance Feminism (GFeminism).⁴ We developed this term in part because it captures the strong resemblance of the new, muscular non-governmental organization (NGO) formations adopted by feminists to the prescription for political engagement with law produced by the "new governance" (NG) school.⁵ Amy Cohen describes the project of the NG literature as follows:

[N]ew governance proponents aim to design a wide-scale problem-solving praxis that is both maximally efficient and normatively (democratically) legitimate. They envisage myriad individual stakeholders grouped into "problem-solving 'publics'"

3. See *infra* Part II.D.b.iv.

4. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 337 (2006).

5. See *id.* at 340–42 (discussing the "new governance" (NG) project as it relates to GFeminism). See generally DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (Archon Fung & Erik Olin Wright eds., 2003); LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006); Joshua Cohen & Charles F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 313–42 (1997); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267–473 (1998); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 543–675 (2000); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 261–327 (2004); Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289 (Christian Joerges & Renaud Dehousse eds., 2002); Bradley C. Karkkainen, *"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 471–97 (2004); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 183–304 (2003); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 342–470 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1016–1101 (2004); Joanne Scott & Susan P. Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 565–94 (2007); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 127–212 (2004); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 458–568 (2001).

... that negotiate about issues of social concern and that openly compare their learning with and against other problem-solving publics. By coordinating and monitoring (but not defining or driving) these horizontal processes from above, moreover, new governance proponents aim to ensure that these local deliberations are inclusive, transparent, justified by a record of demonstrable reason, and progressively evolve towards maximally informed, collaborative, and efficient solutions.⁶

While dissenting from the sunny optimism about NG formations (we were more skeptical that norm follows form in any necessary way),⁷ we did think that the literature captured something important, descriptively, about the newness and the complex, fluid, temporally variable, and networked rather than pyramidal character of NG organizational styles. In particular, we recognized the complex way in which NG formations invaginate the State with non-state elements and their porosity to NGOs aiming to advance specific social interests. GFeminism has grown up along with NG, and surely not accidentally, has co-invented its most salient features.

We also noted the paradox that feminists working on male sexual wrongs against women in the NG mode nevertheless imagine the international and national legal orders as heavy, consolidated, top-down sovereign powers. Their ambition is to wield sovereign power from on high, and to use it to produce absolute results.⁸ In Foucault's terms, they have not learned—they do not *want* to learn—how to cut off the head of

6. Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 514 (2008).

7. See *id.* (locating blindspots shared by the NG literature and new work on negotiation as development strategy); William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CANADIAN J.L. & JURISPRUDENCE 101 (2004) (criticizing the NG assumption that the supposed democratic dimensions of NG will also be progressive).

8. Of course, male domination through rape and other sexual wrongs is not the only focus of international feminist engagement, and the legal modalities to which they have turned for remedial strategies are as diverse as the international legal order. See HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca J. Cook ed., 1994) (demonstrating the awakening of new feminist energy in international law directed at problems as diverse as HIV/AIDS, structural adjustment, land reform, marriage rules, and abortion); INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS; TEXT AND MATERIALS 885-967 (Henry Steiner & Philip Alston eds., 1996) (providing an overview of human rights, including many feminist interventions and achievements that are not about sexual violence and that do not use criminal law as their remedial model); RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda G. Dallmeyer ed., Am. Soc'y of Int'l Law 1993); see also Valerie L. Oosterveld, *The Canadian Guidelines on Gender-Related Persecution: An Evaluation*, 8 INT'L J. REFUGEE L. 569, 570 (1996) (classifying women as a distinct sub-class of refugees and establishing rules for their recognition as refugees on the ground that they have fled gender-related persecution).

the king. They seek to wield the sovereign's scepter and especially his sword. Criminal law is their preferred vehicle for reform and enforcement; and their idea of what to do with criminal law is not to manage populations, not to warn and deter, but to *end impunity* and *abolish*.

Elizabeth Bernstein has done extensive participant-observation field work on the coalition for abolition of "sex trafficking" between feminists organized as what Thomas, Shamir, Kotiswaran, and I call GFeminism, on one hand, and religious conservatism, on the other. She calls the resulting feminist engagement with positive law *carceral feminism*—that is, "the commitment of abolitionist feminists to a law and order agenda."⁹ Kotiswaran, Shamir, Thomas, and I hypothesized that these descriptors would match the ideological stance of GFeminism working both on trafficking reforms, and on reforms relating to rape within two intersecting branches of international law, international humanitarian law (IHL) and international criminal law (ICL). This Article argues that they do work well in the IHL and ICL contexts.

But something unique happened in GFeminist involvement in the criminalization of sexual wrongs over the course of the 1990s, something different from what we discovered on the sex-trafficking side of feminist activism. As Thomas indicated in her contributions to our article, GFeminists were in complete agreement that women selling sex should be immune from punishment, but they disagreed fundamentally beyond that. Some of them were structuralists, committed to the view that prostitution or sex work was equivalent to sexual slavery, could not be meaningfully consented to, and should be abolished.¹⁰ Other feminists took a different position, which Thomas dubbed individualist, committed to the views that sex work could reflect a woman's considered judgment about her best options. For these feminists, only the harmful forms of sex work and only the bad actors in it should be criminalized.¹¹ Still other feminists saw sex work as *work* and sought to legalize and (sometimes) to regulate it.¹² To be sure, the latter were not important players in the development of the current international regimes governing "sex trafficking," but they are an important part of feminist theory and politics, and are politically involved in grassroots and state-based organizing of sex workers as workers. However important the sex-work position was in

9. Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism"*, 18 *DIFFERENCES* 128, 143 (2007).

10. See Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 347–60 (providing an analysis leading to the following taxonomy of feminist positions on trafficking in the 1980s and 1990s, both ideological and legal).

11. *Id.*

12. *Id.*

feminist politics and local struggles, the contest in *international law* was between the structuralists and the individualists.

My most important finding about the substantive politics of feminism in the formation of the ICTs and the ICC: almost without exception, the consensus feminist stance that almost completely dominates the law review literature and pervades the activist literature is structuralist-feminist. Overwhelmingly, the structuralist-feminist worldview animates both argumentation and rule preference.

There are three sub-findings to note here: the fact of near-seamless performance of consensus; the radicalism of the position that became the object of this consensus; and the placid calm with which male international law elites from the West received this GFeminism as the voice of sweet reason about how to condemn wartime rape. Though feminism is uniformly experienced by feminists as a highly contentious field, perhaps even defined by its inability to reach consensus, GFeminism working on sexual violence in IHL and ICL in the 1990s, especially the part of it that worked on the big tribunal-establishing statutes, was nearly consolidated in its feminist ideology and in its goals. Just as GFeminism learned to walk the halls of power—now dressed not in the butch street clothes of the marginal radical feminists of yesteryear but in power suits from Nieman Marcus—its consensus ideology became as radical and as structuralist as anything we ever got from Mary Daly, Adrienne Rich, or Andrea Dworkin. And—except for some very alarmed and entrenched resistance from the Holy See and States that use Islamic law as a source of law—mainstream international lawyers accepted GFeminists as authoritative on the badness of rape and the need for many specific reforms to end the impunity of rapists.

My second most important finding is that the substance of this structuralist feminism vision evolved over the course of the 1990s. It changed without producing a literature of internal dissent. The legal agenda started out as a fairly simple commitment to assure that IHL/ICL expressly and explicitly prohibit rape in war and that the ICTs and the ICC prosecute it vigorously. Not to do so was thought to trivialize or even condone rape. But over the course of the decade, the feminists doing this work discovered ways of implementing their structuralist view that rape was not merely a tool of belligerent forces (Croat vs. Serb, Serb vs. Muslim, Hutu vs. Tutsi, etc.) but part of a global *war against women*. As those reforms took shape, a new feminist idea was clarified, one I call *feminist universalism*. In this view women are not a particular group of humanity but a universe of their own. In the new feminist universalist worldview, humanitarian law and international criminal law norms relating to armed conflict could be about *women*.

The result was not only a much stronger representational practice but also a much bolder reform agenda. The legal reforms involved annexing human rights law to IHL/ICL and vice versa, and extending the explicit prohibitions—the key term evolved from *rape* to *sexual violence* to *sexual slavery* to *gender violence*—beyond wartime rape to everyday rape, beyond war as men define it to war as women experience it. War not as an event but as a situation, as the life of everyday. The literary practices of feminist universalism—made manifest not only as rule proposals but also as their supporting arguments—simultaneously clarified. It made ever more sense to look at the eruption of ethno-nationalist conflict in the Balkans, for instance, and to see and show it as a *war against women*. And it made ever more sense to describe that war without any acknowledgement that men died in it.

Most legal progressives regard the many successes of the GFeminist work that I am about to examine as perfectly benign, if not as precious examples of humanitarian progress. Perhaps they will turn out to be so: perhaps their enforcement will reduce rape, war, human cruelty, and human suffering. That will depend on how the rules are deployed by the tribunals, by military institutions, by belligerents, and by political forces. This Article is limited to the advocacy campaign and the rule successes and defeats it encountered. I do not take up the crucial question, “What will the new rules really *do* in the world?” I have tried to tackle that question elsewhere.¹³ Here, I ask readers a much narrower question: whether the formation of the GFeminist consensus described here is what they want for legally active feminism today and in the future.

It is very possible that some feminist and feminist-fellow-traveler readers will answer that question in the negative. I hope I can show in the following pages that, unless you are a radical feminist holding a structuralist view of sexual subordination and seeking to abolish *as male domination* sex work/sex trafficking and sex between formal enemies in war even when women elect to participate in them, you were not represented by the feminists who advocated and designed the reforms studied here. If you *disagree* with this strand of feminism—and many feminists as well as non-feminists do—the following story may persuade you to repoliticize feminist thought and law reform action on rape and sexual violence.

The Article has two parts. Part I examines the ICTY and ICTR statutes and the Rome Statute as a single process. Part I.A begins by listing the most important documents and the dates of their negotiation and promulgation. Part I.B then shows how GFeminism took shape in the

13. See Halley, *Rape in Berlin*, *supra* note 1, at 110–20 (suggesting some steps in the consequentialist analysis of these reforms).

context of that process. Part II is a story of feminist law reform. It first presents a nutshell statement of IHL against which the feminist intervention had to struggle in Part II.A. Part II.B continues by telling the story of feminists' efforts to intervene in the formation of the ICTY and ICTR statutes. Part II.C then assesses those statutes for the degree to which they reflect feminist reform efforts. I trace the emergence of the GFeminist reform agenda in the run-up to the Rome Diplomatic Conference in Part II.D. Finally, Part II.E assesses the Rome Statute for the degree to which it reflects the much more ambitious feminist agenda that emerged over the course of the mid-1990s. I conclude with a brief statement about why one might be—why I am—concerned about the developments described in this Article.

I. THE ICTY AND ICTR STATUTES AND THE ROME STATUTE SEEN SYNOPTICALLY

The 1990s saw an explosion of lawmaking in international criminal law intended to govern war and armed conflict, prompted in part by conflicts in the Balkans and Rwanda that included widely published incidents of rape, sexual mutilation, and sexual humiliation of women. By 1993, feminists engaged international humanitarian law both as a means to address these terrible wrongs and as a site for feminist lawmaking. This Part describes the legal instruments that these feminists worked on and the evolution of their organizational style.

A. *The ICTY and ICTR Statutes and the Rome Statute as Events in Time*

The ICTY and ICTR statutes were promulgated by the United Nations in 1993 and 1994, respectively, to define the subject matter jurisdiction, procedures, and institutional roles and rules for the new special tribunals. In defining the crimes that could be tried by the ICTs, these statutes selected from the immense body of IHL then suspended across a wide range of treaties, trials, and other authorities, the specific crimes that the tribunals would have jurisdiction to enforce.¹⁴ They authorize prosecution and conviction following already existing forms of international criminal liability. The Statutes modify these bodies of law both formally and substantively: they are *codes* with crisp boundaries. They not only picked and chose from the tradition on which they relied,

14. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

but also modified it. Moreover, they are not identical. They can be compared with their precedents and with each other.

The ICTs were in the somewhat awkward position of promulgating their own rules of evidence and procedure.¹⁵ In the story of feminist activism that follows, we will have occasion to study the feminist effort to influence the resulting ICTY Rules of Procedure and Evidence.¹⁶

The ICTs proceeded to litigate and adjudicate cases. The cases that will call for our attention because they constituted partial feminist victories in adjudication that subsequently influenced the Rome Statute discussions are *Prosecutor v. Tadić*, *Prosecutor v. Furundžija*, and *Prosecutor v. Kunarac, Kovac & Vuković* (*Kunarac*) in the ICTY,¹⁷ and *Prosecutor v. Akayesu* in the ICTR.¹⁸

Meanwhile, momentum built in IHL circles for the establishment of a permanent international criminal court. The ICTs were ad hoc courts, with subject matter jurisdiction over particular conflicts. Many of their proponents wanted more: a general international criminal court with the authority to punish crimes in armed conflicts generally. Discussions and deliberations leading to the establishment of the International Criminal Court (ICC) were elaborate and generated a huge number of drafts of the authorizing statute, proposed amendments, and so on. A U.N.-authorized Preparatory Committee (PrepComI) met six times between March 25, 1996, and April 3, 1998,¹⁹ and produced the first official draft of the statute.²⁰ Then there were several "intersessional" meetings, each revising

15. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.13 (June 13, 2006); International Criminal Tribunal for Rwanda, Rules of Evidence and Procedure, U.N. Doc. ITR/3/Rev.1 (June 29, 1995).

16. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.41 (Mar. 8, 2008).

17. *Prosecutor v. Kunarac, Kovac & Vuković*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Judgment (June 12, 2002); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeals Judgment, ¶ 205 (July 21, 2000); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Corrigendum to Judgment of the Appeals Chamber of 15 July 1999 (Nov. 19, 1999); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment (July 15, 1999); *Prosecutor v. Kunarac, Kovac & Vuković*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment (Feb. 22, 2001); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment (Dec. 10, 1998); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Judgment (May 7, 1997).

18. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeals Judgment (June 1, 2001); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998).

19. Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 6 (1999) (providing a timeline of the Preparatory Committee meetings as well as other meetings that were important moments in the negotiations).

20. MODEL DRAFT STATUTE FOR THE INTERNATIONAL CRIMINAL COURT BASED ON THE PREPARATORY COMMITTEE'S TEXT TO THE DIPLOMATIC CONFERENCE, ROME, JUNE 15-JULY 17, 1998 (Leila Sadat Wexler ed., 1998).

the statute. Then the big Conference, meeting for six weeks in Rome to hammer out a final document.²¹ Afterwards a Preparatory Commission (PrepComII) was convened to do the follow-up documents on procedure, evidence, and further definition of the crimes.²²

The result was the Rome Statute.²³ This is the highest-order code for the ICC. The Rome Statute specifies the scope of the ICC's jurisdiction, sets up the various institutional authorities of the Court, provides for interpretive rules for the ICC to use in construing the Statute, and authorizes the promulgation of rules of evidence and further definition of crimes.

The Rome Statute is a treaty; only States that expressly consent to be bound by it are even nominally governed by it. As of the time that this Article went to press, 108 "States Parties" had ratified the Rome Statute.²⁴ Notoriously, the United States is not among them.²⁵ The Rome Statute entered into force on July 1, 2002, an event triggered by the member status of sixty States.²⁶ Prosecutions in the ICC have begun, and at the time of this writing, several cases involving charges of sexual violence are under investigation or are at the indictment stage.²⁷

This story could mislead readers into thinking of the ICT and the Rome processes as distinct, separate, hermetically sealed from each other. Instead, they were simultaneous. Here is a timeline putting the two processes back into the context of each other:

21. Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 611 n.27 (2003) [hereinafter Oosterveld, *Sexual Slavery*] (noting that this meeting was officially designated the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court); see also *Forward to Developments in International Criminal Law*, 93 AM. J. INT'L L. 1, 1 (1999).

22. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 406-34 (2000). Leila Nadya Sadat and S. Richard Carden—both of them active participants in the process—call the Preparatory Committee PrepComI and the Preparatory Commission PrepComII. I will follow this somewhat confusing practice because it seems to be the conventional thing to do. See *id.* at 383-84 nn.4-5 (noting that there was only *one* Preparatory Committee prior to the Conference).

23. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15-July 17, 1998, U.N. Doc. A/CONF.183/9 (July 17, 1998).

24. International Criminal Court [ICC], About the Court, <http://www.icc-cpi.int/about.html> (last visited Dec. 14, 2008).

25. Rome Statute, *supra* note 23.

26. *Id.* art. 126.

27. ICC, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Dec. 12, 2008). The appointment of Catherine A. MacKinnon as Special Advisor on Gender Crimes to the ICC Prosecutor while this Article was in press may lead to changes in the Prosecutor's investigation and charging practices. Press Release, ICC, ICC Special Prosecutor Appoints Prof. MacKinnon as Special Advisor on Gender Crimes (Nov. 26, 2008), available at <http://www.icc-cpi.int/press/pressreleases/450.html> (last visited Dec. 17, 2008).

- 1993: (May 25) ICTY Statute promulgated.
- 1994: (Nov. 8) ICTR Statute promulgated.
- 1995: Ad Hoc Committee for the Establishment of an international criminal court commences work.²⁸
- 1996: (June 26) First *Kunarac* indictment (*sub nomine* *Gugović*).²⁹
- 1997: (May 7) *Tadić* Trial Chamber Judgment.
- 1998: (June 8) ICTR Rules of Procedure and Evidence promulgated.
- (June 15) Rome Diplomatic Conference begins.
- (July 9–10) ICTY Rules of Procedure and Evidence promulgated.
- (July 13) First Amended Indictment in *Kunarac* (filed Aug. 19, 1998).
- (July 17) Rome Statute promulgated.
- (Aug. 27) Second Amended Indictment in *Kunarac* (filed Sept. 6, 1998).
- (Sept. 2) *Akayesu* Trial Chamber Judgment.
- 1999: (July 15) *Tadić* Appeals Chamber Judgment.
- (Aug. 27) Third Amended Indictment in *Kunarac* (filed Sept. 6, 1999).
- (Nov. 8) Fourth Amended Indictment in *Kunarac* (filed Nov. 8, 1999).
- 2000: (June 30) ICC Elements of Crimes and Rules of Procedure and Evidence adopted.³⁰
- 2001: (Feb. 22) *Kunarac* Trial Chamber Judgment.
- 2002: (June 12) *Kunarac* Appeals Chamber Judgment.
- (July 1) Rome Statute enters into force.

28. Oosterveld, *Sexual Slavery*, *supra* note 21, at 611 n.27; *see also* Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 45, 78 (1997) (indicating that less formal discussions were underway in 1994).

29. *Prosecutor v. Kunarac, Kovac & Vuković*, Case No. IT-96-23, Indictment (June 26, 1996).

30. *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* xxxvii–xxxviii (Roy S. Lee ed., 2001).

The record thus makes it clear that the simultaneity of these parallel processes—the legislation and adjudication in the ICTs and ICC—were vividly real to the participants in them, including the feminist activists. As Patricia Viseur Sellers concluded, “The ad hoc Tribunals by trying and convicting perpetrators [of sex-based crimes] fomented a legal climate beyond its jurisdiction that made it conducive to draft several sex-based crimes into the Rome Statute of the ICC.”³¹ Arguments and “law” jumped from one forum and document to another constantly. We see, for instance, feminists arguing in the Rome Statute process—unsuccessfully, as it happened—that ICT indictments and judgments framing rape as torture and thus as one or another grave breach of the Geneva Conventions constituted authority for including rape in the Rome Statute’s list of grave breaches.³² We will occasionally see GFeminists devising strategy in one forum in light of their gains and/or losses in the other; we will hear them invoking their gains in one forum as authority for similar gains and against similar losses in the other. The two processes, for insiders, were one.

B. Feminist Organizational Capacity and Rhetorical Strategy

Across the course of this legal activity, legislative and prosecutorial, GFeminism emerged as a powerful participant. One of the most striking facts about it is the sea-change in GFeminist organizational capacity and the constant evolution of the feminist strategic repertoire.³³ Another is the emergence of a wide range of roles for GFeminists—from judge to prosecutor to special rapporteur on sexual violence to law professor running a clinic and writing advocacy documents to law professor writing purportedly objectively in law reviews about what international humanitarian law is.³⁴

1. The Emergence of GFeminism as an Important NG Force

We can begin the story in early 1993, when the press was full of news of atrocities in the Balkan conflict and when the United Nations was in the midst of its agonized debate about what, if anything, to do about them. Within the International Human Rights Law Group—what we would now call an NGO, describing itself as having been active since

31. Patricia Viseur Sellers, *Individual(s) Liability for Collective Sexual Violence*, in *GENDER AND HUMAN RIGHTS 10* (Karen Knop ed., 2004) [hereinafter Sellers, *Individual(s) Liability*].

32. See, e.g., Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 *BROWN J. WORLD AFF.* 65, 72 (1999).

33. For that story, see *infra* Part I.B.1.

34. I discuss the various kinds of documents that GFeminists produced over the course of the 1990s in Part I.B.2, *infra*.

1978—emerged a Women in the Law Project (WILP) aimed at forming a “delegation” of human rights lawyers to investigate rape and other sexual violence.³⁵ In February of 1993, four women—Laurel Fletcher, Karen Musalo, Diane Orentlicher, and Kathleen Pratt—traveled to the region, conducted extensive interviews, and published a short report (WILP No Justice, No Peace Report). They recommended that a special criminal tribunal be formed and that rape be included in prosecutions for grave breaches of the Geneva Conventions and other war crimes.³⁶ Meanwhile, Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens (the Green/Copelon Group) rushed to influence United Nations insiders as they drafted the ICTY Statute. They later published their blueprint for the new tribunal in what I will call the CUNY Clinic Memorandum.³⁷ The Green/Copelon group held talks with the U.N. Office of Legal Counsel and some governments, including the U.S. State Department. Green and her co-authors make no claim that they had any effect on the ICTY Statute. Instead, they concluded that “the status of rape and other sexual and reproductive crimes against women will need to be litigated.”³⁸

WILP and the Green/Copelon Group emerge in this story as *voces clamantes in deserto*, setting up the alarm to women’s groups that they had to mobilize *fast* to clarify the feminist line about needed reforms if they were to have an impact on the United Nations.

By the time the ICT Rules of Procedure and Evidence were being negotiated in the fall of 1993, the CUNY Clinic, working with the Green/Copelon Group, had allied with staff and students at the Harvard Law School Human Rights Program. The sense of urgency was clear: “[L]aw students . . . threw themselves into this project on very short notice.”³⁹ Looking back, the footnote listing the participants in the preparation of their submission to the court (the Green/Copelon Working Group Proposals) manifests a very small, but highly motivated and skilled, team of ten professionals and fourteen law students.⁴⁰

35. *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN’S L.J. 89, 91 & n.a (1994) [hereinafter *No Justice, No Peace*].

36. *Id.* at 121.

37. Jennifer Green, Rhonda Copelon, Patrick Cotter & Beth Stephens, *Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique*, 5 HASTINGS WOMEN’S L.J. 171, app. B at 235–41 (1994) [hereinafter CUNY Clinic Memorandum] (discussing a memorandum prepared by the International Women’s Human Rights Clinic of the City University of New York (CUNY) School of Law).

38. *Id.* at 176.

39. *Id.* at 177.

40. *Id.* at 183 n.42; *id.* at 183–221 (suggesting proposals to the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) regarding the prosecution of rape

In ICTY and ICTR litigation, as soon as it got going, the feminists were willing to play hardball. In both tribunals they worked with judges to arrest the process when prosecutors failed to charge crimes of sexual violence.⁴¹ A distinct strategy for forcing the prosecutor's hand emerged early and was used at least twice.

The first time was in *Tadić*. The feminist gambit transformed this case into a pivotal moment for the reclassification of rape and other forms of sexual violence as priority crimes in the ICT. On November 11, 1994, Prosecutor Richard Goldstone, a former justice on the South African Constitutional Court, sought to transfer jurisdiction over Dusan Tadić from a German court to the ICTY.⁴² This must have been one of his very first motions in the case. According to Copelon, his affidavit "gave decidedly secondary consideration to the conditions affecting women and to the severity of rape, for example, treating it as less serious than beatings or omitting discussion of it."⁴³ The affidavit described an episode in which one Muslim man was forced to bite off the testicle of another as "what was worse," presumably, than the rapes also alleged.⁴⁴

At this point in the trial, a remarkable story of feminist intervention and prosecutorial responsiveness unfolded. "At the hearing on the deferral application, Judge Odio-Benito"—the only woman on the ICTY trial court panel trying the case⁴⁵—"questioned the Prosecutor on these defalcations and an amicus brief, filed by the International Women's Human Rights Law Clinic, the Harvard Human Rights Program, and the Jacob Blaustein Institute, underscored the trivialization of violence against women."⁴⁶ According to Copelon, Prosecutor Goldstone very promptly—on November 22, 1994—wrote a personal letter to Copelon and other feminists on the amicus brief, in which he stated:

We essentially concur with your comments as to the characterization of rape. The Declaration's discussion of rape does not sufficiently reflect our policy of equating rape to other serious

and other gender-based violence); *id.* at 177 n.19 (indicating that a preliminary draft of their proposals was submitted to the ICTY judges in November and December 1993 and that the document was revised and resubmitted in early 1994).

41. I have found no evidence that they were also working with witnesses, but the stories that I am about to tell strongly suggest that they were.

42. Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 253–54 n.46 (1994).

43. *Id.* This reportage is not included in *Surfacing Gender*, presumably because these events happened after that version of the article went to press.

44. Joanne Barkan, *As Old as War Itself: Rape in Foca*, DISSENT, Winter 2002, at 60, 63, available at <http://www.dissentmagazine.org/article/?article=633>.

45. Kellye L. Fabian, *Proof and Consequences: An Analysis of the Tadić and Akayesu Trials*, 49 DEPAUL L. REV. 981, 998 n.156 (2000).

46. Copelon, *supra* note 42, at 253–54 n.46; Barkan, *supra* note 44, at 63.

transgressions of international law. Apart from the relevance to charges of genocide and crimes against humanity, rape and other sexual assaults will be prosecuted under the Statute's provisions for torture, inhumane treatment, willfully causing great suffering or serious injury to body, and inhumane acts, and other provisions that adequately encompass the nature of the acts committed and intent formulated.⁴⁷

Feminists had finally gotten a purchase on events. And they were remarkably successful in recruiting Prosecutor Goldstone to their cause. He later recalled the effect of feminist NGO activism in this way:

Let me start with the enormous strides that have been made by the tribunals in the development of the normative law. There has been substantial progressive development of humanitarian law as a consequence of the establishment of the ICTY. Of real importance are developments in the law with respect to gender offenses. From my very first week in office, from the middle of August, 1994 onwards, I began to be besieged with petitions and letters, mainly from women's groups, but also from human rights groups generally, from many European countries, the United States and Canada, and also from non-governmental organizations in the former Yugoslavia. Letters and petitions expressing concern and begging for attention, adequate attention, to be given to gender related crime, especially systematic rape as a war crime. *Certainly if any campaign worked, this one worked in my case . . .*⁴⁸

Feminist activist Joanne Barkan concludes: "Even in the early stages of the tribunal's work, the lobbying to get prosecutors to pay attention to sexual offenses paid off."⁴⁹

Feminists deployed a similar strategy in the ICTR. *Akayesu* was already being tried as a case involving widespread murder and other violence when two witnesses and Judge Navanethem Pillay intervened. Kelly Askin tells the story:

The initial indictment charged Akayesu with twelve counts of war crimes, crimes against humanity, and genocide for extermination, murder, torture, and cruel treatment committed in his commune.

47. Copelon, *supra* note 42, at 253–54 n.46 (quoting Letter from Justice Richard Goldstone, Prosecutor, to Rhonda Copelon, Felice Gaer & Jennifer Green (Nov. 22, 1994)).

48. Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 231 (1997) [hereinafter Goldstone, *United Nations' War Crimes Tribunals*] (emphasis added).

49. Barkan, *supra* note 44, at 63.

In the midst of trial, a witness on the stand spontaneously testified about the gang rape of her 6-year-old daughter. A subsequent witness testified that she herself was raped and she witnessed or knew of other rapes. Fortunately, the sole female judge at the ICTR at that time, Judge Navanethem Pillay, was one of the three judges sitting on the case. Having extensive expertise in gender violence and international law, Judge Pillay questioned the witnesses about these crimes. Suspecting that these were not isolated instances of rape, the judges invited the prosecution to consider investigating gender crimes in Taba and, if found to have been committed and if attributable to Akayesu, to consider amending the indictment to include the charges for the rape crimes.

The trial was temporarily adjourned while the prosecution investigated the reports of rape in Taba. It found significant evidence of rape and forced nudity, often in the presence of Akayesu and with his encouragement or acquiescence. Indeed, many of the gender related crimes had been committed on the grounds of his office, where women and girls throughout the area had sought refuge. Consequently, an amended indictment was filed, charging Akayesu with three counts of rape and other inhumane acts as crimes against humanity. The genocide court [sic] in the amended indictment also referred to the alleged sexual violence.⁵⁰

Feminist advocates quickly intervened. A Working Group on Engendering the Rwanda Tribunal, the International Women's Human Rights Clinic, and the Center for Constitutional Rights, together representing eighty feminist NGOs, promptly filed an amicus brief urging the amendment of the *Akayesu* indictment to include rape and sexual violence. This brief indicates that the ICTY's prosecutor had already indicted sexual violence crimes (and even took a little of the credit for

50. Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 17 (2004) [hereinafter Askin, *A Decade of the Development of Gender Crimes*]; see also Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 282 (2002) [hereinafter Goldstone, *Prosecuting Rape*] (commenting that Judge Pillay's "actions, combined with the amicus brief of the Coalition for Women's Human Rights in Conflict Situations . . . resulted in a postponement of the trial during which the indictment was amended to include charges of sexual violence . . ."). But see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 23 (Sept. 2, 1998) (noting that the end of the first part of the trial came on May 24, 1997). The Prosecutor then made an oral motion to amend the indictment on June 16, 1997, and sought leave to add the rape counts. The Prosecutor's motion was subsequently granted, and the trial recommenced on October 23, 1997. *Id.*

that), and shames the ICTR equivalent for lagging behind.⁵¹ The Prosecutor's Office complied,⁵² an amended indictment was filed, and *Akayesu* produced the first convictions on charges of rape and sexual violence in the ICTs.

Both episodes are stories of intense legal drama, of moments when feminist activists emerged from the sidelines with spectacular suddenness. Feminism was there, active and alert, in the persons of Judge Odio-Benito, Judge Pillay, the NGOs, and perhaps, in *Akayesu*, the witnesses. But it was scrambling for a place at the table.⁵³

The picture changed completely between 1994, when negotiations about a possible international criminal court began, and 1998, when the Rome Statute was adopted. During this period, the ICTs were getting off the ground as operating courts, and, as we have seen, feminists were forming NGOs with highly articulate, explicitly feminist agendas for ICT prosecution and advocacy. Soon they had allies who served as judges and as legal advisors to the ICTs and as Special Rapporteurs on Sexual Violence examining conflicts around the world and issuing expert statements about sexual violence in those conflicts. As we have also observed, feminists acquired male allies holding equally elite positions in the ICT and Rome Statute processes. Valerie Oosterveld is a good

51. Prosecutor v. Akayesu, Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence Within the Competence of the Tribunal et al. as Amici Curiae, Case No. ICTR-96-4T, ¶ 41 (Sept. 2, 1998); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998). The Brief argued,

[T]he failure of the Prosecutor of International Criminal Tribunal for Rwanda to prosecute rape and other sexual violence in the case of Akayesu, and in every other indictment which has been confirmed thus far, is an unfortunate departure from the precedent set by the Prosecutor and International Criminal Tribunal for the Former Yugoslavia which, after initial criticism from a number of the undersigned amici curiae, have taken leadership in ensuring the prosecution of rape and other forms of sexual violence.

Id. See generally SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (Human Rights Watch 1996); see also Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 183, 203 & n.71 (Flavia Lattanzi & William A. Schabas eds., 1999).

52. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (Sept. 2, 1998) (noting that the original prosecutor in *Akayesu* was Pierre-Richard Prosper). Prosecutor Louise Arbour signed the amended indictment. Prosecutor v. Akayesu, Case No. ICTR-96-4-1, Acte d'accusation (June 17, 1997), reprinted in INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, REPORTS OF ORDERS, DECISIONS AND JUDGEMENTS, 1995-97, at 8-13 (Eric David, Pierre Klein & Anne-Marie La Rosa eds., 2000) [hereinafter RWANDA REPORTS].

53. See generally Goldstone, *Prosecuting Rape*, *supra* note 50, at 281-82. Former-Prosecutor Richard J. Goldstone seems to have confused *Tadić* with another very early case in the ICTY, *Prosecutor v. Nolić*. Compare *id.*, with JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 71-92 (2003).

example of the scope and depth of this inclusion. Not only has she written two law review articles bringing us deep into the negotiation of the Rome Statute and its ancillary documents,⁵⁴ she was a "Legal Officer, United Nations, Human Rights and Economic Law Division, Foreign Affairs, Canada" and was a member of the Canadian delegation to the Rome Statute conference and to the subsequent Preparatory Commission and Assembly of States Parties, which conducted the drafting and promulgation of the ICC Rules of Procedure and Evidence and the ICC Elements of Crimes.⁵⁵ She was *involved*.

The Rome Statute process was an important stage in the institutionalization of GFeminism in part because it was an important stage in the institutionalization of NGOs as governance institutions of United Nations bodies. Of course, the emergence of NGOs and their incorporation in international legal institutions as participants in lawmaking often on par with, if not superior to, nation-states, is a much broader event of the 1990s and was by no means the sole invention of feminists.⁵⁶

The two most thorough accounts of how this process affected the Rome Conference are by Fanny Benedetti and John L. Washburn and by Zoe Pearson. Benedetti and Washburn indicate that they both participated in PrepComI, attending all of the public and many of the private meetings at Rome; Pearson interviewed other participants in the process who, in every case, declined to be identified.⁵⁷ These two studies amply demonstrate that PrepComI and the Rome Diplomatic Conference saw a new reliance of the state delegations on NGO activists for advice. According to Benedetti and Washburn, early in the PrepComI process, William R. Pace formed the Coalition for an International Court (CICC) in order to coordinate pro-ICC NGOs.⁵⁸ The initial common goal of member NGOs was to promote the existence, strength, and independence of an ICC. But in the course of its work, the CICC became a strong force *for the involvement of NGOs* in what otherwise would have been largely an encounter of state delegations. Beyond these common goals, Pace's policy was to keep the CICC neutral as to the inconsistent agen-

54. Oosterveld, *Sexual Slavery*, *supra* note 21; Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55 (2005) [hereinafter Oosterveld, *The Definition of "Gender" in the Rome Statute*].

55. Oosterveld, *Sexual Slavery*, *supra* note 21, at 605 n.*; Oosterveld, *The Definition of "Gender" in the Rome Statute*, *supra* note 54, at 55 n.*.

56. Jessica T. Mathews, *Power Shift*, 76 FOREIGN AFF. 50 (1997).

57. Benedetti & Washburn, *supra* note 19, at 34 n.1; Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 243 n.* (2006).

58. Benedetti & Washburn, *supra* note 19, at 8-9.

das of member NGOs. Pace insisted on consensus, and CICC NGOs largely complied.

The CICC found its state allies in the so-called Like-Minded Group of States (LMG), a coalition of state delegations committed to the formation of a strong ICC. This strategic convergence led to a tactical one, as this strong bloc of delegations came to favor ever-increasing NGO involvement, especially when it was managed by Pace's strong hand in the CICC. The CICC was remarkably successful in gaining official status for NGOs. When the time came to organize the Rome Diplomatic Conference, the United Nations issued a resolution requesting the Conference to allow participation by registered NGOs.⁵⁹ At its third meeting, Prep-ComI decided to hold all of its formal meetings *and* informal meetings open to registered NGOs.⁶⁰

The kinds of participation that CICC NGOs found possible evolved over time. At first, they provided wise assistance: their role was "consultative."⁶¹ But Benedetti and Washburn indicate that the CICC changed strategy at Rome, as it consolidated the NGOs into a single solidaristic bloc, assigned them to work on thirteen⁶² (or twelve⁶³) distinct parts of the draft Statute, and focused their work on providing friendly delegations with consolidated drafts, amendments, and arguments. They were no longer merely consultants: they were by this time, in Benedetti and Washburn's minds anyway, "experts."⁶⁴ And they were omnipresent: "[T]his shared coverage, together with an extended meeting schedule, . . . made it much harder for conference delegates to get away from NGOs in Rome."⁶⁵

Pearson's research sought to identify the key features of NGO participation, and she confirms and extends Benedetti and Washburn's assessments. According to Pearson, the CICC worked closely with the LMG,⁶⁶ provided representatives to augment the delegations of small

59. G.A. Res. 52/160, ¶ 9, U.N. Doc. A/RES/52/160 (Dec. 15, 1997).

60. See Benedetti & Washburn, *supra* note 19, at 23; see also Christopher Keith Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 124, 125 (1998).

61. Benedetti & Washburn, *supra* note 19, at 22. This would not be how they describe their involvement: as we will see, from inside of the non-governmental organizations (NGOs) that I have studied, the process was understood to be explicitly political, and they perceive themselves as having *fought hard*. See *infra* Parts I.B.2.b, II.D.2.b.ii–iii.

62. Benedetti & Washburn, *supra* note 19, at 32.

63. Sadat & Carden, *supra* note 22.

64. See Benedetti & Washburn, *supra* note 19, at 32.

65. *Id.*

66. Pearson, *supra* note 57, at 266.

states,⁶⁷ and, overall, “played a significant role in the ICC negotiations.”⁶⁸

The rhetorical value of NGO participation was of course volatile. Claims that NGOs were a large part of the process could be invoked, on the one hand, to legitimate the process or the outcome. For example, heavy NGO participation could be invoked to show that the Conference was transparent, enjoyed lots of civil society buy-in, and so on. The diversity of CICC members could be cited to argue that contentious issues had been thoroughly aired.⁶⁹ On the other hand, these very claims could be invoked to de-legitimize it. For instance, the importance of NGOs could be cited to argue that delegations and the process were captured by ideologically motivated forces.⁷⁰ And NGOs were not always welcome: the Argentinean Asociación de las Madres de la Plaza de Mayo was at one point ejected “for disruptive behavior.”⁷¹ Clearly, NGOs were tolerated only so long as they hewed to an implicit code of conduct. Delegates reported to Pearson that they resented NGOs’ hardball tactics and valued NGO input to the extent that it felt less like lobbying and more like expertise.⁷²

The reputation that NGOs earned as reliable and knowledgeable sources of information, prepared to engage in a professional way about the subject matter of the ICC issues, greatly contributed to the receptiveness of [S]tates to their positions and assisted the good working relationships that evolved between many NGOs and state delegations.⁷³

As long as they spoke with the voice of sweet reason and especially of *expertise*, they could be included almost on par with state delegations.

General statements that the NGOs had a large substantive impact on the outcome at Rome are plentiful in the pro-ICC, pro-NGO law review literature. For example, in his series of interim reports on the work of the third PrepComI meetings published in the *American Journal of International Law*, Christopher Keith Hall concluded that the decision to keep the meetings open made it “possible for NGOs and governmental delegations to continue their constructive working relationship in which NGOs supplied the delegations with detailed analysis and recommendations

67. *Id.* at 266–67.

68. *Id.* at 244.

69. *Id.* at 259–65.

70. *Id.* at 269.

71. *Id.*

72. *Id.* at 278–79 (concluding that it was important for NGO representatives to establish personal rapport with state delegates and to maintain the reputations of NGOs as credible sources of knowledge).

73. *Id.* at 272.

concerning the [International Law Commission (ILC)] draft statute. The NGO recommendations have had a significant impact on governments' proposals . . .⁷⁴ Here is how Hall saw their role in the fifth meeting of PrepComI:

The increasing effectiveness of the coordinated lobbying of the 316 members of the NGO Coalition for an International Criminal Court [the CCIC], including the four groups of nongovernmental organizations, each working on a particular issue such as prohibited weapons and the rights of children, victims and women, was marked. The value of NGO commentaries was widely acknowledged by government delegates and the drafting of the consolidated text reflects their input.⁷⁵

Though NGOs used a different tone than Hall, they agreed with him in substance. Human Rights Watch, for instance, congratulated itself exultantly: "That the ICC has come into force today and is potentially a powerful instrument for protecting women's rights is a testament to this indefatigable activism and determination."⁷⁶

My main goal in Part II is to determine, as far as possible, what constituted feminism in this process. In order to do that, I have needed to figure out who represented women, broadly speaking, in the PrepComI and Rome meetings. More specifically, who thought that women were a distinct human group suffering distinct harms and requiring distinct advocacy in the formation of the new Statute?⁷⁷

No fewer than thirty NGOs with the word "women" in their titles appear on the list of NGOs accredited to participate in the Rome Conference.⁷⁸ Of course, this number does not take into account the other NGOs

74. Hall, *supra* note 60, at 125.

75. Christopher Keith Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 331, 339 (1998).

76. Human Rights Watch, *International Justice for Women: The ICC Marks a New Era* (July 1, 2002), available at <http://www.hrw.org/campaigns/icc/icc-women.pdf>.

77. I use my own definition of "feminist" here: thinkers and actors for whom a male/female and m/f distinction matters, who hypothesize that, at least sometimes, in some domain of human affairs, male is greater than female (m>f), and who direct their efforts to carrying a brief on behalf of female or f more generally. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 17-20 (2006).

78. The Secretary-General, *Note by the Secretary-General on the Non-Governmental Organizations Accredited to Participate in the Conference*, U.N. Doc. A/Conf.183/Inf/3 (June 5, 1998). This number is up from the one, then two, then three feminist organizations engaging in the first stages of the ICT statute and litigation processes described *supra* notes 35-38 and accompanying text. It is much more on the scale of the eighty organizations signing the amicus brief in *Akayesu*. See *supra* note 51 and accompanying text. Indeed, given the much larger organizational capacity needed to participate in the Rome Conference process, as opposed to that required to sign an amicus brief, the active involvement of thirty women's NGOs suggests further growth in the scale of the feminist NGO establishment.

that would have had feminists on board and that worked on the issues of concern to the *women's* organizations. Describing this collaboration, Human Rights Watch indicates that "women's rights activists throughout the world—of every political stripe, faith, sexual orientation, nationality, and ethnicity—mobilized at each step of the International Criminal Court (ICC) process"⁷⁹ Rana Lehr-Lehnardt indicates that the Feminist Majority Foundation, the Women's Division of Human Rights Watch, Amnesty International, "and others" participated actively in the feminist reform effort.⁸⁰ These statements suggest a range of feminist NGOs coupled with a range of feminist views.

Despite the large number of participating NGOs advocating for women, every single explicit statement that I have been able to find identifying the NGOs that *actually* influenced the process for setting rules relevant to a feminist agenda leads to one entity in particular: the Women's Caucus for Gender Justice (WCGJ).

This is certainly the conclusion of feminists writing about their experience of the Rome process.⁸¹ But we need not depend on feminist sources for this conclusion: nonfeminist recorders of PrepComI and the Rome Statute support it as well. Leila Nadya Sadat and S. Richard Carden credit the "Women's Caucus and many State delegations" with producing "a much stronger gender perspective throughout . . . [the Rome Statute's] text" than in any prior IHL document.⁸² Benedetti and Washburn indicate that, in PrepComI, there were four "main groups of the [CICC] coalition"; the first one they mention was the WCGJ and the list does not include any other group devoted to women's issues.⁸³ Hall reports that "[t]he NGO recommendations have had a significant impact on governments' proposals . . . , and, in the absence of summary records in the Preparatory Committee, these recommendations will aid in understanding the history and meaning of many provisions of the statute"

79. Human Rights Watch, *supra* note 76.

80. Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 339 (2002).

81. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *BERKELEY J. INT'L L.* 288, 347 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*] (emphasizing that efforts by organizations working alongside or under the Women's Caucus for Gender Justice (WCGJ) in the International Criminal Court (ICC) secured the inclusion of rape and other feminist reforms in the ICC); *see also* Oosterveld, *Sexual Slavery*, *supra* note 21, at 613 n.33; Oosterveld, *The Definition of "Gender" in the Rome Statute*, *supra* note 54, at 58 n.21. *See generally* Bedont, *supra* note 51; Bedont & Hall-Martinez, *supra* note 32.

82. Sadat & Carden, *supra* note 22, at 396 n.73.

83. The others listed are Amnesty International, the Association of the Bar of New York City's Committees on International Law and International Human Rights, Human Rights Watch, and the Lawyer's Committee for Human Rights. Benedetti & Washburn, *supra* note 19, at 23.

He then lists the position papers of five NGOs as the effective legislative history of PrepComI, and again the WCGJ is the only women's NGO listed.⁸⁴ And he publishes the same list, omitting the New York Bar Association and adding the World Federalist Association, in his report on the fifth meeting of PrepComI.⁸⁵ Jennifer Schense, Legal Advisor to the CICC, includes the WCGJ as the only nominally women's or feminist organization on the Steering Committee of the CICC as of March 2002.⁸⁶

We are warranted in concluding, I think, that though a large number of NGOs was involved, the WCGJ successfully became their coalition leader. And this fact alone is indirect evidence that it also mastered the behavioral codes that gave some NGOs legitimacy. In the intense advocacy and fierce resistance that ensued when the WCGJ proposed that "enforced pregnancy" be included among the prosecutable crimes, the WCGJ was included directly in the negotiations and at one point it was negotiating directly with the Holy See.⁸⁷

In effect, what the CICC was to the pro-ICC NGOs, the WCGJ was to the feminist ones: the decisive legitimate NGO, enjoying the power, conceded by NGOs and Like-Minded Group delegations alike, to organize and speak for member NGOs.

And what was the WCGJ? Officially recognized at the third meeting of PrepComI,⁸⁸ it was a coalition of women's NGOs, counting about 200 affiliates at the time the Conference began. It consolidated a coherent platform for feminist reform and lobbied hard in the Rome Statute negotiations.⁸⁹ In addition, as we will see in Parts II.D and II.E below, it had a rich platform of proposed reforms, arguments, and strategic practices.

Feminists were not shy to claim credit for making a difference in the Rome Statute negotiations, and when they did so they spoke the language not of expertise but of politics. Writing in the law reviews, they testified to their hard work and their partial success. Barbara Bedont and Katherine Hall-Martinez indicate that "[w]omen's rights activists viewed the negotiations for the ICC as a historic opportunity to address the failures of earlier international treaties and tribunals to properly delineate, investigate, and prosecute wartime violence against women."⁹⁰ They describe the WCGJ as an active lobbying entity with the leverage to change

84. Hall, *supra* note 60, at 125 & n.7.

85. Hall, *supra* note 75, at 339 n.17.

86. Jennifer Schense, *Necessary Steps for the Creation of the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 717, 717 n.* (2002).

87. See Bedont & Hall-Martinez, *supra* note 32, at 66-74; Oosterveld, *Sexual Slavery*, *supra* note 21, at 620-21.

88. Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 *COLUM. HUM. RTS. L. REV.* 401, 425 n.97 (1998).

89. Bedont & Hall-Martinez, *supra* note 32, at 67.

90. *Id.* at 66.

some States' negotiating positions: "Few, if any, government delegations would have been willing to expend the political capital needed to secure the provisions [on the WCGJ agenda] . . . without the persistent lobbying efforts of the Women's Caucus."⁹¹ Christine Chinkin concludes that the

success of the intense lobbying by women's groups both at Rome and then throughout the first meeting of the Assembly of States Parties shows that it is possible to gain provisions for equitable gender representation within the constitutive instrument of an international court and also to insist upon voting procedures to ensure that the commitment is met.⁹²

Hilary Charlesworth concurs: "This recognition [of sexual violence as a potential crime of genocide, a crime against humanity, and a war crime in the statutes of the two ad hoc tribunals and the ICC] was the result of considerable work and lobbying by women's organizations"⁹³

Meanwhile, as we have seen, feminists played many explicitly political roles in the ICTY/ICTR charging and adjudication process.⁹⁴ From outside the institutional structure of the tribunals, they intervened in the form of activist NGOs, writing letters, submitting amicus briefs, and putting face-to-face pressure on ICT officials. They also brought pressure by writing law review articles and treatises assessing the tribunals' progress. One of the things that they pushed for was inclusion in the tribunals' processes as official players. A particularly important goal was the appointment of ideologically sympathetic judges. As we have seen, they *were* finally invited inside, and got appointed as experts, special rapporteurs on sexual violence, investigators, prosecutors, and judges.

Feminists repeatedly claimed that they mounted a concerted campaign that made concrete differences in the outcomes. The consensus among feminists writing about these achievements is so smooth that my collection of quotations testifying to them is highly duplicative. Feminists were in complete consensus about the need for political pressure, the fact that they brought it to bear, and the fact that it produced a measure of success.⁹⁵ Two examples may suffice. According to Barkan,

91. *Id.* at 69; see also Lehr-Lehnardt, *supra* note 80, at 345-54 (arguing a more pessimistic assessment that was entirely sympathetic to the WCGJ's aims but more aggrieved about its defeats).

92. Christine Chinkin, "Reconceiving Reality": A Ten-Year Perspective, 97 AM. SOC'Y INT'L L. PROC. 55, 56 (2003).

93. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 386 (1999).

94. See *supra* text accompanying notes 35-53.

95. See, e.g., Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 317 ("The prosecution of gender crimes in the Tribunals is typically fraught with inherent difficulties and gratuitous obstacles, and the crimes are usually investigated and indicted only after concerted

[T]he new International Criminal Tribunal for Yugoslavia looked like an exceptional chance in 1993 for advocates of human rights for women to make some progress. But every step forward, as it turned out, required a lobbying campaign. Nongovernmental organizations and university-based institutes wrote briefs and letters, requested meetings, did press work, and held seminars and conferences.⁹⁶

The struggle was often intense: "The advocates' work had to be thorough, and there was a lot of it."⁹⁷ Barkan attributes the only real successes of the ICTY to this feminist intervention and to the "many prosecutors and judges [who] were responsive, some even courageous."⁹⁸ In light of these achievements, Barkan abandoned some of her cynicism about the tribunals: "From the start, most observers considered the . . . [ICTY] a sop to human rights and feminist activists who wanted intervention Almost no one expected it to succeed. And yet, to some extent, at least for women, it did."⁹⁹

Askin tells largely the same story:

The cases demonstrate that female judges, investigators, prosecutors, and translators, particularly those with expertise in gender crimes, are extremely useful in the prosecution of gender

pressure by women's rights organizations and feminist scholars to prosecute the crimes. Nonetheless the progress made is nothing short of revolutionary."); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 98 (1999) [hereinafter Askin, *Sexual Violence*] ("[T]he jurisprudence of the United Nations Tribunals reflects women's participation."); Bedont & Hall-Martinez, *supra* note 32, at 75-76 ("The gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY and ICTR as investigators, researchers, judges, legal advisors, and prosecutors."); Charlesworth, *supra* note 93, at 387 (arguing that the ICTY recognition of sexual violence as a criminal act under international humanitarian law (IHL) "was the result of considerable work and lobbying by women's organizations"); Chinkin, *supra* note 92, at 55 (observing that the effort to secure recognition of "gender crimes" from the ICTY has "met with considerable success"); *id.* at 63 ("The work of the International Criminal Tribunals for the former Yugoslavia and Rwanda—once again driven by energetic outsider [NGOs] and committed insiders . . . [crafted] gender-sensitive procedure and case law [such as the *Akayesu*, *Kunarac*, and *Furundžija* cases]"); CUNY Clinic Memorandum, *supra* note 37, at 173. The authors of the CUNY Clinic Memorandum stated,

[The ICTY] is . . . historic in that it is the first to give distinct attention to gender-based crimes. This is in no small measure the result of the persistent efforts of survivors and their advocates, as well as the growing global campaign for women's human rights, which has made violence against women a major international issue.

CUNY Clinic Memorandum, *supra* note 37, at 173.

96. Barkan, *supra* note 44, at 63.

97. *Id.*

98. *Id.*

99. *Id.* at 62.

crimes. They further demonstrate that there must be political will to prosecute sex crimes, and that pressure exerted from NGOs is often indispensable to ensuring that gender crimes are investigated and indicted.¹⁰⁰

Nor are Barkan and Askin guilty of empty boasting. As we have seen, ICTY/ICTR Prosecutor Richard Goldstone was willing to go public claiming that his heart and mind had been changed by feminist advocacy. Clearly he, at least, thought that announcing his susceptibility to GFeminist pressure and persuasion added to, rather than impugned, his credibility.¹⁰¹

2. The Emerging Genres of GFeminist Rhetoric

So far the feminist strategy in legislative and prosecutorial reform appears seamlessly identical. GFeminism, however, housed a vast array of roles, each of which had a number of genres of writing available to it. A judge could write opinions but would probably hesitate to write hard-hitting advocacy op-eds; a hard-hitting advocate might denounce international law for failing to recognize the harm of rape in war, provoking the ire of a comrade who was writing in the law reviews to argue that international law has always recognized wartime rape as a violation and that the only change needed now was to make this prohibition explicit.

I decided early on in the research summarized in this Article that I would not interview participants in the processes I describe here: the result, I thought, would simply have multiplied rather than reduced the interpretive challenges of dealing with the written archive. So I have made myself entirely dependent on genres of legal writing, ranging from the judicial opinion to the op-ed, for the material on which I base the conclusions of this Article. And this has in turn made me reckon with the particular representational or literary capacities of these different genres. When could I take a given text as reliable reportage of what happened, and when was it an event in its own right? When was the patent spin exaggerating a legal claim just misleading, and when did it tell me something about feminist strategy and tactics?

In thinking about these problems constantly while composing this Article, I came to the conclusion that, consciously or not, the feminists made an allocation of rhetorical styles to occupants of different roles, and that this allocation shifted over the course of the decade, always in response to an advocacy/legitimacy tension that was immanent in different ways in different institutional settings and various roles. Part of what

100. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 19.

101. See *supra* text accompanying notes 47–48.

makes the outsider activist feminists of the early 1990s so different from the insider GFeminists of the late years of the decade was this new relationship to that advocacy/legitimacy tension.

One of the most dramatic changes over the course of the 1990s involved the deployment of position papers, draft legislation, written talking points, and the like. In the ICT phase, feminists published these, but in the Rome phase, they did not. That is, in the very beginning, while they were ignored by the United Nations personnel drawing up the ICTY Statute, feminists decided to publish *some* of their blueprints for rule reform—and when they did publish, they set out their agenda rule by rule, rationale by rationale. They also ushered into print some of the documents that they submitted to the rule-making bodies. Both kinds of publications give us snapshots of what they were doing in their actual interventions. Three such publications have been extremely useful to me in my research:

1. *The WILP No Justice, No Peace Report*.¹⁰² The printed version of this document does not disclose how or when it was circulated in the United Nations. It was produced sometime between the WILP delegation's February 1993 journey to the Balkans conflict area and the print publication of the Report in the winter of 1994, probably in the winter months of 1993.
2. *The CUNY Clinic Memorandum*.¹⁰³ Submitted to United Nations bodies involved in drafting the ICTY Statute, it is undated but must have been in circulation in the early months of 1993.
3. *The Green/Copelon Working Group Proposals*.¹⁰⁴ These were submitted to the ICTY judges and were aimed at influencing the Rules of Procedure and Evidence. They too are undated, but we know that they were submitted to the ICTY in late 1993 and, revised, again in early 1994.

By the time formal discussions leading to the Rome Conference were underway, the practice of publishing this kind of material had fallen into disuse. I have relied on documents I was able to obtain on the WCGJ

102. See *No Justice, No Peace*, *supra* note 35.

103. See *CUNY Clinic Memorandum*, *supra* note 37, app. B at 235–41.

104. *Id.* at 171.

website (now closed),¹⁰⁵ and through the immensely appreciated generosity of Valerie Oosterveld.¹⁰⁶

In my view, the GFeminists' attitude was not that these materials were secret. Rather, GFeminism as it took shape shed the earlier strategic impulse to publish position papers. There are many likely reasons for this, probably including the vastly increased volume of such documents, the increasingly minute detail that they encompassed, and the emergence of distribution networks that did not rely on law review publication. In its hammer-to-anvil work, GFeminism entered into discussion with itself and with the world of IHL/ICL officials.

These "blueprint" documents aren't just direct evidence of the reform demands made by the feminists issuing them: they *are* those demands. They give us unalloyed access to the feminist rule demands and the arguments that feminists thought politically, ethically, and rhet-

105. WCGJ, Recommendations and Commentary for December 1997 PrepCom on the Establishment of an International Criminal Court United Nations Headquarters (Dec. 1-12, 1997) [hereinafter WCGJ, 12/97 Recommendations] (on file with author); WCGJ, Summary of Recommendations: Composition and Administration of the Court; Crimes Against Humanity, pt. II.2 (March 1998) [hereinafter WCGJ, 3/98 Summary of Recommendations] (on file with author).

106. See WCGJ, Recommendations and Commentary for August 1997 PrepCom on the Establishment of an International Criminal Court [hereinafter WCGJ, 8/97 Recommendations on the Court] (on file with author); WCGJ, Recommendations and Commentary for the March 1998 PrepCom, Reparations, pt. III (Mar. 18, 1998) [hereinafter WCGJ, 3/98 Recommendations on Reparations] (on file with author); WCGJ, Recommendations and Commentary for the March 1998 PrepCom, Establishment of the Court & Relationship with the United Nations, Financing the Court; Final Clauses, pt. V [hereinafter WCGJ, 3/98 Recommendations on the Institutional Court] (on file with author); WCGJ, Recommendations and Commentary for the March 1998 PrepCom, Composition and Administration, pt. I [hereinafter WCGJ, 3/98 Recommendations on Composition and Administration]; WCGJ, Recommendations & Commentary for the March 1998 PrepCom, Article 5[20] *Chapeau*, Crimes Against Humanity, pt. IV (Mar. 19, 1998) [hereinafter WCGJ, 3/98 Recommendations on Crimes Against Humanity] (on file with author); WCGJ, Recommendations on Composition and Administration of the Court (Apr. 14, 1998) [hereinafter WCGJ, 4/98 Recommendations on Composition and Administration] (on file with author); see also WCGJ, Gender Justice and the ICC (addressed to the Rome Conference) [hereinafter WCGJ, Gender Justice and the ICC] (on file with author). See also the position papers composed to address specific controversies that arose around WCGJ proposals during the Conference. These I subdivide, in turn, into two series, one on the controversy about "gender violence" and the second on a controversy about "enforced pregnancy." Gender violence: WCGJ, Briefing Paper on Gender (Mar.-Apr. 1998) [hereinafter WCGJ, 3/98 Briefing Paper on Gender] (on file with author); WCGJ, Applying the Most Recently Negotiated Definition of Gender to the ICC Statute [hereinafter WCGJ, Negotiated Definition of Gender] (on file with author); WCGJ, The International Community Has Repeatedly Reaffirmed the Need to Eliminate Gender Violence [hereinafter WCGJ, Need to Reaffirm Gender Violence] (on file with author); WCGJ, Call to Delegates: Resist the Attack on Gender Justice [hereinafter WCGJ, Call to Delegates on Gender] (on file with author). Enforced pregnancy: WCGJ, Justice for Women: The Crime of Enforced Pregnancy (June 26, 1998) [hereinafter WCGJ, 6/98 Crime of Enforced Pregnancy] (on file with author); WCGJ, Priority Concerns: Respecting War Crimes, art. B [hereinafter WCGJ, Priority Concerns (Enforced Pregnancy)] (on file with author).

orically apt to support them. To borrow J.L. Austin's terminology, they are performative, not constative.¹⁰⁷ But they are not transparent statements of what their promulgators *wanted* the law to be or harbored as their core ideological reasons for those desires. Controversy among feminists could be hidden behind compromise language, and strategic and even small tactical concerns could cause feminists to mute certain demands and to advocate rules quite different from their ideal prescriptions. It was only as I learned a lot about the process that I felt comfortable attributing a "legal vision" and a "feminist ideology" to particular moves manifested in these materials. I try to be explicit about how I came to my conclusions so that they can be challenged where I have missed something or am wrong.

Even as the feminist law reform archive stopped going into print, a parallel shift was happening in feminists' use of journals and other print media. In the early days, before the existence of GFeminist insiders and thus of GFeminism as a real possibility, feminist activists producing the "blueprint" documents were also willing to publish guides to their legal and rhetorical strategies. Rhonda Copelon published some extremely frank assessments of the advantages and impediments offered to feminists by existing humanitarian law.¹⁰⁸ She, Jennifer Green, Patrick Cotter, and Beth Stephens set out their blueprint for the Green/Copelon Working Group Proposals in an article bluntly entitled "Affecting the Rules."¹⁰⁹ They put political and strategic motivations directly on the table. Back then.

Also in the early days, high feminist legal theory was blunt about the failings of international law and invoked *feminism* as the source of its norms. For example, Charlesworth, Chinkin, and Shelley Wright, in their article essentially inaugurating feminist interventions in international law,¹¹⁰ drew up a world in which international law and feminism were distinct sources of normativity, the former sadly in need of help from the latter. Though of course Charlesworth, Chinkin, and Wright invoke international law as a source not only of legal but also of normative authority, they also denounce it as "a thoroughly gendered system."¹¹¹ It

107. J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 1-24 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1976).

108. Rhonda Copelon, *Surfacing Gender: Reconceptualizing Crimes Against Women in Times of War*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 197, 197-218 (Alexandra Stiglmeier ed., Marion Faber trans., 1994); see also Copelon, *supra* note 42 (providing a substantially revised and republished version of her article entitled "Surfacing Gender: Reconceptualizing Crimes Against Women in Times of War").

109. See CUNY Clinic Memorandum, *supra* note 37, at 171.

110. Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

111. *Id.* at 615.

is feminist theory that constitutes the overarching normative reference point for reform: "By taking women seriously and describing the silences and fundamentally skewed nature of international law, feminist theory can identify possibilities for change."¹¹²

This transparency, frank strategy, and feminist—as opposed to legal—normativity gradually went missing from feminist publications on rape, sexual violence, and related matters in international law. The first sign of the shift was in feminist work on particular cases in the ICTs. Feminists withheld many of the real-time documents that did not have to be officially filed (letters, etc.); they stopped publishing articles setting forth strategy going forward; and instead they published articles describing and assessing the work of the prosecutors and the courts *ex post*. By the time of the Rome Conference, there was a small library of feminist articles and even books restating and assessing what was actually in the final Statute. In this bibliography, the outsiders—and some insiders—describe, restate, praise, and criticize the already-existing law produced by the insiders.

A word needs to be said about the problems involved in using this subsequent, far more voluminous literature as evidence of what happened or of what those involved actually wanted, thought, or did. It is precisely at the line between description/restatement on the one hand, and praise/blame on the other, that the rhetorical complexity of this published record emerges. The feminist legislative blueprints had a manifesto-like clarity, and the frank strategy papers weighed pros and cons and argued for risky but plausible approaches or for conceding important normative points for strategic gains. This relative directness is almost entirely absent from the feminist law review literature describing and assessing both the litigation/adjudication process in the ICTs and the legislative process especially at and leading up to Rome. Instead, description is sometimes infused with assessment; assessment sometimes gains its rhetorical punch from artful rather than naïve description. In several instances, which I will detail carefully below, feminists were more willing to disclose strategic reasons for positions that they took than to reveal the underlying intra-feminist disagreements that made strategy trump normative assertion. We have here what you might call *literary nonfiction*. The authorial stance is objectivity, descriptive accuracy, and legal rightness, but the writing *itself* is strategic and full of spin. And sometimes the writing goes off the rails of descriptive accuracy altogether; when it does, I experience the work as *literary fiction*.

For my purposes, these deviations from simple restatement were extremely valuable. Whenever I could identify them, frustrated feminist

112. *Id.*

desire was being revealed to me, perhaps even more clearly, if less directly, than in the declamations of the manifestos and the earnest argumentation of the early strategy papers.

What follows is a brief analysis of the two main genres of GFeminist writing: contributions by feminists who held official positions in the ICTs, PrepComI, or at Rome;¹¹³ and contributions by feminists writing in the mode of restatement, codification, and the objective transmission of existing positive law.¹¹⁴ I am not aiming here to present an encyclopedia of writing on the topic: for instance, strong feminist writing in the tradition of the inaugural Charlesworth, Chinkin, and Wright article did occasionally appear,¹¹⁵ and a critical literature also emerged,¹¹⁶ and I set them aside. The aim here is to take the measure of feminist writing as feminism was increasingly merged into international law's common sense.

a. Contributions by Feminists Who Held Official Positions in the ICTs and PrepComI or at Rome

Extremely rarely would an insider don the label "feminist," and Prosecutor Goldstone was far more willing to affiliate himself with a feminist agenda than were any of the women holding official positions. But women and men invested with official roles contributed decisively to the feminist cause. It is I, not they, who designate them "feminist." I do so on the grounds that they treated women as a distinct social group, saw women as subordinated to men at least some of the time, and shared the goal of finding for subordinated women some relief from, if not cessation of, their subordination.¹¹⁷

It is easy to see why the judges would have been circumspect. The ICTs had to create themselves *ex nihilo*. For years, they operated under the

113. See *infra* Part I.B.2.a.

114. See *infra* Part I.B.2.b.

115. See Charlesworth, *supra* note 93 (departing completely from the restatement/advocacy dichotomy).

116. Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778 (2005) [hereinafter Engle, *Feminism and Its (Dis)Contents*]; Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427 (2005) [hereinafter Engle, *Liberal Internationalism*]; Elena Loizidou, *Criminal Law and Punishment: Indexical Permission*, 6 PUNISHMENT & SOC'Y 303 (2004); Elena Loizidou, *The Trouble with Rape: Gender Matters and Legal "Transformations"*, 7 FEMINIST LEGAL STUD. 275 (1999); Diane Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, in INTERNATIONAL LAW AND ITS OTHERS 318 (Anne Orford ed., 2006); Annelise Riles, *The Virtual Sociality of Rights: The Case of "Women's Rights are Human Rights"*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 420, 420-39 (Michael Likosky ed., 2002).

117. See HALLEY, *supra* note 77, at 17-20 (offering the definition of feminism that I use here).

constant danger that public confidence in them would collapse, funding dry up, and a humiliating, violence-affirming institutional disintegration ensue. They had to apply *sui generis* statutes to *sui generis* conflicts. The ICTY had to do this *during* the conflict it was adjudicating. For the ICTY, illegitimacy could come not in a charge of "victor's justice" but of taking sides in an ongoing war.¹¹⁸ As a result, the ICTs labored under a near-crippling legitimacy deficit.¹¹⁹

There were other legitimacy constraints. When it came time to consider legal innovations, the tribunals had to pay obeisance to the principle of *nullum crimen sine lege*. The Rome Conference too was sometimes justified on grounds that it merely codified existing international law, though it enjoyed some scope for explicit innovation in that it was negotiating a treaty document that would apply only to signatory States through a court that would enforce its terms only prospectively. But both the ICTs and the ICC were and are supposed to be applying *existing* law. For their convictions to mean "justice" to many consumers of their output, the judges had to convince people that they were respecters of right, neutral objective arbiters of guilt or innocence.

According to my research, the ICT judges limited themselves to legal rulings and opinions and refrained from publishing in the law reviews or political journals. Yet, as we have seen, they could be quick to advance the GFeminist cause when the opportunity arose.¹²⁰ How could this judicial activism be made to jibe with their obligations to remain neutral and merely apply law? By *representing feminism as justice* and *representing feminism as knowledge*.

Recall ICTR Judge Pillay's intervention in *Akayesu* to ensure that testimony of sexual violence became the basis of an amended indictment with new counts charging rape as the predicate crime for genocide, crimes against humanity, and more.¹²¹ In its closing statement, the *Akayesu* defense "questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence."¹²² The argument was that these charges were not law but politics.

118. Why, someone might ask, were those who perpetrated the NATO bombing of Kosovo not tried as war criminals?

119. See Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1 (2002) (noting the dilemma of legitimacy that besets special tribunals, and that will beset the ICC, as they adjudicate violations of international humanitarian law and international criminal law).

120. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 17 (discussing the story about Judge Pillay intervening in order to get sexual violence testimony expanded).

121. See *supra* text accompanying notes 50–52.

122. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 417 (Sept. 2, 1998).

The Trial Chamber responded by translating politics into justice through a series of verbal transpositions that successively displaced the former by morphing it into the latter. Here is the first step in the Trial Chamber's response:

The Chamber understands that the amendment of the Indictment resulted from the *spontaneous testimony* of sexual violence by Witness J and Witness H during the course of this trial and *the subsequent investigation* of the Prosecution, rather than from public pressure.¹²³

Here we have gone from public pressure, to simple fact, to objective investigation. The Trial Chamber continues,

Nevertheless, the Chamber takes note of the *interest shown in this issue by non-governmental organizations*, which it considers as indicative of *public concern* over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is *in the interest of justice*.¹²⁴

We have successfully navigated from the rocky coast of public pressure to the calm, smooth isthmus of justice. Note the transvaluation of the term "interest." The NGOs are represented as interested not in the sense that they form an interest group or have a stake in the outcome, but in the sense that their attention has been focused on events in the trial. They make manifest generic "public concern" that the "interest" not of any politically self-interested group but "of justice" itself be done.

The idea that the commitments of feminism *are* justice, I would argue, is going to make them more palatable among international-law insiders bound to norms of neutrality. It will also make them more difficult to detect: as they become part of international law's common sense, they also

123. *Id.* (emphasis added).

124. *Id.* (emphasis added). I think that someone at the ICTR was worried about the charge that the Prosecutor's amended indictment in *Akayesu* was politically motivated and sought to shape the docket to make the charge difficult to lodge. I was unable to find anywhere in the official publications of the ICTR records in *Akayesu*, or on the ICTR website, any trace of an original indictment lacking charges of sexual violence crimes. Both the official paper publication and the website *begin* with an indictment including crimes of sexual violence. RWANDA REPORTS, *supra* note 52, at 8–13. Moreover, this indictment *pre-dates* by several months the tribunal's order permitting the amendment of the original indictment. *Id.* at 52–53. It seems likely that these official sources substitute the amended indictment for the original one, which remains unpublished. And it also seems at least possible that this substitution is not accidental but the result of a desire to keep the official docket innocent of the startling events leading to the first indictment's amendment.

lose their fingerprints, become generic, become capable of being hidden in plain sight. They will be ever more difficult to discern *as feminist*.

The same could be said of the second accommodation GFeminism has made to the demands of IHL/ICL legitimacy: feminism as *expertise*. Joanne Barkan, whose writing I will classify below as outsider-activist GFeminist, shows an extremely nice sense of who could fight and who had to *know*:

The cases demonstrate that female judges, investigators, prosecutors, translators, particularly those with expertise in gender crimes, are extremely useful in the prosecution of gender crimes. They further demonstrate that there must be political will to prosecute sex crimes, and that pressure exerted from NGOs is often indispensable to ensuring that gender crimes are investigated and indicted.¹²⁵

Barkan claims for feminism the full range of roles, from NGOs on the outside, to judges on the ultimate inside. And whereas the outside forces exert "political . . . pressure," the inside players have "expertise in gender crimes." Feminism *as knowledge* could wear judicial robes and wield prosecutorial discretion without sacrificing legitimacy.

We see this defensive re-characterization again and again. For example, William R. Pace and Jennifer Schense describe a sharp conflict in the PrepComI between a group of Arab States and the WCGJ in homologous terms:

[T]he *advocacy-oriented activities* of the Women's Caucus encountered difficulties because of the sustained opposition of a small number of delegations to what they perceived to be the pursuit of a *purely political agenda* rather than the contribution of *legal expertise based on the real-life experiences of war-affected women and survivors of sexual violence*.¹²⁶

Of the three italicized modes of operation, Pace and Schense were willing to defend the WCGJ's engagement in a lot of the first from attacks that they were really doing the second as long as their work could be described as, really, instead, the third.

Feminist judging was really expert judging. Askin praised Judge Pillay's intervention in *Akayesu* for its abrupt effectiveness, concluding that "it is highly unlikely that the *Akayesu* decision . . . which exemplifies a

125. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 19.

126. William R. Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, *supra* note 30, at 705, 719 (emphasis added).

heightened awareness of crimes committed against women, would have demonstrated such gender sensitivity without South African Judge Navanethem Pillay's participation in both the trial and the judgment."¹²⁷ That is to say, her intervention *worked*. And this powerful intervention brought not politics, but knowledge: "*Having extensive expertise in gender violence and international law*, Judge Pillay questioned the witnesses about these crimes."¹²⁸ Similarly, Askin tells us, Judge Odio-Benito, who, by the relevant time, was "one of the three female judges appointed to the Yugoslav Tribunal, was sitting on . . . [Čelebici], and her *extensive expertise in gender crimes* had a significant impact on adjudicating female sexual torture and male sexual violence."¹²⁹

In fact, the ICTY has actually *held* that experience as a feminist activist in international legal work can be a *qualification* for service as a judge on the court. In one important ICTY prosecution, the accused, Anton Furundžija, moved to disqualify Judge Florence Ndebele Mwachande Mumba on the ground that her participation in the Trial Chamber proceedings created an appearance of bias. She had been a member of the U.N. Commission on the Status of Women (UNCSW) during the Yugoslav war, and had participated in its work on allegations that mass rapes were occurring there. Moreover, complained the defendant, the prosecutor in his case—Sellers—and three authors of an amicus brief filed in his case had participated *with* Judge Mumba in the United Nations fourth World Conference on Women in Beijing in September 1995. And finally, all four of these women—including, again, Judge Mumba—had also participated in an Expert Group Meeting after the Conference that produced recommendations to the United Nations to ensure that rape be prosecuted under IHL as a war crime. The accused argued that these activities and associations created the appearance of bias. The Appeals Chamber rejected this challenge, citing Judge Mumba's experiences on the UNCSW as positive "qualifications . . . which, by their very nature, play an integral role in satisfying the eligibility requirements" for ICT judges.¹³⁰ Summing it all up, Mappie Veldt concluded, "Judge Mumba's membership of the UNCSW and her general experience in the

127. Askin, *Sexual Violence*, *supra* note 95, at 98 n.8.

128. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 17 (emphasis added); see also Katy Glassborow, *Apartheid Legacy Haunts ICC Appeals Judge*, INST. FOR WAR & PEACE REPORTING, July 25, 2006, http://www.iwpr.net/?p=acr&s=f&o=322493&apc_state=henh (providing a biography of Judge Pillay, and, in particular, noting that she has been a member of Equality Now and is a staunch advocate of defendants' rights in international tribunals).

129. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 17 (emphasis added).

130. Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeals Judgment, ¶ 205 (July 21, 2000).

field were, by their very nature, an integral part of her qualifications for nomination as judge of the ICTY.”¹³¹

The neutrality of the resulting new official cadre was often subtly indicated by designating their sole qualification as their biological sex, but the real driver was the expertise that feminism had become. For instance, Askin describes ICT decisions that represent progress, and indicates that in each of them

a *female* judge was a member of the Trial Chamber hearing the case, and occasionally it was her skillful intervention, expertise in *women's* issues, or judicial competence that facilitated the judicial redress process and impacted the development of gender crimes There is little doubt that the presence of qualified *female* judges, prosecutors, investigators, translators, and facilitators (for example in the Victim and Witnesses Unit) has improved the record in affording redress for gender-related crimes.¹³²

We should not be deceived: Phyllis Schlafly would not have been welcome. Female here is code for feminist. Men can be—and did become—feminists: “The ICTY and ICTR are case studies on why it is so crucial to include *women as well as men* with *appropriate expertise* in international bodies charged with investigating war and conflict situations.”¹³³ But the call for *women* was a call for *feminists*.

So much for the judges: what about the Prosecutor's Office? Prosecutors were far more willing than judges to write in the law reviews, and to publish their conference papers and after-dinner remarks. We have already heard what Prosecutor Goldstone has had to say in these venues.¹³⁴ Chief Prosecutor Louise Arbour published a lecture in which she both espoused the feminist agenda and distanced herself from it, performing her neutrality while incorporating parts—but by no means all—

131. Mappie Veldt, *Commentary*, in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997–1999, at 357, 358 (André Klip & Göran Sluiter eds., 2001).

132. Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 346 (emphasis added); *see also* Askin, *Sexual Violence*, *supra* note 95, at 98 (“The jurisprudence of the United Nations Tribunals reflects women's participation.”); Bedont & Hall-Martinez, *supra* note 32, at 75–76 (“The gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY and ICTR as investigators, researchers, judges, legal advisors, and prosecutors.”).

133. Bedont & Hall-Martinez, *supra* note 32, at 75 (emphasis added).

134. Goldstone, *Prosecuting Rape*, *supra* note 50, at 277 (revealing how willing then-Prosecutor Goldstone was to disclose the political vexations and moral affiliations of his work); Goldstone, *United Nations' War Crimes Tribunals*, *supra* note 48, at 231.

of the feminist agenda.¹³⁵ But by far the most complex performance was put in by Sellers. Sellers was Senior Trial Attorney in the Office of the Prosecutor for the ICTY and prosecuted several of the cases that will interest us most.¹³⁶ In 1994, then-Chief Prosecutor Goldstone created the post of Legal Advisor for Gender-Related Crimes and appointed Sellers to fill it.¹³⁷ It should be noted that Sellers was an adviser to the Prosecutor's Office, not to the judges or defense counsel: feminism as legal expertise has the same carceral consciousness as the GFeminist effort in IHL/ICL generally. While occupying this post, simultaneously prosecuting cases, and advising the Prosecutor's Office, she *also* published a series of unusually hard-hitting feminist law review articles, basically putting *pressure on herself to do something, finally*, about the scandal of IHL indifference to rape and sexual violence.¹³⁸

An interesting aspect of Sellers's persona is the sheer absence of personal historical information about her in the voluminous archive of ICT information. I have found only three claims made by others documenting that she was in any way effective.¹³⁹ These three acknowledgements of her interventionist capability are aberrational in the ample commentary I have read about the judges and prosecutors of the ICTs. Generally, the feminist activist practice was to pay no attention to the feminist behind the

135. Louise Arbour, *Crimes Against Women Under International Law*, 21 BERKELEY J. INT'L L. 196 (2003) (reflecting on her years in the ICTY Prosecutor's Office).

136. Sellers, *Individual(s) Liability*, *supra* note 31 (indicating that she had served as trial attorney in *Furundžija*, co-counsel in *Akayesu*, and "principal legal advisor to several cases including the *Kunarac* case").

137. Goldstone, *Prosecuting Rape*, *supra* note 50, at 280 (indicating that Goldstone had appointed Sellers as the "legal advisor to the Office of the Prosecutor for Gender Crimes"); Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT'L L. 287, 287 n.1 (2002) [hereinafter Sellers, *Sexual Violence*] (indicating that Sellers served as Legal Advisor for Gender Related Crimes to the Prosecutors' Office of the ICTs from 1994 until at least 2002).

138. Payam Akhavan, Theodor Meron, W. Hays Parks & Patricia Viseur Sellers, *The Contribution of the Ad Hoc Tribunals to International Humanitarian Law*, 13 AM. U. INT'L L. REV. 1509 (1998); Sellers, *Individual(s) Liability*, *supra* note 31; Sellers & Okuizumi, *supra* note 28; Sellers, *Sexual Violence*, *supra* note 137; Patricia Viseur Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 263-332 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) [hereinafter Sellers, *The Context of Sexual Violence*]; Patricia Viseur Sellers, *The Cultural Value of Sexual Violence*, 93 AM. SOC'Y INT'L L. PROC. 312 (1999) [hereinafter Sellers, *The Cultural Value of Sexual Violence*].

139. Dorothea Beane, *Human Rights in Transition: Freedom from Fear*, 6 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 1, 22-23 (2000) (describing Sellers as "one of the Gender Crimes strategists for the" ICTs); Goldstone, *Prosecuting Rape*, *supra* note 50, at 280 (indicating that many of the developments within the Prosecutor's Office and in its prosecutions were "the result of her initiatives and her imaginative approach"); Lehr-Lehnardt, *supra* note 80, at 324 ("[Patricia Viseur Sellers] has been a leading force ensuring that war crimes against women are punished.").

curtain, and instead, to introduce her, if at all, only as the embodiment of justice or expertise.

Those familiar with the simultaneous evolution of GFeminism in the domain of human rights will surely be thinking of the parallel phenomenon there: the appointment of Special Rapporteurs on Violence against Women and the publication of reports that give elements of the GFeminist agenda official status within the U.N. human rights bureaucracy.¹⁴⁰ Several provisions in the Rome Statute authorize, and even purport to require, the appointment of experts in sexual violence to the judiciary, to the Prosecutor's Office, and to the Victims and Witnesses Unit.¹⁴¹ A new NGO, the Project on International Courts and Tribunals (PICT), has generated a strategy for empanelling judges with legal expertise on violence against women and children. PICT's goal: "[J]udges with *competence* in international humanitarian law, human rights law, and with *legal expertise* on specific issues, such as violence against women and children, will be crucial for the work of the Court given its intended subject matter."¹⁴² For PICT, at least, it is sufficient if an ICC judge is merely competent in law, as long as he or she is an expert in gender.¹⁴³

Does that last claim seem extreme? Here is one Special Rapporteur's version of the story I told in Part I.B.1 of this Article:

Many positive jurisprudential and structural developments have taken place since 1994; the international community has devel-

140. This bibliography is voluminous. The following have been relied on by GFeminists in the Rome process: U.N. Econ. & Soc. Council [ECOSOC], *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, 60th Sess., U.N. Doc. E/CN.4/2004/66 (Dec. 26, 2003) (prepared by Yakin Ertürk); ECOSOC, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, 59th Sess. U.N. Doc. E/CN.4/2003/75/Add.1 (Feb. 27, 2003) (prepared by Radhika Coomaraswamy) [hereinafter Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women*]; ECOSOC, Sub-Comm. on Promotion & Prot. of Human Rights, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000) (prepared by Gay J. McDougall).

141. Rome Statute, *supra* note 23, art. 36.8(b) (providing that, when nominating judges, States "shall . . . take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children"); *id.* art. 42(9) ("The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children."); *id.* art. 43(6) ("The . . . Victims and Witnesses Unit within the Registry . . . shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.").

142. Thordis Ingadottir, *The International Criminal Court: Nomination and Election of Judges* 39 (Project on Int'l Courts & Tribunals, ICC Discussion Paper No. 4, 2002) (emphasis added).

143. Query whether the Project on International Courts and Tribunals (PICT) goal is the appointment of experts in gender as the Pope understands it or gender as the GFeminists affiliated with the WCGJ know it.

oped precise legal standards that confirm that rape and other gender-based crime can be war crimes, crimes against humanity, and components of the crime of genocide, as well as torture or other cruel, inhuman and degrading treatment and enslavement. The [ICTY and ICTR] . . . have set jurisprudential benchmarks for the prosecution of wartime sexual violence. In addition . . . the entry into force of the . . . Rome Statute . . . now specifically defines rape and other gender-based violence as constituent acts of crimes against humanity and war crimes Women's rights activists, and principally the International [sic] Caucus for Gender Justice¹⁴⁴ played a significant role in every major United Nations preparatory meeting on the ICC: (a) to ensure that the range of abuses that happen to women was accurately reflected in the list of crimes over which the ICC would have jurisdiction; and (b) to ensure that the rules and procedures governing how the court functions would be responsive to gender-specific crimes. It was a significant success in the struggle to end impunity for crimes of sexual and gender-based violence.¹⁴⁵

Aside from the idea that legal rules are "jurisprudential benchmarks," every word of this paragraph can be matched by statements in the literary nonfiction of GFeminists writing in the law reviews (to whom we will soon return). I could offer quotations from Askin, Bedont, Bedont and Hall-Martinez, and Oosterveld using every important word and phrase that comes to us here as official knowledge. This *is* the feminists' version of what happened in the ICT/Rome Statute process. In this vision, the WCGJ becomes the ensurer of legally correct outcomes: politics is translated, once again, into justice. We also see here the statement, very common in GFeminist assessments of the Rome Statute, that "gender-based violence" was actually made a crime in that document. The Special Rapporteur does not bother to note that, though "gender violence" was included in several provisions relating to the required expertise for various institutional roles in the new ICC, the WCGJ effort to insert this new term into the crime-defining provisions was soundly defeated.¹⁴⁶ Citing a Report of the Special Rapporteur on Violence against Women for such tentative verities is much stronger than citing the law review literature, however, precisely because the persona of the Special Rapporteur on Violence against Women institutionalizes feminism as an objective expertise.

144. Coomaraswamy must be referring here to the *Women's Caucus for Gender Justice*.

145. Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women*, *supra* note 140, ¶ 8.

146. *See infra* Part II.B.1.

A particularly delightful indication of the close dependence of expertise on the work of advocates can be detected in the paragraph just cited.¹⁴⁷ The WCGJ, as we have seen, was a strong feminist-activist NGO that participated full-bore in the development of the Rome Statute. Special Rapporteur Radhika Coomaraswamy invokes *the WCGJ's* work as a warrant for the *validity of the Rome Statute*. And in one of its submissions to PrepComI for the Rome Statute, the WCGJ cited the report of another Special Rapporteur on Sexual Violence for expert knowledge that the right legal term for the “comfort women” forced to have sex with Japanese soldiers was “military sexual slaves”—a term derived directly from a highly distinctive branch of American feminism, as we will see in Part II.B.1 below. In that submission, the WCGJ includes a block quote from the Special Rapporteur’s Report—in which the Rapporteur argues for reaching this expert conclusion on the grounds that activist NGOs and “some academics” advocate it!¹⁴⁸

How did the WCGJ, its constituent NGOs, and feminists on state delegations resolve the advocacy/legitimacy tension in PrepComI and at Rome? The feminist members of state delegations and feminists representing NGOs that were officially cut into the process were far less tethered by the expectations of objectivity and detachment that attended judicial or prosecutorial power in the ICTs. But legitimacy constraints were not wanting, even in this process of explicit negotiation. For an NGO wanting to play an important role in the CICC, the ticket of admission to PrepComI was to behave not like a pugilist but like a consultant and an expert. This was partly an accommodation to the effort to produce a Rome Statute that could be represented not as the product of interest groups in struggle but as the consensus of world nations. Oosterveld looks back on the intense but doomed effort of the WCGJ

147. See *supra* text accompanying note 145.

148. ECOSOC, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, 52nd Sess., ¶¶ 8–10, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996). The Report reads,

[T]he practice of “comfort women” should be considered a clear case of sexual slavery . . . [T]he Special Rapporteur concurs entirely with the view held by members of the Working Group on Contemporary Forms of Slavery, as well as by representatives of non-governmental organizations and some academics, that the phrase “comfort women” does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase “military sexual slaves” represents a much more accurate and appropriate terminology.

Id.

and its allies to include “crimes of gender violence” in the crimes-defining sections of the Statute and defends the WCGJ against accusations that it violated these norms:

In the author’s experience, some have viewed the debate on the term “gender” as overly confrontational (and emotional) within a U.N. process that works on the basis of consensus. It is true that such debates tend to become polarized and are used as a tactic by those wishing to restrict or eliminate the term. However, a debate can be helpful for international law if chaired, moderated, or guided by a person who understands the issues, both stated and unstated.¹⁴⁹

According to Oosterveld, if it got too emotional, that was not the GFeminists’ fault. One wonders whether Pace, mastermind of the CICC and its strategy of consensus, agreed.

The legitimacy of the ICC also rested in part on the representation of the Rome Statute as merely a codification of *existing* humanitarian law. Christopher Keith Hall, for instance, praises NGOs involved in PrepComI meetings for the degree to which they forbore from representing their reforms as advances: “Human rights organizations usually sought to ensure that the court would embody the current status of international humanitarian law.” And Hall criticized them for “sometimes succumb[ing] to the temptation to try to use the PrepCom to advance the current status in international law of issues such as war crimes and crimes against humanity.”¹⁵⁰ The rhetorical strategy for feminists wishing to participate in the consensus, then, would be to represent advances as restatements.

What is the literary output of PrepComI/Rome GFeminist insiders? Official records of these discussions and debates do not exist.¹⁵¹ It is an indication of the stature of the WCGJ as a legitimate player in the eyes of the CICC that Hall can point to the WCGJ Recommendations as our best source on the legislative history for the otherwise unrecorded meetings of PrepComI.¹⁵² Oosterveld, as we know a member of the Canadian delegation to the Rome Conference, has provided two highly detailed and astute insider accounts of feminist goals, strategy, and struggle, one concentrating on “sexual slavery” and the other on “crimes of gender

149. Oosterveld, *The Definition of “Gender” in the Rome Statute*, *supra* note 54, at 83 n.164.

150. Benedetti & Washburn, *supra* note 19, at 15.

151. Hall, *supra* note 60, at 125 n.6.

152. *Id.* at 124 n.7.

violence.”¹⁵³ In addition, we have two fascinating law review articles by Barbara Bedont and Katherine Hall-Martinez, feminists who disclose that they were direct participants in the Rome process and who affiliated themselves with the WCGJ.¹⁵⁴ That is to say, GFeminist insiders used the law review article as a strategic and tactical tool. I will discuss the literary status of these interventions and the voluminous law review output by GFeminist outsiders in the next subsection.¹⁵⁵ Here, just two comments on these articles seen as reports by insiders.

First, Oosterveld, Bedont, and Hall-Martinez all use the law review venue to address the feminist legal community. They report on successes and losses in a way that assumes a consensus on what the goals were. Oosterveld in particular defends the compromise that the WCGJ reached in the fierce fight over “gender violence” from a voluminous law-review-based feminist attack. As will become apparent, I hope, in Parts II.D and II.E below, her articles provide no sign of any significant dissent—in the insider GFeminist project or in the attacks on them from feminists back home—from the WCGJ agenda. Instead, the attack literature Oosterveld tackles blamed the GFeminist insiders for not achieving the full WCGJ agenda, leaving the strong implication that the agenda itself was shared by everyone. Whether dissent existed or not is another question; *dissent was not performed*. For anyone accustomed to the strong tendency of feminists to disagree amongst themselves, this express and implied GFeminist and feminist consensus is quite breathtaking.

Second, Oosterveld, Bedont, and Hall-Martinez also addressed the international legal community, praising it for its successes in adopting WCGJ reforms and expressing dismay at the backwardness, social conservatism, and patriarchal intransigence that led to its failures. Here again, there is no publicly detectable light between the GFeminist insiders using the law reviews as a venue and the WCGJ’s expressed agenda. Once again, *performed consensus*.

b. Contributions by Feminist Activists Writing in the Mode
of Restatement, Codification, and the Objective
Transmission of Existing Positive Law

As Bedont acknowledged, feminists “had the paradoxical task of showing that the existing standards were inadequate and had to be remedied . . . while also showing that sufficient progress had been made

153. Oosterveld, *Sexual Slavery*, *supra* note 21, at 605; Oosterveld, *The Definition of “Gender” in the Rome Statute*, *supra* note 54, at 55.

154. Bedont, *supra* note 51, at 183 n.* (disclosing that Bedont was an attorney for the WCGJ); Bedont & Hall-Martinez, *supra* note 32, at 66–67 (praising the efforts of the WCGJ).

155. See *infra* Part I.B.2.b.

under customary international law to close the existing gaps.”¹⁵⁶ All producers of GFeminist law review articles, whether the author was an official insider, a professor, or a student writing a note, faced the challenge of mediating between legal advocacy and law. They had to perform restatement while pursuing advocacy.

Here is an example of the dilemma they faced. The post World War II criminal tribunals in Nuremberg and Tokyo offered significant precedent for convicting people of IHL crimes when they had participated in sexual violence, had supervised troops who raped, or had forced women into prostitution.¹⁵⁷ To that extent, feminists depended on the judgments and opinions of these tribunals as legal authorities. Invoking these precedents was a way of legitimating their claims as consistent with *nullum crimen sine lege* and the (supposed) nonpolitical character of the Rome process. But feminists were aggrieved that—despite the massive number of sexual assaults of all kinds that women suffered in Europe, the Soviet Union, and the Pacific—none of these trials emphasized sexual violence. And they had to let their grievance become audible. How to do both?

One way was to see-saw: they could invoke pre-existing IHL instruments because they treated sexual violence and enforced prostitution as clearly admissible as evidence of war crimes and because a number of convictions included sexual crimes in the panoply of predicate wrongdoing—while also representing this legacy as legally defective because neither the Tokyo nor the Nuremberg Charter named rape as a predicate crime, and because rape and sexual violence never stood alone as the sole focus of a count or a conviction. You cannot take both positions at once, so writing that does this tends to swing back and forth between them like a pendulum. Askin provides us with an example of this complex maneuver:

[see] In part because of the [Nuremberg] trial’s focus on those responsible for waging aggressive war, [saw] sexual violence was largely ignored.

... [saw] [T]he IMT Charter failed to include any form of sexual violence, and the tribunal did not expressly prosecute such crimes, even though they were extensively documented throughout the war and occupation. [see] Nonetheless, the trial records contain extensive evidence of sexual violence. [saw] While not explicit, [see] gender-related crimes were included as evidence

156. Bedont, *supra* note 51, at 184.

157. Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 295 nn.36–37 (tabulating evidence admitted in the Nuremberg and Tokyo trials that could have supported charges of rape and other sexual violence but that was instead considered to support charges of other, non-sexual crimes).

of the atrocities prosecuted during the trial and can be considered subsumed within the IMT Judgment

Similarly, in the subsequent Nuremberg trials held by the Allied forces under the auspices of Control Council Law No. 10 (CCL 10), [see] which did explicitly list rape as a crime against humanity, [saw] gender crimes were given only cursory treatment

In the post-World War II trials held in Tokyo, [see] rape crimes were expressly prosecuted, [saw] albeit to a limited extent and in conjunction with other crimes.¹⁵⁸

Good lawyering. And it all checks out: there is plenty of spin here, but it is all visible on the surface.

Askin has been an immensely prolific producer of GFeminist re-statements with an advocacy intention, or, if you like, advocacy articles that restate/describe while praising and blaming.¹⁵⁹ It is interesting to compare Askin's articles, which are mostly about adjudication in ICTs, with Oosterveld's accounts of the Rome Conference. Oosterveld is far more explicit than Askin about feminist strategy, and far more likely to invoke feminist values instead of legal rightness as her source of normative ideas. It is a small measure of the different places they inhabited in the emerging distribution of roles in the task of building feminist legal legitimacy.

Far less trustworthy are the several tomes that have been published as restatements of the statutory and case law reforms.¹⁶⁰ These codifica-

158. Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 301-02.

159. See, e.g., KELLY D. ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997) [hereinafter ASKIN, *WAR CRIMES AGAINST WOMEN*]; Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50; Kelly D. Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. INT'L CRIM. JUST. 1007 (2005); Kelly D. Askin, *Issues Surrounding the Creation of a Regional Human Rights System for the Asia-Pacific*, 4 ILSA J. INT'L & COMP. L. 599 (1998); Kelly D. Askin, *Judgments Rendered in 1999 by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda: Tadić (App. Ch.); Aleksovski (ICTY); Jelisić (ICTY); Ruzinkana & Kayishema (ICTR); Serushago (ICTR); Rutaganda (ICTR)*, 6 ILSA J. INT'L & COMP. L. 485 (2000); Kelly D. Askin, *Omarska Camp, Bosnia: Broken Promises of "Never Again"*, 30 HUM. RTS. 12 (2003); Kelly D. Askin, *Part IV—ICTY (2001)*, 8 HUM. RTS. BRIEF 20 (2001); Askin, *Prosecuting Wartime Rape*, *supra* note 81; Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903 (2003); Askin, *Sexual Violence*, *supra* note 95; Kelly D. Askin, *The International War Crimes Trial of Anto Furundžija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes*, 12 LEIDEN J. INT'L L. 935 (1999); Kelly D. Askin, *The Quest for Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT'L L. 509 (2003) [hereinafter Askin, *The Quest for Post-Conflict Gender Justice*].

160. See, e.g., ANNE-MARIE DE BROUWER, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR* (2005); JU-

tion-style handbooks purport to restate the work of the ICTs and the Rome Conference but instead are permeated with feminist advocacy moves. No one who wants to know what the official documents say should rely on them. Though unreliable sources of the ICTs and Rome Conference, they are extremely useful when read as guides to the structure of feminist ambition.

And then there are general restatements, such as Roy S. Lee's compendious handbook *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*. This volume presents itself as an authoritative interpretive guide to these ancillary law texts, providing the history of their negotiation and describing and settling many questions about how to interpret them. But Lee's volume is, from a GFeminist perspective, an unreliable reporter of the negotiations producing the Elements of Crimes and the Rules of Procedure and Evidence. At one point, Copelon even denounces Lee for altering a GFeminist author's contribution to his collection of purported restatements.¹⁶¹ Copelon's evidence that *someone* modified it seems watertight, but I have not personally inspected the relevant unpublished materials. Here is her claim. The provision at stake is the last sentence of the definition of gender in the Rome Statute: "The term 'gender' does not indicate anything different from the above."¹⁶² As we will see in Parts II.D and II.E below, this provision was the site of intense GFeminist advocacy and intense conservative resistance, one of the biggest conflicts in the entire Rome process. At issue for Copelon is whether this second sentence narrows the Statute's definition of gender, so that, for instance, it could not be interpreted to include sexual orientation. Her quarrel with Lee arises because the published version of C. Steains' "Gender Issues," a contribution to his collection of restatements, legitimates a conservative reading of this provision, one that Steains herself would not endorse.¹⁶³ Copelon's charge of editorial interference is as follows:

The published article concludes at 374: "Although many delegates felt that the second sentence was superfluous, it was ultimately included to forestall any implication that the issue of sexual orientation could be raised in connection with Article

DITH G. GARDHAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW (2001).

161. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217 (2000) [hereinafter Copelon, *Gender Crimes as War Crimes*].

162. Rome Statute, *supra* note 23, art. 7.3.

163. See Cate Steains, *Gender Issues*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 357 (Roy S. Lee ed., 2002).

2.1.3" of the Rome Statute. The published version is completely inconsistent with the draft submitted by the author, which states in the pertinent part: "The second sentence was included upon the insistence of the 'anti-gender' delegations, despite arguments by the 'pro-gender' delegations that it was superfluous."¹⁶⁴

The publication of unreliable GFeminist codifications is surely and understandably motivated by a desire to counteract the danger posed by this sort of incident—but it does mean that anyone uninterested in spin should forego resort to this politically tremulous body of work.

Very often, and to my mind less objectionably, the law reviews have allowed themselves to be the venue for less transparent representation of the legal materials. Feminist literary *fiction* amounted (usually) to representing the legal materials as more *positive* than they were. Early on in the work of the ICTs, for instance, proponents of the feminist reforms reported *indictments* as though they were on par with *judgments*.¹⁶⁵ Users of law review and journal articles that do this have to be willing to check to ascertain whether the cases invoked actually ended up issuing holdings consistent with these claims.

And judgments are often represented to install feminist-inspired reforms into the positive law when good arguments lie ready to hand that those reforms were actually being rejected. Three examples may suffice. First, Askin persistently refers to the Trial Chamber Judgment in *Kunarac* as the first legal authority making *sexual slavery* a violation¹⁶⁶—but, as she conceded elsewhere,¹⁶⁷ that is exactly what the Chamber did *not*

164. Copelon, *Gender Crimes as War Crimes*, *supra* note 161, at 237 n.60 (quoting C. Steains, *Gender and the ICC* (July 1999) (unpublished draft); Memorandum from C. Steains to R. Lee (July 2, 1999)).

165. See generally Askin, *Sexual Violence*, *supra* note 95.

166. Askin, *A Decade of the Development of Gender Crimes*, *supra* note 50, at 18. Askin described *Kunarac* as

the first international trial in history to adjudicate rape and enslavement for *crimes essentially constituting sexual slavery* [A]lthough the ICC Statute specifically enumerates sexual slavery as a crime, the ICTY Statute only lists rape and enslavement; hence, these offenses were combined to *prosecute the accused for the sexual enslavement of women and girls*.

Id. (emphasis added); Askin, *The Quest for Post-Conflict Gender Justice*, *supra* note 159, at 520 n.43 (summarizing *Kunarac* as achieving a "conviction for . . . indicia of enslavement for sexual slavery . . .") (emphasis added).

167. Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 337 (reporting that the *Kunarac* Trial Chamber "found two of the accused guilty of rape and enslavement as crimes against humanity for *acts essentially amounting to sexual slavery*") (emphasis added)). But see *id.* at 340 ("Regrettably, the term 'sexual slavery' was never used in the Judgement."). Askin added,

The facts of the case demonstrate that the enslavement and rape were inseparably linked, and the accused enslaved the women and girls as a means to effectuate continuous rape. Since a primary, but not necessarily exclusive, motivation behind the

do. To be sure, the defendants were convicted of *enslavement* on facts that *included* sexual assaults, forced nudity, and the like. The ICTY Statute, though it did authorize the ICTY to try charges of enslavement, did not include the term “sexual slavery.” This was in strong contrast with the recently adopted Rome Statute, which *did* include the contested term.¹⁶⁸ Perhaps not surprisingly, the ICTY proved unwilling to engraft the feminists’ preferred term onto a statute from which it was, by comparison with the Rome Statute, so conspicuously absent. Insisting that *Kunarac* had, instead, handed down a conviction for “sexual slavery” would make that case a direct precedent in the ICC. It remains to be seen whether GFeminists so argue, and whether the new court accepts their somewhat exaggerated reading of the case.

We can find another example of strong GFeminist spin in Charlesworth’s conclusion that “the statutes of the two ad hoc tribunals and the ICC . . . provide much fuller responses to sexual violence, constructing it, depending on the circumstances, as potentially a crime of genocide, a crime against humanity and a war crime.”¹⁶⁹ Well, technically and at an extremely high level of generality, that is right. The ICT statutes do not use the term *sexual violence*, but the Rome Statute does; and, while none of the *statutes* acknowledges that *sexual violence* is a mode of *genocide*, there are two legal sources for this idea elsewhere. *Akayesu*, applying the ICTR Statute, held that rape and other sexual assaults were sufficient to sustain a conviction for genocide; and the ICC Elements of Crimes includes a *footnote* indicating that “genocide by causing serious bodily or mental harm” “may include, but is not necessarily restricted to, torture, rape, sexual violence or inhuman or degrading treatment.”¹⁷⁰ How decisive are *Akayesu* and the Elements of Crimes for construing the statutory regime? As the timeline in Part I.A indicates, *Akayesu* was decided *after* the Rome Statute was promulgated. Whether its rape-as-genocide holding will be repeated by the ICC remains to be seen. And the Elements of Crimes is a somewhat ambiguous legal authority. The

enslavement was to hold the women and girls for sexual access at will and with ease, the crime would most appropriately be characterized as sexual slavery.

Id. Compare Prosecutor v. Kunarac, Kovac & Vuković, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶¶ 728–45 (Feb. 22, 2001) (deploring the rapes but declining to find them to be the central purpose for the defendants’ entire course of conduct and instead expressing equal outrage that the victims, all of them women, were forced to perform housework).

168. Rome Statute, *supra* note 23, art. 7.1(g) (crimes against humanity); *id.* art. 8.2(b)(xxii) (laws and customs of war in international conflicts); *id.* art. 8.2(e)(vi) (laws and customs of war in conflicts that are not international in character).

169. Charlesworth, *supra* note 93, at 386.

170. Preparatory Commission for the International Criminal Court, *Addendum: Finalized Draft Text of the Elements of Crimes*, art. 6(b) n.3, U.N. Doc. PCNICC/2000/INF/3/Add.2 (Nov. 2, 2000) [hereinafter ICC Elements of Crimes].

Rome Statute provides that the Rules of Procedure and Evidence "shall enter into force," while the Elements of Crimes "shall" merely "assist the Court."¹⁷¹ Will the Elements of Crimes be held to be binding or merely advisory? It remains to be seen. And what about the footnotes to the Elements of Crimes? Charles Garraway, commenting on one such footnote, notes that the inclusion of a rule in a *footnote* rather than in the text itself indicates that *some* of the players wanted it badly, but that others were either indifferent or, in the case he addresses, mildly to extremely hostile.¹⁷² Will the ICC read the footnotes as restrictive interpretations of the text they adorn or as a roll call of failed legislative efforts? That, too, remains to be seen. Not surprisingly, the footnotes repeatedly install WCGJ agenda items on this legal periphery: is that going to be a good thing or a bad thing for the WCGJ agenda? Again, we will not know until the ICC has decided the question, if it ever does. So, under those circumstances, Charlesworth's legal claim is potentially right.

One final example of GFeminist art in the representation of positive law can be found in the writings of Bedont and Hall-Martinez, who consistently describe the sexual violence crimes in the Rome Statute as *gender crimes* even though, as they also concede, GFeminists completely failed to gain sufficient support for this language to install it anywhere in the Statute.¹⁷³

In sum, I have found that you need to know the legal outcomes and their representation in the articles in deep detail to detect the gaps between them. The little bits of spin one eventually learns to detect in the law review archives are extremely reliable indicators that the feminists are writing about reforms that they regarded as crucial, if difficult to accomplish. Sexual slavery, gender crimes, rape as genocide: I hope to show in Part II of this Article not only that these reforms mattered to them, but *why* they did.

Should we regard this bibliography as an element of GFeminism? When it is in full (performed) consensus with the agendas of operative GFeminist insiders, I think we should. We have already seen evidence of a rich association between GFeminist insiders and the academics. In Part III, I hope to show also that they engaged in intense idea-trading, and

171. Rome Statute, *supra* note 23, art. 9.1 (noting that the "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8," which are the articles defining genocide, war crimes, and crimes against humanity for purposes of determining ICC jurisdiction). Compare Rome Statute, *supra* note 23, art. 51.1 (authorizing the promulgation of Rules of Procedure and Evidence).

172. Charles Galloway, *Elements of the Specific Forms of Genocide*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *supra* note 30, at 49, 50-51.

173. Bedont & Hall-Martinez, *supra* note 32, at 68 (noting the failure of efforts to legislate "gender crimes").

that many of their ideas are now ensconced in the language of the Rome Statute. *Ex post*, it is clear that the immense outpouring of law review articles on making rape and sexual violence the subject of international humanitarian and international criminal concern was part of the reinvention of feminism in NG terms. Denying this role for academic feminist legal theory—traditionally understood by its producers and consumers to be excluded from legal and social power and to occupy a stance *opposed* to them—would, I would suggest, be not merely inaccurate but, for feminist legal theory itself, an act of bad faith.

Taken together, nonofficial GFeminists writing in the law reviews and publishing treatises and the like performed consensus. That does not mean there *was* consensus; only that the work of feminists, especially as they were drawn into the vortex of the Rome Conference, became more and more compliant with the requirement that consensus be the *manifest style of all participants*. Part II of this Article diagnoses the actual reforms sought and the arguments made for them in order to discover whether there was any consistent feminist ideology holding the reform consensus together.

II. FEMINIST GOALS, SUCCESSES, AND DEFEATS IN THE STATUTORY PROCESSES

Feminists had many goals in the massive explosion of lawmaking that attended the constitution of the ICTs and the ICC and their production of a highly self-referential body of case law. The Green/Copelon Working Group Proposals of 1993, for example, include sections on the scope of the ICTY's jurisdiction, the substantive definition of gender-related crimes, rules for imposing secondary or indirect liability and command liability, rules about the admissibility of evidence of sex crimes, rules about evidentiary standards for command liability, proposals for a special system for protection of victim witnesses, proposed penalties, and a proposal for the compensation of victims.¹⁷⁴

This Article studies only *one* of those efforts: the struggle to alter the rules of IHL with respect to rape and other forms of sexual violence suffered by women in war and armed conflict. As the Rome Statute process got going, this morphed into an effort to establish rules in that new body of ICL.

The initial goals were a matter of perfect consensus among the feminists involved: they wanted authoritative enumeration of sexual crimes in their own terms. They wanted to establish that rape, sexual violence, and

174. See CUNY Clinic Memorandum, *supra* note 37.

sexual slavery are IHL/ICL crimes. They wanted these sexual crimes to be lodged *as high up the hierarchy of IHL/ICL codification as they could get them*, and *in terms that derive from their shared feminist understanding of them*. I will call these, respectively, their vertical and their horizontal reform projects.

Of course, there were disagreements among the feminists both as to goals and as to means. One early disagreement, analyzed in a brilliant paper by Karen Engle, divided feminists working in the ICTY on the design of specific prosecutions. Some wanted rape to be understood and prosecuted as genocide, while others objected that this framing subordinated feminism to nationalism, obscured the fact that rape was committed “on all sides,” and suggested that wartime rape was somehow worse than everyday rape.¹⁷⁵ As Engle also indicates, beyond this very sharp confrontation, the very same feminists were largely in consensus.¹⁷⁶ I hope to show here that this consensus emphasized the continuity between wartime rape and everyday rape and was vital to the trajectory of their work on the Rome Statute.

In this Part, I tell the story of the feminists’ evolving engagement with IHL. I will be asking: what feminist ideas animated their rulemaking; where were feminists in consensus, and where were they in disagreement about their goals; what parts of the law and what specific outcomes show signs of the feminists’ intervention; and where were they defeated?

As I have argued in Part I.A above, the actual *experience* of engaging in this work for any of the participants spanned a long period—from sometime in 1994 to mid-1998—when litigation and adjudication in the ICTs was being pursued simultaneously with debates over the Rome Statute and its supplementary documents. These two fora formed important political and strategic contexts for each other. I have separated the two processes, however, because the rules are somewhat intricate and keeping a close focus on them is crucial to my project here.

In this Part, I first set out in a nutshell, in Part II.A, the legal context in which the feminists’ effort began; then, in Part II.B, I study the early stages of feminist reform thinking and reform goals; in Part II.C, I examine the ICTY and ICTR Statutes to detect the successes and defeats the feminists experienced in the initial lawmaking moment of our story; and I return in Part II.D to feminist theory and law reform as GFeminism emerged during the run-up to the Rome Diplomatic Conference; and, finally, I conclude, in Part II.E, with an assessment of GFeminism’s successes and defeats at Rome.

175. Engle, *Feminism and Its (Dis)Contents*, *supra* note 116, at 785–803.

176. *Id.* at 798.

A. *The Legal Backdrop*

An immense body of IHL could be designated “the backdrop” for the feminist reforms. These certainly included the Nuremberg Charter prohibiting “crimes against humanity,” the Geneva Conventions, numerous treaties prohibiting genocide and torture, and the more diffuse concept of international customary law supposedly governing the conduct of war. Each of these has a distinct trajectory through the ICT/Rome process, and GFeminists worked hard on all of them. Here, I will start with the Geneva Conventions because they provide an especially crisp point of departure for analyzing the ICT/Rome process and the role of early feminist interventions, and eventually GFeminism, in it.

The Fourth Geneva Convention applies to the treatment of civilians in international armed conflict. Article 27 states, “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”¹⁷⁷ Red Cross Commentaries on the Geneva Conventions described enforced prostitution as “the forcing of a woman into immorality” and introduced the term “indecent assault.”¹⁷⁸ The emphasis on honor in Article 27, as well as its prohibition of “rape, enforced prostitution, or any form of indecent assault,” reappear almost verbatim in Additional Protocols I and II of 1977. The main innovation there is the express classification of these harms as “outrages upon human dignity.”¹⁷⁹

Parties to the Geneva Conventions promised to legislate against “grave breaches,” but they made no such commitments about other breaches of the Conventions.¹⁸⁰ Grave breaches were subject to

177. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

178. 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 206 (Jean S. Pictet ed., Ronald Briffin & C.W. Dumbleton trans., Int'l Comm. of the Red Cross 1958).

179. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 76(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (addressing special protections for women and children, and stating that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”); *see id.* art. 75(2)(b) (listing the “[f]undamental guarantees” for civilians in international conflicts, and prohibiting “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II] (prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”).

180. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter

“universal jurisdiction,” as IHL insiders like to say. This established what I will call a *hierarchy of prohibition* within the Geneva Convention regime. In addition, the Geneva Convention includes a *list* of grave breaches, one which reads not as exemplary but as exclusive. That is, it does not conclude by opening out to “other conduct of similar gravity.”¹⁸¹ The provisions of Article 27 of interest to the feminists in the 1990s—rape, enforced prostitution, and indecent assault—are not referenced or included in the list of grave breaches.

Another very highly valued piece of the Geneva Conventions real estate is Common Article 3—common in the sense that it is common to all four Geneva Conventions. It is valued for that reason and because it protects noncombatants in “armed conflict not of an international character”¹⁸² This Article *also* prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”¹⁸³ The replication of this language in the Additional Protocols, and the specification there in that rape, enforced prostitution, and other forms of indecent assault could constitute outrages upon personal dignity, made it possible to argue that Common Article 3 should be understood to embrace those crimes as well. When the ICTs got started, however, no legal authority had connected the dots in this way.

First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 86 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 177, art. 146.

181. Fourth Geneva Convention, *supra* note 177, art. 147. The Convention provides that

[g]rave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

182. First Geneva Convention, *supra* note 180, art. 3; Second Geneva Convention, *supra* note 180, art. 3; Third Geneva Convention, *supra* note 180, art. 3; Fourth Geneva Convention, *supra* note 177, art. 3.

183. First Geneva Convention, *supra* note 180, art. 3(1); Second Geneva Convention, *supra* note 180, art. 3(1); Third Geneva Convention, *supra* note 180, art. 3(1); Fourth Geneva Convention, *supra* note 177, art. 3(1).

*B. Early Feminist Goals and the Emergence
of the Feminist Universalist Vision*

As we have seen, feminists rapidly coalesced to influence the drafting of the ICTY and ICTR statutes. But U.N. insiders did not at that time consider them to be indispensable consultants on all matters sexual. The early articulation of feminist goals had therefore an immediacy, even a desperation, in its tone.

Even at this early stage, we see a high degree of consensus on the importance of the horizontal and vertical rule reforms. Perhaps the most urgent—you could even say hectic—argument for them came from Sellers in a series of articles published while she was the Legal Adviser for Gender Related Crimes to the ICTY Prosecutor's Office. All of these articles come with Sellers' disclaimer that, in them, she speaks in her personal, not official, capacity. Yet it is impossible to read them as devoid of any intention to influence the prosecutor and judges of the ICTs. This is the voice of GFeminism at or near its apex.

Sellers argued that the specific prohibition of rape in IHL was so patchy, intermittent, low-level, and often entirely absent that rape during war could not be understood to violate any peremptory norm in human rights law. She argued that rape could not be considered a violation of *jus cogens*, and might even be technically permissible:

It is questionable whether a general norm of the prohibition of rape, in and of itself [exists] in human rights law. It is likewise uncertain that the crime rape under humanitarian law has been considered, in and of itself, as imposing a non derogatory obligation on the community of states other than protection against its infliction. And quite frankly, rape has never been cited, heretofore, as a peremptory norm.

... [C]ould one fathom two states entering into an agreement to rape persons in a third state, without the condemnation of the international community of States? If so,¹⁸⁴ why has rape, whether a commonly committed national or international crime or perhaps an emerging human rights violations [sic] that is never justifiable, not crossed the peremptory norm threshold? Is the prohibition of rape's inability to meet international law's formalistic peremptory norm requirement the gendered legacy of a patriarchal legal culture?¹⁸⁵

184. I think that she means "if not."

185. Sellers & Okuizumi, *supra* note 28; Sellers, *Sexual Violence*, *supra* note 137, at 303; see also Sellers, *The Cultural Value of Sexual Violence*, *supra* note 138.

Sellers' 1997 article, "Intentional Prosecution of Sexual Assaults," co-authored with Kaoru Okuizumi, was published while the ICTY and ICTR were just getting going as active courts and before the commencement of the final Rome Statute Conference. In it, Sellers and Okuizumi offer a mind-bogglingly complex display of the arguments that need to be made and accepted to make rape prosecutable under the many heads of the ICTY and ICTR statutes that do not specify rape as a primary form of liability:

Charging sexual assault under the above provisions of Articles 2 through 5 which do not make explicit reference to sexual assault conduct, *i.e.*, provisions other than Article 5(g), requires a sophisticated recognition of how violations of international humanitarian law are prosecuted, as well as some mental gymnastics.¹⁸⁶

Their prescription for the Rome Statute discussions was as follows: "[I]t is imperative that the subject matter jurisdiction of a permanent international court *clearly include* sexual assaults committed in armed conflicts as among 'the most serious crimes of concern to the international community' within the court's jurisdiction."¹⁸⁷ I have italicized Sellers' and Okuizumi's statement of the two intersecting feminist goals: specific mention of rape defined in feminist terms—"sexual assaults"—as among the most serious crimes of concern. Once again, the horizontal and the vertical feminist rule reform projects.

Statements of these goals are everywhere in the GFeminist literature about the ICT statutes and the Rome Statute.¹⁸⁸ Almost all GFeminists held on fast to the most authoritative IHL instruments criminalizing rape and other sex-related harms in war—few were willing to despair publicly, with Sellers, about their legal existence—but they also thought that this body of law not only fell woefully short in recognizing sexual harms, but also got them wrong when it did take them into account. They took the ICT/Rome process as their opportunity to introduce feminist-defined

186. Sellers & Okuizumi, *supra* note 28, at 59.

187. *Id.* at 77–78 (quoting Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Forty-Sixth Session, May 2–July 22, 1994, Draft Statute for an International Criminal Court*, U.N. Doc. A/49/10 (1994)) (emphasis added).

188. See, e.g., Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 294 (critiquing international humanitarian law before the ICT/Rome process and commenting that "despite the fact that many regulations protecting either combatants or civilians are often described in minute and exhaustive detail, very little mention is made of female combatants or civilians"); CUNY Clinic Memorandum, *supra* note 37, app. B at 237 ("The explicit recognition of these crimes [rape and forced prostitution] is essential to assuring their full prosecution as well as to undoing the legacy of disregard."); *id.* at 185 (noting that the Geneva Conventions implicitly prohibit rape even where they do not do so explicitly, but that "[i]t is critical that this implicit authority be made explicit").

crimes as high in the IHL/ICL hierarchy of crimes as they possibly could. In the course of this work a new feminist idea was born.

A premier goal, identified very early in the feminists' work, was to *move rape up* the hierarchy dividing grave breaches from breaches in the Geneva Conventions regime. To be sure, rape could be the *evidence* or the *underlying conduct* of one or more of the crimes constituting grave breaches, particularly "torture" and "willfully causing great suffering to body or health."¹⁸⁹ GFeminists were willing to argue that rape was "torture" as well as that it was "willful [conduct] causing great suffering to body or health" and, for that reason, a grave breach.¹⁹⁰ But what they really wanted was a judicial, customary, or code-based stipulation that rape was a grave breach.¹⁹¹

When feminists justified these reforms, they often wrote as though they wanted merely to borrow the normative bully pulpit of positive IHL to issue authoritative condemnations of rape.¹⁹² The examples in note 188 above are all about making explicit and visible: the politics of recognition.¹⁹³ Even when the horizontal reform project became engaged in substantive revisions of the language of prohibition, feminists in the early 1990s wrote about their aims as being limited to changing the *representation* of rape and sexual violence in IHL. Two important elements of this representation were, first, to put an end to the representation of wartime rapes as crimes against women's honor, and, second, to represent victimized women not as members of ethnic, national, or religious groups but as *individuals*.

To be sure, the idea that the wrong of rape was captured by describing it as an "outrage upon personal dignity"—or that the wrong of "forced prostitution" was captured by describing it as an offense against a woman's honor—did expose a problematic. To some commentators, these formulations usefully captured what sexual crimes during war might well mean to the victims, given the cultural presuppositions they themselves held. For instance, Christopher Scott Maravilla argued that,

189. See, e.g., Bedont & Hall-Martinez, *supra* note 32, at 72; CUNY Clinic Memorandum, *supra* note 37, at 186; Sellers & Okuizumi, *supra* note 28, at 59–62.

190. See, e.g., Bedont & Hall-Martinez, *supra* note 32, at 72 (reporting that feminists were willing to put forth such arguments, but only *faut de mieux*); CUNY Clinic Memorandum, *supra* note 37, at 186 (developing an early statement of the argument that rape is torture); Sellers & Okuizumi, *supra* note 28, at 59–62 (constructing an argument, over four closely argued pages, that rape is torture).

191. CUNY Clinic Memorandum, *supra* note 37, app. B at 236 ("Every act of rape in war—whether a consequence of indiscipline, retaliation, or genocidal policies—is a 'grave breach.'").

192. See, e.g., Charlesworth, *supra* note 93, at 393 ("Claims based on international law can carry an emotional and moral legitimacy that can have considerable political force.").

193. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25–73 (Amy Gutman ed., 1994).

[i]n the Balkans, chastity of women is a sign of family and community honor. Rape was used as an instrument of war, used to undermine community ties, and threaten the civilian population into fleeing The Bosnian Serbs violated the women of their hated nemesis in order to undermine their manhood by not being able to protect their wives and daughters. It was a process of dehumanizing the enemy to the point where the women and children could be treated like cattle only to serve the appetites of the conquering Bosnian Serb forces.¹⁹⁴

For some but not all feminists, this was a usable idea. They sometimes objected that, because of the Muslim conception of honor, the rapes of Muslim women in Bosnia-Herzegovina were particularly harmful and warranted priority over other wrongs committed by Serbs and by non-Serbs in the war.¹⁹⁵ In arguing that rape was torture, under rules that required a showing that the victim suffered intensely, these feminists sometimes argued that the Muslim conception of honor caused the Muslim rape victims to suffer intensely; in arguing that it was genocidal, they sometimes argued that the Muslim conception of honor ensured that the rape of Muslim women would cause the disintegration of the entire community.¹⁹⁶ As Karen Engle amply documents, however, these argu-

194. Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, and Vukovic on International Humanitarian Law*, 13 FLA. J. INT'L L. 321, 338 (2001).

195. See Azra Zalihić-Kaurin, *The Muslim Woman*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA, *supra* note 108, at 170, 173. Azra Zalihić-Kaurin can be our example of this argument that rape produces an ethnically particularized harm:

[P]eople [in Bosnia] told the story of a young Muslim woman who lived in the vicinity of Sjenica during World War II. Emina took up a gun to defend her village against the loyalist Serbian Chetniks but was not able to hold them back. When she fell in to their hands she begged one of the Chetniks, "Only leave me my honor; I will forgive you my death." Emina is taken as a model Muslim woman; her honor and dignity were worth more to her than her life. She forgives the Chetniks for her murder so that she will not be raped, humiliated, and defiled. Bosnian Muslims wanted to dedicate one day of the year to her and make March 8 "Emina's Day." But then a new war broke out, bringing new rapes and new sexual abuses.

Id.

196. Adrienne Katherine Wing & Sylke Merchán, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 24 (1993). Adrienne Katherine Wing and Sylke Merchán stated,

The systematic rape of Muslim women in Bosnia could potentially result in the complete destruction of the Muslim social fabric. Because of the centrality of the concept of honor, the rape of one female member of a family can bring shame and disgrace to not only her immediate family, but also the entire extended family.

Id.; *id.* at 24-25 (noting that the resulting disruption of the social order, radiating ever outward, could produce a "phenomenon of destabilizing and destroying the social order of an

ments were controversial among feminists: some objected that they enlisted feminists to a nationalist project—pro-Bosnian and anti-Serb—and/or that they made it more difficult to focus on harm to *women*.¹⁹⁷

These internal tensions notwithstanding, feminists were completely uniform in opposing any recourse to honor in the statutory definition of rape and other sexual violence. There was complete consensus that the pictorial output of IHL's most authoritative statements of law must not legitimate and entrench the ideas that the rape of a woman harmed her because of its meaning to the men in her family or culture, or that it harmed a wife, daughter, or sister because it impugned a husband's, father's, or brother's honor. Charlesworth, for instance, objected that Article 27 of the Fourth Geneva Convention, "assumes that women should be protected from sexual crimes because they implicate a woman's honor, reinforcing the notion of women as men's property, rather than because they constitute violence."¹⁹⁸ Bedont and Hall-Martinez objected that the "characterization of sexual violence as an attack against a woman's honor was based on the stereotype that a woman is shamed by being the victim of rape and denies the great physical and emotional harm suffered as a result of sexual violence crimes."¹⁹⁹ Rana Lehr-Lehnardt argued that defining "rape as a crime against a woman's dignity minimizes the physical and psychological pain she suffered from the rape."²⁰⁰ They were vigilant against any effort to smuggle in the idea that rape constituted an actual, rather than merely ideational, degradation of a woman's integrity or dignity.²⁰¹ Oosterveld, for instance, objected to "cast[ing] crimes of sexual violence as crimes related solely to the honor

entire population group"—a harm that they term "spirit injury"); see also ASKIN, *WAR CRIMES AGAINST WOMEN*, *supra* note 159, at 262 n.867; Sharon A. Healy, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 *BROOK. J. INT'L L.* 327, 369–74 (1995); Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based Crimes*, 89 *GEO. L.J.* 2557, 2571–72 (2001). But see Engle, *Feminism and Its (Dis)Contents*, *supra* note 116, at 809 n.184 (criticizing the argument as both inaccurate in its description of Bosnian Muslim culture and in its understandings and uses of Islamic law). For example, Karen Engle noted that Wing and Marchán invoke interviews that they conducted in the West Bank and Gaza as authority for claims about Bosnian Muslim cultural norms about intermarriage. *Id.*; Wing & Merchán, *supra*, at 23 n.109.

197. See Engle, *Feminism and Its (Dis)Contents*, *supra* note 116 (surveying the debate); see also Copelon, *supra* note 108, at 197–218; *No Justice, No Peace*, *supra* note 35, at 108 n.38 (arguing that rape was stigmatic for the victim in Croat and Serb communities as well).

198. Charlesworth, *supra* note 93, at 386.

199. Bedont & Hall-Martinez, *supra* note 32, at 71.

200. Lehr-Lehnardt, *supra* note 80, at 341.

201. See, e.g., Samantha I. Ryan, *From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crime*, 11 *PACE INT'L L. REV.* 447, 477 (1999) ("When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as dirty or spoiled.").

and dignity of the victim.”²⁰² She concluded that seeing rape and enforced prostitution as “outrages on personal dignity” sends “the outdated and potentially harmful message that these violent, physical crimes were to be evaluated based on the harm done to the victim’s honour, modesty or chastity.”²⁰³ Oosterveld objected that the Red Cross Commentaries on the Geneva Conventions described enforced prostitution as “the forcing of a woman into immorality”²⁰⁴ This was objectionable because it endorsed the idea that women subjected to sexual assaults and enforced prostitution were *actually* degraded or, worse, morally tainted. In Oosterveld’s view, IHL had no business entrenching women in such outmoded ideologies; to do so is to “distance the crime from the perpetrator,” concentrate attention on the victim’s honor, and “overlook consideration of sexual autonomy.”²⁰⁵

It is an odd vocabulary for drafters of a criminal code to be using. Including language about honor and dignity in the Geneva Conventions reinforces notions, ratifies stereotypes, denies harm, casts crimes inaccurately, sends outdated and potentially harmful messages, represents the crime as being about the victim not the perpetrator, and overlooks attributes of the victim that should instead be emphasized. The reform project implied by these modals is entirely ideological: IHL represents rape as X and women as Y, but it should instead represent them as A and B. Why? Because feminism *sees them as A and B*. IHL should stop sending a patriarchal message about the world and start sending a feminist one.

What was that feminist message? That rape is a crime of *sexual violence*.²⁰⁶ This seems obvious today, a mere statement of fact. But it is actually an immense achievement of feminism itself that it should seem so. For centuries, people thought that rape was a crime against a woman’s husband or father, a crime against her honor or dignity, a crime against morality and social order. And, for years, feminists debated whether rape were primarily a crime of sex or a crime of violence. The feminist law reformers were aware of this debate and sometimes en-

202. Oosterveld, *Sexual Slavery*, *supra* note 21, at 608.

203. *Id.* at 613.

204. *Id.* at 650.

205. *Id.* at 651.

206. See also Bedont & Hall-Martinez, *supra* note 32, at 71 (objecting that “[the] characterization of *sexual violence* as an attack against a woman’s honor was based on the stereotype that a woman is shamed by being the victim of rape and denies the great physical and emotional harm suffered as a result of *sexual violence crimes*” (emphasis added)); Charlesworth, *supra* note 93, at 386 (objecting that Article 27 of the Fourth Geneva Convention “assumes that women should be protected from *sexual crimes* because they implicate a woman’s honor, reinforcing the notion of women as men’s property, rather than because they constitute *violence*” (emphasis added)).

gaged it. For some feminists, the violence of rape predominated,²⁰⁷ while others saw it as the paradigm instantiation of sexuality understood as male domination.²⁰⁸ When the time came to pick a feminist message about rape to send through IHL, however, feminists reached the consensus view that rape is a crime of sexual violence. As Copelon put it, "The conceptualization of rape as an attack against honor, as opposed to a *crime of violence*, is a core problem."²⁰⁹ Similarly, Askin concluded, "[T]he Conventions expressly include rape and forced prostitution, although they *erroneously* link rape with crimes of honor or dignity instead of with *crimes of violence*. Such a demarcation *grossly mischaracterizes* the offense, perpetuates detrimental stereotypes, and conceals the *sexual and violent* nature of the crime."²¹⁰

As I hope these quotations make manifest, the classification of rape as sexual violence brings some new descriptors in its train: it is a sexual assault; it is *violent* and *physical*; it causes *physical and emotional* (or *physical and psychological*) harm; it is *painful*. The trauma conception of political injury is deeply implicated in these representational choices.²¹¹

So far, we have described the emerging feminist consensus representation of rape as a crime of sexual violence which, if not explicitly and vehemently condemned by criminalization, is implicitly condoned or trivialized. IHL must prohibit it as high up in its prohibitive hierarchy as possible.

But there was something more elusive, more structural in the feminist reform ambitions, something that became clear to me only after months of immersion in the archive of feminist writing on IHL. I argue

207. Ruth Siefert, *War and Rape: A Preliminary Analysis*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA, *supra* note 108, at 54, 55 ("[T]here are good reasons to assume that rapes do not have much to do . . . with . . . sexuality. Rather, they are acts of extreme violence implemented, of course, by sexual means. Studies show that rape is not an aggressive manifestation of sexuality, but rather a sexual manifestation of aggression.")

208. Catharine A. MacKinnon, *Rape, Genocide and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 12 (1994). MacKinnon argued,

It will not help to say that this is violence, not sex, for the men involved. . . . One woman was allowed to live only as long as she kept her Serbian captor hard all night orally, night after night after night, from midnight to 5:00 A.M. What he got was sex for him. The aggression was the sex.

Id.

209. Copelon, *supra* note 42, at 249 (emphasis added).

210. Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 304 (emphasis added).

211. ANN CVETCOVICH, AN ARCHIVE OF TRUE FEELING: TRAUMA, SEXUALITY, AND LESBIAN PUBLIC CULTURE (2003); Lauren Berlant, *The Subject of True Feeling: Pain, Privacy and Politics*, in LEFT LEGALISM/LEFT CRITIQUE 105, 105–13 (Wendy Brown & Janet Halley eds., 2002); Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, UNBOUND: HARV. J. LEGAL LEFT (2005), <http://www.legalleft.org/?cat=1>.

that the vertical and horizontal reforms sought by feminists—seen across their range as they were gradually clarified, deepened and broadened over the course of the 1990s—became an attempt to change the very classificatory structure of IHL. The honor/sexual violence struggle was by comparison a minor one, and, as it turned out, easily won. The *big* problem that the feminists had with the actual Geneva Conventions formulation was its universalism, which of course feminists have consistently decried as masked masculinism.²¹² In response, and in a move which, I will argue, was an important conceptual invention with concrete law-reform consequences, feminists working in IHL in the 1990s devised an alternative legal order in which *the sexual harms suffered by women are universal in their scope*. As we will see, they were only partially successful in their struggle for rule reforms consistent with this vision.

From the perspective of contemporary feminists concerned with sending the message that rape was a violation of women's honor, Article 27 of the Fourth Geneva Convention is the great culprit. But, as the Red Cross Commentaries to Article 27 make clear, Article 27 classifies honor as an attribute of "man"—which clearly means not men as distinguished from women but "man as man"²¹³—that is, *humans*. According to those Commentaries, the Fourth Geneva Convention "proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women."²¹⁴ The Commentaries go on to explain that

[t]he right of respect for the person must be understood in its widest sense: it covers all the rights of the individual, that is, the rights and qualities which are inseparable from the human being by the very fact of his existence and his mental and physical powers; it includes, in particular, the right to physical, moral and intellectual integrity—an essential attribute of the human person.²¹⁵

Thus, when Article 27 provides that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights . . .," it attributes that honor to human beings *universally*.

Of course, Article 27 adds that "[w]omen shall be *especially* protected against any attack of their honour, in particular against rape,

212. ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 159, at 253 (arguing that international humanitarian law is "not truly universal, but masculine . . .").

213. 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 178, at 200.

214. *Id.*

215. *Id.* at 201.

enforced prostitution, or any form of indecent assault.”²¹⁶ That is, women’s honor, like men’s, is *generally* protected, and it is *especially* protected against sexual violence and other forms of sexual coercion.

This pattern is reflected in the Red Cross Commentaries. Explicating “[r]espect for honour,” the Commentaries say, “[h]onour is a moral and social quality. The right to respect for his honour is a right invested in man because he is endowed with a reason and a conscience.”²¹⁷ And then an entire special section of the Commentaries is specifically devoted to the “Treatment of Women.”²¹⁸

I will hazard to say that there is no trace of the patriarchal conception of honor in this pattern or in the words that construct it. Rather, we have the universal rights of man, and the claim that they require specification because of the special harms that befall women. Rape is represented here as an *instance* of a general crime against humanity, and inviolability from rape is *just one way* of securing a universally shared human integrity.

It was this classificatory structure, and not the patriarchal concept of honor, that formed the feminists’ more ambitious target in their work on the Geneva Conventions. To understand the scope of their engagement, we need to get clear on what they did and what they did not like in the Geneva Conventions approach to rape. Here is the key passage on the “Treatment of Women” in the Red Cross Commentaries on the Geneva Conventions. I italicize all the language to which feminists involved in the ICT/Rome Statute process would have objected, and underline all of the language that they could have written themselves:

Paragraph 2 denounces certain practices which occurred, for example, during the last World War, when innumerable women of all ages, and even children, were subjected to outrages of the worst kind: rape committed in occupied territories, brutal treatment of every sort, mutilations etc. In areas where troops were stationed, or through which they passed, thousands of women were made to enter brothels against their will or were contaminated with venereal diseases the incidence of which often increased on an alarming scale.

These facts revolt the conscience of all mankind and recall the worst memories of the great barbarian invasions. They underline the necessity of proclaiming that women must be treated with special consideration

216. *Id.* at 199.

217. *Id.* at 202.

218. *Id.* at 205–06.

The provision is founded on the principles set forth in paragraph 1 on the notion of "respect for the person", "*honour*" and "*family rights*["

A woman should have an acknowledged right to special protection, *the special regard owed to women being, of course, in addition to the safeguards laid down in paragraph 1, which they enjoy equally with men.*

The Conference listed as examples certain acts constituting an attack on *women's honour*, and expressly mentioned rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, or any form of *indecent assault* [W]omen . . . have an absolute right to respect for their *honour and their modesty*, in short, for their dignity as women.²¹⁹

As we have seen, the feminists involved in the ICT/Rome Statute processes were eager to retire the italicized terms and to endorse the underlined ones. They wanted the intense denunciation of rape and other sexual wrongs against women; they have consistently championed the aggressive commitment to securing women from sexual violence. The urgent denunciation of rapes in World War II was exactly what feminists wanted from the Nuremberg and Tokyo trials but did not get.

Over the course of the 1990s, the feminists' goal of horizontal visibility—add security from rape to the universal rights of human beings—was dramatically expanded. The goal became changing the very classificatory scheme of universal justice. The feminists involved in this work did not want women's physical integrity to be a subset of *universal* human integrity, and they did not want the protection of women to be *special*. To them, the right of women to be secure from sexual assault was itself fundamental, central, and of universal scope. In opposition to the Geneva Conventions' universal/particular schema, they wanted women's security from rape to be universal. I will call this idea *feminist universalism* (FU).

FU thinking was legally inchoate in the early years of feminist IHL activism in the United Nations. The most articulate statements of it come from Copelon. In debates over the ICTY reform agenda, she actively resisted other feminists' classification of rape as an instrument of genocide or as persecution based on ethnicity, arguing instead that if feminists were to understand accurately the rapes that happened in the Balkan War, they had to identify

219. *Id.* at 205–06 (emphasis added).

... rape as a crime of gender as well as ethnicity. Women are targets not simply because they 'belong to' the enemy, but precisely because they keep the civilian population functioning and are essential to its continuity. They are targets because they too are the enemy; because of their power as well as vulnerability as women, including their sexual and reproductive power. They are targets because of *hatred* of their power as women; because of endemic objectification of women; because rape embodies male domination and female subordination.²²⁰

This formulation radically re-envisioned the Balkan War. The classic, mainstream understanding of that conflict would identify it as ethnic cleansing followed by partition: an ethno-nationalist conflict that produced the existence of and the antagonism of Serbian, Croatian, and Muslim social forces and their territorial separation. What Copelon asks us to see is another war, simultaneously happening on a plane entirely different and completely orthogonal to the ethno-national conflict: a "war against women"²²¹ imposing male domination on female subordination. To get this right in your head you have to try to imagine the Balkan conflagration as a war of men—Serbian, Croatian, Muslim—against women—again, Serbian, Croatian, Muslim. Unless you are a radical feminist, seeing it that way will take an effort of sympathetic imagination. If you can do it, you have entered into the consciousness of FU.

Copelon also grokked the consequences of this consciousness for the war/peace distinction that is so central to the separation of IHL from the national legal orders that it only intermittently claims to govern. The eruption of a war against women in the Balkans was not a special case. That war is "ubiquitous";²²² it goes on "everyday":

Emphasis on the gender dimension of rape in war is critical not only to surfacing women as full subjects of sexual violence in war, but also to recognizing the atrocity of *rape in the time called peace*

From a feminist human rights perspective, gender violence has escaped sanction because it has not been viewed as violence and because the public/private dichotomy has shielded such violence in its most common forms. The recognition of rape as a war crime is thus a critical step toward understanding rape as violence. The next is to recognize that rape that acquires the

220. Copelon, *supra* note 108, at 207 (underlined emphasis added).

221. *Id.* at 213.

222. *Id.*

imprimatur of the state is not necessarily more brutal, relentless, or dehumanizing than the *private rapes of everyday life*

Every rape is a grave violation of physical and mental integrity. *Every rape* has the potential to profoundly debilitate . . . *Every rape* is an expression of male domination and misogyny, a vehicle of terrorizing and subordinating women.²²³

Extend the thought experiment. If the Balkans conflict is untethered from its ethno-nationalist manifestations, if instead it is a war of men on women, then it is available for re-envisioning—for re-representation, if you will—as a part of the war against women that is happening in places in which there is no ethno-nationalist conflict to confuse the picture. In this formulation, the Balkan war against women was continuous with the war against women that permeates everyday life in the form of privatized and tolerated rape in bars, dormitories, public parks, and marital homes. This war against women is waged everyday, even in the time that men experience as peace, and everywhere, even in places where IHL does not apply because there is currently no armed conflict. As we will see in Part II.D below, Copelon's instinct that *human rights law* would be the lever for extending the feminist IHL vision to everyday rape was right on target. Moreover, as we will see in Part II.E, this shift to a human rights approach had concrete consequences in the drafting of the Rome Statute.

Copelon played a direct role in drafting the first concrete reform agenda reflecting this FU vision. She was one of the four authors of the CUNY Clinic Memorandum, which argued that "it must be recognized and charged that apart from ethnic cleansing, forced prostitution and forced pregnancy [and, *a fortiori*, rape] constitute war crimes and crimes against humanity because they are crimes of gender hatred, violence, discrimination, and dehumanization perpetrated *against women as a class*."²²⁴ The CUNY Clinic Memorandum, and Copelon writing separately, argued that *persecution "based on gender"* must be recognized as its own category of crimes against humanity.²²⁵ Copelon fully intended this prohibition to extend to everyday rape. As she explained, *all* rapes are per se persecutions on the basis of gender: "[I]t is not enough for rape to be viewed as a crime against humanity when it is the vehicle of some other form of persecution: it must also be recognized as a crime against humanity because it is *invariably* a persecution based on gender."²²⁶

223. *Id.* at 212–13 (emphasis added).

224. CUNY Clinic Memorandum, *supra* note 37, app. B at 237.

225. *Id.*; Copelon, *supra* note 108, at 206 (emphasis added).

226. Copelon, *supra* note 108, at 208 (emphasis added).

In subsequent Sections, I will show that the ICTs did not adopt the idea that persecution based on gender was a crime against humanity, but that the Rome Statute did. The idea that rape is *per se* discriminatory on the basis of gender did find its way into the reasoning of the ICTY in *Kunarac*.²²⁷

I would like to offer two further thought experiments to help specify the radical potential of these reforms. First, just imagine that you are a prosecutor deciding what to charge when you have facts telling of the violent ethnic separation of two populations. Imagine that armed forces on both sides took property and territory from the other; destroyed property, both public and private, belonging to its disfavored group; detained civilians from that group on a mass scale in lethally inadequate facilities; subjected the men in those facilities to beatings, mutilations, and killings; and subjected the women in them to rape. Imagine a conflict in which the armed forces of the gradually prevailing group preferentially killed men and boys of age to fight, both individually and in large massacres, and that these armed forces deported women, old men, and young boys by the tens of thousands outside the region that they claimed for themselves. The feminist agenda for you is that you should prosecute the rapes as matter of top priority, in a distinct trial, as crimes against humanity, because they constitute *persecution based on gender*.

Later, as we will see, feminists added other ways of doing this to their reform agenda such as prosecuting the rapes as grave breaches of humanitarian law because they constitute a widespread and systematic *attack on women*, or simply because they are rapes and this violates the *individual women's right not to be raped*.

There are some differences between these approaches. The shift to an individual rights approach is particularly suggestive. Persecution is intrinsically group-based, large-scale, and intentional, and grave breaches are by definition widespread and systematic. Both imply a large social impact. However, individual rape charges would drop the Damocles sword of IHL enforcement on purely individual wrongs and harms. To reach everyday rape using persecution charges and/or grave breach charges, feminists would have to convince the IHL intelligentsia that everyday life involved high levels of systematic male sexual assault on women. An individual rights approach would make that visionary shift unnecessary.

We are used to making these distinctions. What they share is harder to see because it is so new and so big: all three strategies will make your

227. Prosecutor v. Kunarac, Kovac & Vuković, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Judgment, ¶ 218 (June 12, 2002); see Engle, *Feminism and Its (Dis)Contents*, *supra* note 116, at 804–05 (offering a discussion of this holding).

prosecution fully orthogonal to the alignment of antagonism in the war itself. *It will not be "about" how to fight the ethno-nationalist war.* Instead, you will be prosecuting the persecution of women, a widespread and systematic attack on women, or the individual rape of a woman. You will be prosecuting rape crimes within an ethnic conflict as a "war against women." It is only through radical feminist lenses that such a war can be visible.

The second thought experiment takes us to "peacetime."²²⁸ If indeed the war against women in the ethno-nationalist war is continuous with the war against women conducted everyday and everywhere, then the requirements that IHL limit itself to genocidal attacks, widespread and/or systematic attacks, and/or armed conflict seems absurd. Some way around those requirements will be needed. At this point, Copelon's instinct to reach out to human rights law is the right move for the rights-maximizing international lawyer. Signatory States are obliged to protect human rights in war and in peace. So, the question becomes: how can IHL annex human rights and reach the everyday? As we will see, feminist thinking on this point was to become far more elaborate over the course of the 1990s.

The FU vision thus caused feminists to imagine a restructuring of the architecture of humanitarian law on a dramatic scale. It also caused them to redefine individual crimes such that rape was no longer a mere example of a more generally defined crime but stood at its definitional core. At the Rome Conference, for instance, feminists argued that mutilation should be included as a discrete crime against humanity because rape is the prototypical mutilation: "Rape is the paradigmatic, but often ignored, form of mutilation, constituting as it does a gross invasion/splitting of the body which is usually health- or life-threatening and produces long-term damage to body and health."²²⁹ The argument is not that mutilation is an apt metaphor for rape or that rape and physical mutilation have similar effects; it is that rape is the quintessential mutilation, of which, for instance, amputation is a derivative and secondary example. This micro-restructuring is perfectly homologous with the macro-restructuring implicit in the war-against-women framing of the Balkans conflict.

A brief conclusion of this section before we turn to the ICT statutes. Very early in the ICT process, feminists developed a series of ideas about how to criminalize rape about which they had substantial agreement. They performed even if they did not reach a consensus resolving an earlier debate within feminism about whether rape was sex *or* vio-

228. Charlesworth, *supra* note 93, at 390-91.

229. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 7.

lence (it is both), and a consensus resolving an earlier debate about whether rape was better classified as an assault simpliciter or as a distinct, *sexual*, assault (it is the latter). Feminists resolved that rape is sexual violence and should be criminalized under two rubrics: rape and the almost redundant “sexual violence.” They agreed that they wanted rape, understood to be criminal because it is sexual violence, to appear in the IHL hierarchy at the highest level of generality possible. They had begun to see that this goal could not be satisfied by treating rape as a special harm subsidiary to the false universals of masculinist humanitarianism. They had begun to realize that they sought a new universe of wrongs: the wrongs women suffer in time of war must be classified separately from the wrongs men suffer in time of war. In the new FU vision, women do not share these wrongs with men, but rather suffer them in their own universe and at the highest level of rights generality. With the exception of Copelon’s remarkable invention of a crime against humanity based on persecution based on gender, and her even more remarkable idea that every rape is per se a persecution based on gender, they did not yet realize what it would mean to put these ideas into operation. Clarity about that did not come until they ran up against the deficits of the ICTR and ICTY statutes as *faits accomplis* and as impediments to their work on the ICT litigation. We will see that clarity emerge in Part II.D, but first, we turn to an assessment, in Part II.C, of the feminists’ successes and defeats in the drafting of the ICT statutes.

C. Feminist Successes and Defeats in the ICTY and ICTR Statutes

The feminist efforts to rank-order *up* and to redefine—the vertical and horizontal reform projects—have been partly successful. Mostly defeated in the drafting of the ICTY and ICTR statutes, they were far more successful in the drafting of the Rome Statute. Rape and sexual violence appear in these instruments and have moved up the hierarchy of criminality. But, as we will see in Part II.E, even at Rome, the feminists’ most expansive classificatory ambitions were almost consistently foiled.

The ICTY Statute specifically includes “rape”²³⁰ (along with “murder,” “extermination,” “enslavement,” “deportation,” “imprisonment,” “torture,” “persecution on political, racial and religious grounds,” and “other inhumane acts”)²³¹ as *crimes against humanity*. The ICTR Statute does precisely the same.²³² Vertically, the effect of this new legislation is to classify “rape” as a “crime,” which is a “crime against humanity”

230. ICTY Statute, *supra* note 14, art. 5(g).

231. *Id.* art. 5(a)–(i).

232. ICTR Statute, *supra* note 14, art. 3(a)–(i).

when committed in armed conflict.²³³ Horizontally, these new rules relieve rape of its retro dignity and honor baggage, and repackage it, *in abstracto* at least, as a freestanding crime of the same gravity as murder, extermination, enslavement, and so on. Rape as rape has entered the pantheon of IHL crimes, *but* with the proviso that it is punishable in IHL only when it is the predicate crime of a crime against humanity.

As feminists repeatedly noted, rape, even rape in war, is rarely so clearly connected to such an attack. Instead, it is frequently “sporadic.”²³⁴ The ICTY Statute provides that crimes against humanity can be established only if they are committed in the course of “armed conflict.”²³⁵ The ICTR Statute gives a narrower definition of the kinds of armed conflict included: to be a crime against humanity, the offense must be “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”²³⁶ The ICTY Statute, seemingly at least, has broader authority: it can prosecute the listed crimes “when committed in armed conflict, whether international or internal in character, and directed against any civilian population.”²³⁷ In the Rome process, feminists would seek reforms to the Geneva Conventions’ heritage that would minimize the level of armed conflict required, and loosen the requirement of a nexus between armed conflict and individual violations. Assuming this was a goal in the ICTY/ICTR processes, how did the feminists do? Not too well.

The ICTR Statute broke significant new ground in many ways. Most dramatically, it established an international criminal tribunal to enforce carefully drafted selections from the law of armed conflict in an *internal*—not international—conflict. This meant that the only element of the Geneva Convention regime that the ICTR could draw on for authoritative, non-retrospective war crimes was Common Article 3 and Additional Protocol II.²³⁸ Although the specific violations listed in those instruments include many fragmentary elements that can be tracked back to Article 147 of the Fourth Geneva Convention, which lists the grave breaches, most of the drafting is new.²³⁹ This means that an international court, not

233. *Id.* art. 3; ICTY Statute, *supra* note 14, art. 5.

234. Bedont & Hall-Martinez, *supra* note 32, at 70; WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 2, Commentary WC.2.3.

235. ICTY Statute, *supra* note 14, art. 5.

236. ICTR Statute, *supra* note 14, art. 3.

237. *Id.*

238. *Id.* art. 4; First Geneva Convention, *supra* note 180, art. 3; Second Geneva Convention, *supra* note 180, art. 3; Third Geneva Convention, *supra* note 180, art. 3; Fourth Geneva Convention, *supra* note 177, art. 3; Additional Protocol II, *supra* note 179.

239. ICTR Statute, *supra* note 14, art. 4. The Statute provides,

These violations shall include, but shall not be limited to: a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel

merely the Member States of the Geneva Conventions, now had the power to enforce some (but by no means all) elements of the Geneva Conventions, to do so in an internal conflict, and to include rape as a statutory basis for the prosecution of crimes against humanity. This innovation in the ICTR Statute also meant that the ICTR, unlike the ICTY, had express statutory authority for enforcing the Geneva Conventions against rapes. Rape as an explicitly named crime enters the pantheon of IHL crimes.

This was an important advance for feminists, but it by no means suggests that they were at the drafting table or powerfully influencing those who were. The feminists took at least two directly related losses, and some others as well. First, the prized territory of grave breaches remained out of their reach. Article 2 of the ICTY Statute, which does give that tribunal authority to prosecute grave breaches, makes no mention of rape.²⁴⁰ Meanwhile, the ICTR Statute, as we have seen, authorizes the prosecution of violations of Common Article 3: the internal character of the conflict put grave breaches out of reach. But it is the provision that specifies rape.

Nor were the feminists able to replace women's honor with sexual violence. The language giving the ICTR authority to prosecute violations of the Geneva Conventions is taken verbatim from Additional Protocols I and II, and extends to "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."²⁴¹

However defective the ICTR Statute, at least it gave feminists their first opportunity to argue that IHL was committed to punishing rape in conflict. Nowhere else were they so happy. The ICTY Statute did not include any sexual crimes in its "laws and customs of war" and genocide provisions.²⁴² The ICTR Statute makes no provision for enforcement of

treatment such as torture, mutilation or any form of corporal punishment; b) Collective punishments; c) Taking of hostages; d) Acts of terrorism; e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) Pillage; g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; h) Threats to commit any of the foregoing acts.

Id.; see also *id.* (listing several elements that go beyond the Geneva Conventions' definition of grave breaches, such as violence to mental well-being, violence to well-being (not "body and health"), mutilation, corporal punishment, collective punishment, acts of terrorism, outrages upon personal dignity, pillage, and threats to commit the above). Compare Fourth Geneva Convention, *supra* note 177, art. 147.

240. See ICTY Statute, *supra* note 14, art. 2.

241. ICTR Statute, *supra* note 14, art. 4(e).

242. ICTY Statute, *supra* note 14, arts. 2, 4.

the former and is silent on sexual crimes in its article on the latter.²⁴³ If more vertical or horizontal progress were to be made in the ICTs under these silent *chapeaux*, GFeminism would have to persuade the Prosecutor to charge in particular cases, and to take their victories in the form of case law and convictions. All of the arduosities detailed by Sellers and Okuzumi would have to be undertaken.²⁴⁴

The ICT statutes thus gave feminists a small vertical victory—one that was soured by its retro horizontal content. Otherwise the statutes taught a stern lesson: if you are not at the table when the drafting begins, you cannot influence the line-by-line construction of a court-establishing statute.

D. Feminists at Rome

Feminists did not have to wait long to show that they had learned the harsh counsel of their many defeats in the ICT statutes. By the mid-1990s a grand convention was planned to establish a new International Criminal Court. A new body of law was about to be drafted, derived from IHL but taking the institutional form of ICL. Here was a chance for feminists to draft legislation on what might have seemed to be a clean slate, but was actually a battlefield. This time, as we have seen, the feminists were ready.

The law review advocacy literature shows that, by the advent of the Rome Statute debates, feminists understood the feminist-universalism position better, advocated it more articulately, and knew more clearly what kinds of legal reforms would put it into positive law. I will set out their thinking and reform proposals in two Sections, one devoted to the academic elaborations of FU, and the other to the WCGJ's specific reform proposals.

1. The Feminist Universalist Vision Comes of Age

One of the chief visionaries for the FU project was Hilary Charlesworth, who picked up on Copelon's formulations and ran with them.

Charlesworth criticized the ICTY and ICTR statutes for tethering the prosecution of rape as a violation inside a widespread and systematic attack and assailed the *Akayesu* tribunal for holding that the rapes were violations of IHL because they were genocide. In an article published after the Rome Statute was promulgated, she assessed the earlier statutes:

243. ICTR Statute, *supra* note 14, art. 2.

244. See *supra* text accompanying notes 185–187.

Thus the “new” international criminal law engages sexual violence only when it is an aspect of the destruction of a community [R]ape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition. In this account, the violation of a woman’s body is secondary to the humiliation of the group.²⁴⁵

Charlesworth greeted this secondariness with indignation. The rapes must be not only mentioned and made explicit, but also ranked as crimes against humanity and war crimes in themselves. In addition, the universal class against which they are aimed—women—must be framed into the construction of the IHL regime. Charlesworth’s point, in sum, was that “[r]ape and sexual assault should be analyzed in international law as crimes against women, rather than offenses against their communities.”²⁴⁶

Like Copelon, Charlesworth understood that “the consequence of defining certain rapes as public in international law is to make private rapes seem somehow less serious.”²⁴⁷ What Copelon called the “ubiquitous war against women” requires a profound extension of the jurisdictional predicates for crimes against humanity—currently limited to armed conflict—and war crimes—currently limited to widespread and systematic attack. Thus, “[t]he notions of conflict and attacks are themselves contingent and controversial. When do they begin and end? For many women, violence is not reduced with the cessation of military hostilities, and ostensible times of peace may be full of conflict for women and produce serious human rights violations.”²⁴⁸ Like Copelon, Charlesworth used derisory scare quotes to mock the peacetime/wartime distinction, seeing instead “the continuity between the ways women are treated in ‘peacetime’ and in times of ‘conflict’” Indeed, according to Charlesworth, the acceptability of rape in “peacetime” *causes* rape in “conflict.”²⁴⁹

Publishing in 1999, Charlesworth had many of the same, but also many *more*, ideas than Copelon had offered in 1993 about how to operationalize FU in IHL. She was joined toward the end of the decade and in the early years of the new millenium by other academic/activist feminists with equally concrete reform proposals. What follows are the feminist

245. Charlesworth, *supra* note 93, at 387.

246. *Id.* at 394.

247. *Id.* at 388.

248. *Id.* at 389 (“[R]ape in armed conflict is made possible by the prevalence of rape in times of peace.”).

249. *Id.* at 390–91.

rule proposals, ranked by scale from small fixes to large structural shifts. Only the latter would deliver in any holistic way on the FU vision.

a. Classify Rape as a Grave Breach not a
Crime Against Humanity

Writing together in 2000, Charlesworth and Chinkin argued that the ICT prosecutors should avoid charging rape as a crime against humanity. Instead, they argued, it should be charged as a grave breach. Why? Crimes against *humanity* implied that rape harmed *humanity*—that it was a general wrong in the humanist universalism that we have attributed to the classificatory scheme of Article 27 of the Geneva Convention. Charging rape as a grave breach would individualize the wrong and allow its *gendered* focus to emerge.²⁵⁰

b. Criminalize Persecution on the Basis of Gender as
a Crime Against Humanity

Charlesworth's generally critical review of the Rome Statute included one exception: the inclusion of gender among the grounds of persecution constituting a crime against humanity. Charlesworth argued that "[r]ape and sexual assault should be analyzed in international law as crimes against women, rather than crimes against their communities. International legal recognition of persecution based on gender offers the possibility of challenging the narrow conception of the social order protected by international criminal law."²⁵¹ For feminist-universalist reasons, Charlesworth approved Copelon's 1993 proposal,²⁵² and liked the fact that it is now part of ICL.

c. Classify Rape as Rape

In place of rape as an insult to women's honor or to humanity, feminists animated by the FU vision increasingly advocated the classification of rape as rape, located at the highest level of the IHL/ICL hierarchy. Rape and other sexual violence crimes should become freestanding crimes in IHL/ICL. This idea was a late development: all of my examples are from published reports looking back on the Rome process.

250. Cf. HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 315–21 (2000) (arguing for inclusion of rape as a "grave breach"); see also Lehr-Lehnardt, *supra* note 80, at 341 ("[L]isting rape as a war crime . . . [is] an advancement for women, because it reinforced the notion that the injury was suffered by the individual instead of by the society, or even more generally, by humanity, which is inferred by listing rape as a crime against humanity.").

251. Charlesworth, *supra* note 93, at 394.

252. See *supra* text accompanying notes 220, 225–226 (providing a discussion of Copelon's original proposal).

Bedont, for example, argued:

[I]t is insufficient to subsume sexual violence under torture or assault. This hides the sexual aspect of the crime and denies the particular harm suffered by a victim of rape. For this reason the objective of the Women's Caucus [for Gender Justice] was to identify separately certain sexual and gender crimes in addition to rape in the Rome Statute.²⁵³

The ultimate goal here was succinctly stated in a section heading of a student note: "Rape Should Be a Crime of Rape, Not a Subsection of Another Crime."²⁵⁴ Its author explained:

Rape should be prosecuted as rape, as a crime in itself, not as a subset of a war crime or a crime against humanity. Rape is not less harmful to the victim if she is raped in an isolated incident and not part of a systematic attack or large-scale commission of rape. It seems that rapists still do not have to answer for the violence toward the individual woman but instead for the violence toward the community.²⁵⁵

Or, as Samantha L. Ryan put it, looking back on the Rome Statute in 1999, "sexual assaults should have been given a separate article under the Rome Statute."²⁵⁶ That is to say, *crimes against humanity*, *war crimes*, *genocide*, *aggression*, and *sexual assault* should have been the chief headings of the new ICC's subject-matter jurisdiction.²⁵⁷

d. Use IHL/ICL Criminal Enforcement to Vindicate Human Rights

As we have seen, in 1993, Copelon had the breakthrough intuition that achieving a FU legal order in IHL would require annexing human rights law to humanitarian law. In 2001, one feminist codification described this project as "The Utopian Vision."²⁵⁸

At first blush, to an international law outsider, this sounds perfectly reasonable and a little anodyne. If, as a *human being*, one has *human* rights to be free from certain kinds of harms, why should those rights not

253. Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 51, at 183, 196–97.

254. Lehr-Lehnardt, *supra* note 80, at 346.

255. *Id.* at 347.

256. Ryan, *supra* note 201, at 450.

257. Bedont & Hall-Martinez, *supra* note 32, at 72 (claiming that "the general practice of the Prosecutor at the ICTY and more recently at the ICTR has been to charge the crime of rape both as rape and as a constituent act of another crime under the statute").

258. GARDHAM & JARVIS, *supra* note 160, at 254–56.

be secured by *humanitarian* law? And it is a perfectly commonplace recommendation in late-1990s feminist advocacy in IHL/ICL contexts. But of all the feminist reform proposals listed so far, this one is the most structurally dramatic. The goal was to extend the reach of IHL from armed conflict to “peacetime” (during which human rights law does apply) *for the purposes of getting accountability in the ICC for the everyday rape and sexual assault of women.*

Again, Charlesworth carried Copelon’s idea forward:

International law has traditionally drawn a distinction between the principles of individual conduct that apply in times of armed conflict [IHL] and those that operate in peacetime (human rights law) From a feminist perspective, the distinction has allowed IHL, with its bases in codes of warriors’ honor, to factor out issues that do not relate to the warrior caste.²⁵⁹

If IHL-enforcing entities were to dissolve that false dichotomy, they could enforce human rights. For instance, Charlesworth suggested that the International Committee of the Red Cross, in its IHL-enforcing capacity, should have been able to take action against the Taliban’s *exclusion of women from the workplace.*²⁶⁰

e. Extend IHL (With its Substantive-Law Annexation of Human Rights) to “Peacetime”

Charlesworth sometimes seems to concede that human rights violations must be connected to armed conflict if they are to be prosecuted in an IHL tribunal. For instance, at one point she seeks “accountability for human rights violations in internal armed conflict.”²⁶¹ Additionally, her Taliban example may imply that the exclusion of women from the workplace in Detroit would not be within the reach of her ideal ICC. But elsewhere, as we have seen, she decries the wartime/peacetime distinction as an effect of masculinist consciousness, describes “peacetime” as a state of war against women, and argues for the prosecution of everyday sexual violence in IHL. Although she does not explicitly say so, this logic would allow IHL and even ICC enforcement of human rights violations occurring in States at “so-called peace.” Indeed, she sees how the Rome Statute’s criminalization of persecution based on gender can be used to dissolve the international/national and war/peace distinctions that entangle IHL in the implicit legitimization of peacetime violence against women. In her view, “[m]ost fundamentally, international lawyers need

259. Charlesworth, *supra* note 93, at 386.

260. *Id.*

261. *Id.* at 385.

to understand that the way that our discipline has legitimated the use of violence by accepting it is an inevitable aspect of international relations and the implications that this has *for our daily lives*.”²⁶²

Other feminists argue that the reach of IHL must extend to “peacetime.” Ryan, for instance, argues that the Rome Statute should have provided that human rights violations were triable in the ICC.²⁶³ She notes that the Special Rapporteur on Violence against Women has reported myriad instances of sexual violence against women in States that are devoid of armed conflict, States in which no IHL-cognizable widespread or systematic attacks are under way.²⁶⁴ Thus, Ryan concludes that, where national criminal justice systems refuse to vindicate women’s human rights to be free of sexual violence, the ICC should have the power to intervene: “These crimes cannot go unpunished. Where the national courts are unable or unwilling to do so, the international community must rise to the responsibility.”²⁶⁵

The resulting legal vision matches feminist universalism to a kind of legal universalism. Human rights are protected by a penal law enforceable both in armed conflict and in “peacetime”: the world is paved with law; the law it is paved with is *criminal* law; and “these crimes cannot go unpunished.” Taken literally, this is a call not just for universal jurisdiction but universal *liability* for rape and sexual violence.

The visionaries writing in the law reviews thus did a lot to extend the FU vision and to hammer out discrete rule proposals consistent with it for feminists to seek at Rome. What did the activists working in Prep-ComI and the Rome Diplomatic Conference actually seek?

2. WCGJ Operationalization of the Feminist Universalist Vision as Legal Rule Proposals

Like all of its predecessor feminist organizations, the WCGJ had a broad agenda, far broader than the criminal provisions under examination here. It sought procedural rules such as requiring special protection of witnesses, receipt of amicus briefs, and the appointment of a special advisor on gender crimes to the Prosecutor’s Office.²⁶⁶ It sought to narrow

262. *Id.* at 394 (emphasis added).

263. Ryan, *supra* note 201, at 474.

264. *Id.* at 483.

265. *Id.* at 485; *see also id.* at 453 (objecting that classifying sexual assaults *under* existing rubrics of IHL imposed on victims of sexual violence the burden of showing that “the additional and complex contextual requirements under international law” had been met).

266. *See, e.g.,* WCGJ, 12/97 Recommendations, *supra* note 105, pt. V, art. 44 (protection of witnesses); *id.* art. 50 (amicus briefs); WCGJ, 12/97 Recommendations, *supra* note 105, art. 50 (amicus briefs); WCGJ, Gender Justice and the ICC, *supra* note 106, at 32 (special advisor on gender crimes).

and/or eliminate a long list of defenses.²⁶⁷ It sought to secure heavy sentences for convicted perpetrators and reparations to victims.²⁶⁸

Most generally, the WCGJ supported the formation of a strong, independent ICC with the power to try individuals for a wide range of important crimes. What may be the first circulated WCGJ position paper calls for these central CICC and Like-Minded Group aims.²⁶⁹

Here we are interested in the WCGJ agenda for the redefinition of IHL crimes to be inserted into the new ICL regime, and in a few additional reforms that carry over to the Rome process the advocacy feminists had developed in the ICTs. Once again, the agenda can be divided into vertical and horizontal reforms. Our questions: what did the feminists want and how much did their agenda coincide with the "utopian" agenda of the visionaries?

a. Vertical Reform Agenda

The vertical reform agenda was rich with new ideas about how to operationalize the FU vision. I start with the more familiar proposals and proceed to the more structural and inventive.

i. Push Rape and Other Sexual Violence Crimes up the Hierarchy of Crimes

The WCGJ worked to push sexual violence crimes *up* within the articles on war crimes and crimes against humanity. The vertical reforms for war crimes include the specification of sexual and gender assault as an explicitly included type of every single enumerated form of misconduct—I will call this line-by-line specification—and a new, general *chapeau* allowing the prosecutor to charge sexual and gender crimes in any prosecution for war crimes.²⁷⁰ Both proposals would have made it possible to claim that gender and sexual violence, including rape, was a grave breach, the former explicitly, the latter implicitly.

ii. Classify Rape as a Grave Breach

As we would expect, the WCGJ described the inscription of rape and other forms of sexual violence into the grave breaches prosecutable as war crimes in the ICC as "of 'fundamental importance' "²⁷¹

267. See, e.g., WCGJ, 12/97 Recommendations, *supra* note 105, pt. II, arts. L–N, P–R.

268. See, e.g., *id.* pt. IV.

269. WCGJ, 8/97 Recommendations on the Court, *supra* note 106.

270. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, WC7.1.

271. WCGJ, Gender Justice and the ICC, *supra* note 106, at 18.

iii. Add Persecution Based on Gender to the Predicate
Crimes Against Humanity

As we have seen, this reform was one of Copelon's first FU aims.²⁷² The WCGJ persistently advocated this reform at the PrepCom and at Rome.²⁷³

iv. Classify Rape as Rape?

I have been unable to find any evidence that the WCGJ sought to make rape and other sexual violence a separate article of ICC criminality, on par with war crimes, crimes against humanity, genocide, and aggression. The proposed general *chapeau* was as close as the WCGJ got to advocating the criminalization of rape as rape.²⁷⁴ But it may have intended the latter reform to accomplish reclassification of rape as rape. Its explanation of the general *chapeau* argues that it was needed because, "even while sexual violence can meet the elements of the other enumerated crimes, criminal law provides definitions of rape, enforced prostitution, and forced sterilization and other forms of violence and abuse that are different from that of the enumerated crimes."²⁷⁵ If "enumerated crimes" is construed to refer, say, to torture, then the insertion of the general *chapeau* would not have been a big structural overhaul of IHL. But if it refers to war crimes and crimes against humanity, the implication would be that the ICC should be authorized to prosecute sexual violence crimes using national law, *as a new and independent species of war crime*.

v. Reach "Peacetime"

Neither war crimes nor crimes against humanity should be limited to armed conflict. The WCGJ consistently sought extension of ICC enforcement to "peacetime."

For war crimes, the WCGJ proposed to eliminate the requirement of some connection to a widespread and/or systematic attack or a plan adopted by a State or other belligerent entity. Most wartime rapes, they argued, are more sporadic and could not be charged or punished if these requirements were retained.²⁷⁶

272. See *supra* text accompanying notes 220, 225–226.

273. WCGJ, 3/98 Summary of Recommendations, *supra* note 105, pt. II.4.

274. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, WC7.1.

275. *Id.*

276. *Id.* pt. III.

Similarly, by the March 1998 PrepCom, the WCGJ had proposed that crimes against humanity should not be mandatorily linked to armed conflict.²⁷⁷ The new statute should “[r]eject any linkage to war.”²⁷⁸ Why?

The linkage to war would exclude from prosecution most official perpetrators of massive violence through repressive dictatorial regimes such as in Chile and Latin America [sic] in recent decades. All that should be required is that they occur on a widespread or systematic basis References to the “civilian population” should be replaced with a reference to “any population.”²⁷⁹

Specifically, persecution based on gender should not be linked to war.²⁸⁰ Under these reforms, ICC enforcement of widespread unofficial rape during “peacetime” would be prosecutable.

vi. Annex Human Rights Law to IHL/ICL

As we have seen, from the early 1990s, feminists saw the annexation of human rights law to IHL as a large structural reform that would enable them to use the criminal enforcement capacities of humanitarian law to reach the everyday. This was, as we have also seen, its largest, most ambitious reform idea. At Rome, the WCGJ vigorously advocated specific rules that would effect this change.

In December 1997, the WCGJ drew up a general *chapeau* setting forth interpretive principles for the entire statute: “The application and interpretation of the general principles of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender and gender-stereotyped assumptions.”²⁸¹ This proposed *chapeau* is packed with innovations.

First, the *chapeau* would make human rights law—human rights law as it is “progressive[ly]” understood—the overarching source for general principles governing the Statute. The authorities cited in the WCGJ’s footnotes include a plethora of human rights conventions, the reports of

277. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 3 (“Crimes against humanity should . . . encompass the enumerated crimes of official as well as non-state actors when committed on a widespread or systematic basis against any population whether in war or peace . . .”); see also WCGJ, Gender Justice and the ICC, *supra* note 106, at 14.

278. WCGJ, Gender Justice and the ICC, *supra* note 106, at 4 (emphasis added).

279. WCGJ, 3/98 Summary of Recommendations, *supra* note 105, pt. II.2.

280. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 12.

281. WCGJ, 12/97 Recommendations, *supra* note 105, pt. II, art. L-T, § 2.

Special Rapporteurs on Human Rights, and law review articles addressing human rights in the mode of literary nonfiction and advocacy. All of these are cited as *sources* of human rights law to which the ICC could legitimately turn for interpretive guidance.²⁸²

Second, the WCGJ's proposed language would require that all applications and interpretations of the Statute be nondiscriminatory on the basis of gender. The *chapeau* not only invoked human rights as a constraint on interpretation of IHL/ICL but added a requirement that IHL/ICL be applied and interpreted without discrimination of any kind, including discrimination on the basis of sex. According to the WCGJ, nondiscrimination on the basis of sex was a, perhaps *the*, core principle of humanitarian law.²⁸³ The intense FU focus of this proposed reform is made manifest in its gender-exceptionalism: the *commentary* lists other impermissible bases of discrimination, including sexual orientation and health, but none of these was included in the draft *chapeau*.²⁸⁴ The proposed *chapeau* thus carries the FU torch to the very pinnacle of the proposed Statute's interpretive hierarchy.

In the WCGJ's supporting commentary, we find a very strong, positive-rights understanding of nondiscrimination. It was the WCGJ's position that the "*minimization of sexual violence and the failure to condemn sexual violence violate humanitarian law's core principle against discrimination based on sex.*"²⁸⁵ That is, non-prohibition of sexual violence and the exercise of prosecutorial discretion not to prosecute it would violate the principle of nondiscrimination on the basis of sex. In order not to discriminate on the basis of sex, the ICC would be required to indict and prosecute sexual violence crimes. This odd new bit of drafting actually operationalizes the mandates of feminist politics of recognition.

Nothing in the law review literature prepared me for this element of the *chapeau*. It is a surprise and seems to be the brainchild of the WCGJ itself. The WCGJ justification for it derives directly from the FU vision, however. It invokes feminist universalism explicitly when it claims that "the prohibition on adverse discrimination and reliance on stereotypes based on gender is of particular importance to the integrity of the ICC and its capacity to render *universal justice*."²⁸⁶

How could such a requirement ever actually constrain the ICC prosecutor? The WCGJ also proposed rules providing for review of the Prosecutor's decision not to investigate or indict. A comprehensive

282. *Id.*

283. *Id.* pt. III, § II, Introductory Note.

284. *Id.*; see also *id.* pt. II, Recommendation 5, Suggested Text.

285. *Id.* pt. III, § II, Introductory Note, ¶ 2 (emphasis added).

286. *Id.* pt. II, GP 12.2 (emphasis added).

statement of its positions that the WCGJ probably completed in June 1998 proposed that victims and other interested parties—presumably to include expert NGOs—be able to seek review of the prosecutor's decision not to investigate or prosecute.²⁸⁷ Thus, "victims and interested non-governmental organizations" would be empowered to appeal prosecutorial inaction to the Pre-Trial Chamber.²⁸⁸ This provision would make the general *chapeau* requiring nondiscrimination on the basis of gender enforceable to the extent that the reviewing chamber could actually reverse the Office of the Prosecutor's decision.

vii. Expand the Scope of ICL Vis-à-Vis National Law

At several points, the WCGJ agenda assumes such an expansive concept of gender and coercion that it implicitly incorporates into ICL criminal conduct that had theretofore been solely subject to national law. For example, the WCGJ would have included sexual harassment in the scope of ICL prosecution of "humiliating and degrading treatment."²⁸⁹ Elsewhere, it recommended giving the ICC jurisdiction to protect women and children from marriage practices that constitute enslavement.²⁹⁰ Thus the WCGJ's vision for the ICC would have endowed it with jurisdiction over violations of gender and sexual violence even in peacetime, by displacing national law and national institutions tasked with its enforcement.

b. Horizontal Reforms Agenda

None of the vertical reforms comes with any sign of internal disagreement within the WCGJ. And most of the horizontal reforms were also matters of smooth actual or performed consensus. But there was disagreement about several of the horizontal reforms, disagreements that were sometimes about strategy, but sometimes about substantive feminist ideology.

A very interesting feature of these disagreements is their near-complete erasure from the available materials. One must infer that the CICC command to produce consensus was reproduced among the feminists working inside the WCGJ.

287. WCGJ, 8/97 Recommendations on the Court, *supra* note 106, at 18.

288. WCGJ, Gender Justice and the ICC, *supra* note 106, at 24.

289. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 6, Commentary, WC.6.3.

290. *Id.* pt. III, Recommendation 8, Commentary, WC.8.2 ("[W]omen and girls are not only sold into forced marriage, but also kidnapped, coerced, threatened or deceived into 'accepting' it."). I will discuss below the implications of the substantive position stated here, that marriages that women "accept" under conditions of threat or deception are *slavery* and constitute *gender violence*.

Another interesting feature of these disagreements is that they arose between more radical and more liberal feminist political visions—and that it was the *radical vision that the WCGJ presented* as its public face at the Rome Conference. Except on issues that could produce resistance by States committed to regulating abortion, lines that were more liberal were submerged under lines that were more structuralist and that pursued the FU vision. In this Section, I read the WCGJ materials to show that GFeminism at Rome was far more radical and structuralist than some of its own most prominent proponents.

i. Delink Honor and Dignity from Sexual
and Gender Violence Crimes

The WCGJ was vigorous in its denunciation of the idea that rape is an insult to women's honor and dignity. At one point it indicated that Caucus members would take it as a personal affront—an affront that they describe in specifically criminal terms—if the two were not firmly distinguished once and for all:

This underestimation of both the purpose and effect of sexual violence is shocking today and deeply discriminatory now that the violent, terrible nature of rape and other sexual violence against women has finally been recognized To continue the linkage of rape, enforced prostitution (which . . . is usually at least serial rape) with “ridicule,” “calumny” or “being forced to perform degrading acts” when what is being punished is the infliction of some of the most extreme and traumatizing forms of physical and psychological violence, amounting to sexual torture or slavery, is itself humiliating and degrading to women and reinforces the stigma that it is the purpose of justice to prevent.²⁹¹

For all its denunciation of the idea that sexual assaults were wrong because they were humiliating and degrading, the WCGJ did not advocate for the elimination of “humiliating and degrading treatment” from the Statute. Deletion of that crime might have made it harder to prosecute sexual harassment short of forced nudity or forced sexual performance.²⁹² Instead, the WCGJ's strategy was to ensure that honor and dignity provisions lack any reference to sexual and gender crimes and that sexual and

291. *Id.* pt. III, Recommendation 6, Commentary, WC.6.2 (conflating prohibition, punishment, and prevention); *see also id.* pt. III, Recommendation 5, Commentary, WC.5.2.

292. *Id.* pt. III, Recommendation 6, Commentary, WC.6.3.

gender crimes provisions lack any reference to honor and dignity. They called this procedure "delinking."²⁹³

ii. Add "Crimes of Gender Violence"

As we have seen, over the course of their struggles with the ICTs, feminists redrew the poster-child injury at the center of their remedial activism so that rape became sexual violence. A further big shift in the language of sexual injury happened in the Rome process. The WCGJ advocated adding, at a still higher level of generality than sexual violence, *gender violence*.

"Gender violence" was an entirely new goal. Bedont and Hall-Martinez, both of them self-declared supporters of the WCGJ, explain the thinking that motivated this shift:

The Women's Caucus pushed for the term "gender" as opposed to "sex" because the latter is restricted to the biological differences between men and women, whereas gender includes differences between men and women because of their socially constructed roles. Similarly, "gender crimes" is preferable to "sexual violence" because it includes crimes which are targeted at men or women because of their gender roles which may or may not have a sexual element.²⁹⁴

This was a significant departure from the understanding that had developed during the years in which the overarching feminist rubric was sexual violence. In the WCGJ's thinking, sexual violence is a *kind* of gender violence, and gender violence is a far more expansive real-world problem. IHL/ICL should criminalize sexual assaults on men as well as women—a reform that is, of course, achievable under the rubric of sexual violence—but above all should target *gender-based* assaults on women that are not "sexual" in the sense that rape is "sexual." What could they have meant by this?

By the mid-1990s an extremely abstruse debate in elite Western feminist theory²⁹⁵ had been reduced to a formula that was often invoked in the human rights context in precisely the terms the WCGJ uses: sex is the bodily or natural distinction between men and women, and gender is

293. *Id.* pt. III, Recommendation 6; *id.* pt. III, Recommendation 6, Suggested Text; *id.* pt. III, Recommendation 6, Commentary, WC.6.1–6.4 ("[d]elinking sexual and gender violence from humiliating and degrading treatment").

294. Bedont, *supra* note 51, at 183 (disclosing that Bedont was a lawyer for the WCGJ); Bedont & Hall-Martinez, *supra* note 32, at 68.

295. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); JAY PROSSER, *SECOND SKINS: THE BODY NARRATIVES OF TRANSEXUALITY* (1998); Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157–211 (Rayna R. Reiter ed., 1975).

a vast array of cultural *meanings* given to that distinction, including the roles prescribed for its performance. Sex is having a penis or a vagina; gender is wearing pants or a skirt—or *having* to wear pants or a skirt. The sexual straddles the sex/gender distinction. Sex is clearly sexual when, for instance, a penis enters a vagina; but it may not be sexual when, for instance, custom requires that men and women use segregated bathrooms. And gender is sexual when, for example, women are required to dress modestly in order to avoid blame for any sexual assaults they may suffer; but it is less clearly sexual when, for instance, men are expected to work in paying jobs and women are expected to work in the home. Of course, anything can be eroticized; hence my hesitation about designating any manifestations of sex and gender “not sexual.” Again, elaborate and important theoretical debates worry this question,²⁹⁶ debates which have been completely ignored (for good reasons, no doubt) by feminists working the international beat. The point is rather that GFeminism has fully assimilated and operationalized a feminist sex/gender distinction, simplified to a distinction between sex as nature and/or the body and gender as culture.

Given these understandings, the shift in the feminist reform agenda from sexual violence to gender violence entailed an ambitious—one might say massive—expansion of the number and kinds of social events that would fall within the pale of their carceral project. The WCGJ’s arguments about this are somewhat garbled but give us an indication of what they were reaching for:

Gender violence also includes non-sexual attacks on women or on men based on their gender-defined roles; the physical or psychological targeting of women or their livelihoods to undermine the civilian population during war; attacks on reproductive integrity such as forced pregnancy or forced sterilization; the enslavement of women through forced marriage or otherwise for domestic as well as sexual service; and intentional or negligent disregard for the consequences of warfare on women—*e.g.*, the impacts of chemical warfare.²⁹⁷

Well, that was a muddle of bodily and cultural targets for violence against women. Perhaps this argument—explaining the WCGJ’s advocacy of the inclusion of sexual slavery, a project we will examine in detail shortly—will help clarify the force of the shift to gender violence:

296. See Janet Halley & Andrew Parker, *Introduction to After Sex?: On Writing Since Queer Theory*, 106 S. ATLANTIC Q. 421 (2007).

297. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 4, Commentary.

Enslavement is also gendered when it exploits women's or men's traditional roles. When . . . women are impressed into maternity, this is a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large-scale or individualized basis (forced temporary marriage) basis.²⁹⁸

It is hard to avoid the conclusion that WCGJ lawyers imagined the shift to gender violence as a definitional reform that would accomplish much of what Charlesworth and the WCGJ wanted to achieve by annexing human rights to IHL/ICL: make *cultural practices* differentiating between men and women subject to IHL/ICL even when they are not plausibly connected to armed conflict. For example, the Taliban's ban on women's employment in the paid workforce.

What, then, is at stake in the shift from the "war against women" framing to "gender violence"? Perhaps the most salient implication is that the new formula includes more practices affecting *men*. Note that the descriptions of gender violence just quoted mention "women and men." The WCGJ acknowledged that it intended to include, as types of gender violence, the targeting of homosexuals and people with HIV for separate detention, other maltreatment, and even discrimination.²⁹⁹ Occasionally, an example of gender violence affecting only men is showcased. "Gender-based persecution," for instance, "is involved . . . when young boys are either killed to prevent their becoming soldiers or coerced and humiliated into becoming killers."³⁰⁰ The WCGJ advocated an increase in the minimum age at which soldiers could be put in uniform—a rule that would, if enforceable and enforced, primarily and predominantly benefit boys who do not want to fight, and maybe also those who do.³⁰¹

These new elements of the GFeminist agenda raise a second question: had the FU vision been eclipsed in the push to intervene in the cultural politics of gender?

I think not. Instead, the "war against women" vision, in which war is about women and wartime rape is continuous with everyday rape, infused almost all of the WCGJ explanations of what "gender violence" looks like. Consider the WCGJ's justification for raising the minimum recruitment/impressment age. Its trajectory takes us on an actual, not experimental, trip into FU consciousness.

298. *Id.* pt. III, Recommendation 5, Commentary, WC5.6–13.

299. *Id.* pt. III, Recommendation 4, WC.4.6; *see also* Bedont, *supra* note 51, at 188.

300. WCGJ, Gender Justice and the ICC, *supra* note 106, at 18; *see also* WCGJ, 3/98 Briefing Paper on Gender, *supra* note 106.

301. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 9.

In its December 1997 submission to the PrepCom, the WCGJ argued for prohibition of military recruitment of minors by morphing a world in which boys suffer into one in which only women suffer, and suffer at the boys' hands, not only in war but continuously from war to peace. We begin with the WCGJ's objection to the use of child soldiers because of its "pervasive gender impact."³⁰² At first this includes trauma to the boys who must fight, but they are soon sifted out of the mix:

Military service, despite its pervasive glorification in many societies, is often profoundly traumatizing for those who perform it either because they must or cannot become inured to killing and to death. Military recruitment and service thus operate to divide society by gender and reinforce stereotypes about strength and weakness, protection and dependency, superiority and inferiority in violation of international norms designed to eliminate discrimination against *women*.³⁰³

Trauma to the boys is problematic because it produces an ideology of "masculinity," ratifying "patriarchal values,"³⁰⁴ and thus discriminates against *women*. Indeed, it conjoins wartime rape to everyday rape, returning us in the end to the war against women:

Women are frequently *the* victims of this militarization, as targets of sexual and gender violence when used or tolerated as instruments of war. They are also targets of violence in war's aftermath: women suffer equivalent forms of violence in refugee camps created by war and are battered and raped—tortured in fact—by intimate partners and family members in their homes.³⁰⁵

So much for the trauma suffered by those boys. In March 1998, the WCGJ explained gender violence to men in much the same way:

Sexual violence, whether directed against women or men, is usually a form of gender violence, since it is an attacked [sic] based on and intended to destroy one's gender identity, whether masculine or feminine. That is, women are raped, for example, to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them though [sic] forcing them to experience the position of women

302. *Id.* pt. III, Recommendation 9, WC9.2.

303. *Id.* pt. III, Recommendation 9, WC9.2 (emphasis added).

304. *Id.*

305. *Id.* (emphasis added); see also WCGJ, Gender Justice and the ICC, *supra* note 106, at 13 (offering a similar rationale).

and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior.³⁰⁶

This rendering of injured male masculinity is structuralist-feminist. It starts from the assumption that sexuality and gender are structurally committed to male domination and female subordination. If a man—or boy—is injured in sexuality or gender, that cannot be because masculinity has become a site of harm. To concede that would relinquish not the commitment to seeing domination in sexuality and gender, but the commitment to seeing that domination as *structurally committed to male domination and female subordination*. The move we see the WCGJ's gender violence arguments make—to identify the injury as suffered only in *feminine* places—restores the *structural* assumption to its full upright position.

The Women's Initiatives for Gender Justice (WIGJ), the successor organization to the WCGJ that is carrying on its work as a feminist watchdog guarding the ICC, explains the difference between sexual and gender violence by once again making the classic structuralist-feminist operation we have just witnessed. It discusses an episode arising during the Balkan conflict in which a Muslim man was forced to bite off the testicle of another Muslim man in the Omarska prison camp. Then-Prosecutor Goldstone—before his change of heart—described this episode as “what was worse” than rape.³⁰⁷ Explaining the difference between gender violence and sexual violence, the WIGJ expresses concern about the victim *because he is like a woman*:

Men may also be raped to humiliate them by forcing them into the position of women and thereby rendering them weak or inferior according to the prevailing stereotypes. In one incident described in the *Tadić* case [before the ICTY], a man was tortured when another prisoner was forced to bite off his testicle. The sexual organs of the man were targeted in order to take away his male identity and make him like a woman.³⁰⁸

We can analyze this description of the assault at Omarska as a literary event—that is, as embodying a range of choices about how to *represent* an event, how to pictorialize it. In the ICTY's version, two men were forced into unwanted sexual contact: the first command was that

306. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 10.

307. See *supra* text accompanying note 44.

308. Erb, *supra* note 88, at 426 nn.98–100 (attributing the text to a “Briefing Paper on Gender” produced by the WCGJ during the Rome Conference and “on file with the author”); see also Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 87 n.3 (1999).

the one man “lick the bottom” of a second man; then the former was forced to sexually mutilate the latter; the second man suffered intense pain, physical mutilation, and, then, according to the prosecutor, death; the crowds of detainees—most, if not all, men—who watched and/or heard this event were put on notice of how hostile their captors were and how defenseless they themselves were.³⁰⁹ Of course, the men involved on both sides may have seen old village and town rivalries and alliances played out, religious identity transformed into nationalist identity, profound personal psychic fears enacted—the range of possible framings for such a story is probably impossible to exhaust. The WIGJ looks at this picture and sees a man losing his male identity and becoming like a woman.³¹⁰ This representation is not only structuralist; it is a classic example of the FU vision at work.

The WCGJ’s effort to redefine sexual crimes as gender crimes provoked fierce resistance from at least sixteen States and had the steady support of only four.³¹¹ The opposition to gender crimes was ferocious—and perhaps understandable. States in which Islamic law makes an important contribution to the legal order often maintain a strong differentiation between the legal rights and responsibilities of husbands and wives; faced with a feminist reform expressly designed to transform cultural differences in the legal treatment of men and women into the material for ICC prosecution, they quite plausibly saw a threat. Their opposition could only have been fortified by the WCGJ’s opposition to linking crimes against humanity and war crimes to armed conflict situations and its inclusion of marriages which women and girls “accept”—in scare quotes, a structuralist gesture—within the scope of sexual slavery.

The WCGJ fought a short but intense battle on behalf of this reform. In the process, the WCGJ issued four emergency position papers, at first placidly defining gender in the voice of feminist expertise, then asserting

309. Prosecutor v. Tadić, Case No. IT-94-I-T, Trial Judgment, ¶¶ 193–477 (May 7, 1997) (recalling the factual findings generally); *id.* ¶¶ 194–244 (reporting the factual findings about the forced sexual mutilation of one detainee by another).

310. To be sure, in the battle over gender violence waged at the March PrepCom described immediately below, the WCGJ issued a briefing paper that acknowledged that male masculinity could be the site of male gender violence. The briefing paper indicated that “[e]xamples [of gender violence] include the forcible recruitment of young boys into the army who are put through violent indoctrination, and then made to perform suicide missions in order to prove their masculinity; and the killing of pregnant women by the slashing of their wombs and removal of their fetuses.” WCGJ, 3/98 Briefing Paper on Gender, *supra* note 106. But an analysis of the Omarska incident virtually identical to that just quoted from the WCGJ website immediately follows.

311. Bedont & Hall-Martinez, *supra* note 32, at 67, 81 n.7 (listing the opposing States to be Qatar, Libya, Egypt, Venezuela, Guatemala, the United Arab Emirates, Saudi Arabia, Kuwait, Syria, Turkey, Sudan, Bahrain, Iran, Yemen, Brunei, and Oman, and counting Canada, Australia, New Zealand, and Samoa to be among the consistent supporters).

that gender violence had been condemned in a range of human rights documents that made the term not only legitimate but almost obligatory on the Rome Conference, and, finally, issuing a “[c]all to delegates” to “fight the attack on gender justice.”³¹² In this progress, the WCGJ shifted from the *de rigueur* composure required by its role as advisor/consultant/expert to an explicitly political posture, both embattled and belligerent.

The collective resolve to fight for “gender violence” must have been intense—suggesting a large, if not uniform, consensus within the WCGJ on its behalf. But, eventually, the WCGJ caved. Bedont and Hall-Martinez summarize the reasons for this decision: “The dispute regarding terminology threatened the inclusion of certain gender crimes, of a non-discrimination clause, and of special protective measures under the procedural provisions.”³¹³ That is, the battle for gender violence crimes was so sharp and the delegation-level support for it so sparse, that the WCGJ abandoned a highly desired term for purely strategic reasons. Indeed, I have been unable to find any trace of internal controversy either about the desirability of including crimes of gender violence or about the FU structuralist vision implied by the WCGJ’s explanations of the term. Instead, even when, after it had thrown in the gender-violence towel, the WCGJ proposed statutory crime-defining language silently omitting “gender violence,” it proceeded to *explain* the provision as if the fraught term were still there.³¹⁴ Gender violence went underground and continued its fight for recognition.

iii. Defend and Relabel Enforced Pregnancy

As far as I can tell, the idea of introducing a crime of enforced or forced pregnancy into the list of sexual violence crimes punishable by the ICC originated from feminist activists.³¹⁵

During the Rome Conference, the Holy See sought to delete enforced pregnancy from the draft statute on the ground that it threatened to criminalize enforcement of national laws discouraging or criminalizing abortion.³¹⁶ The documents that I have been able to obtain strongly

312. WCGJ, 3/98 Briefing Paper on Gender, *supra* note 106; WCGJ, Negotiated Definition of Gender, *supra* note 106; WCGJ, Need to Reaffirm Gender Violence, *supra* note 106; WCGJ, Call to Delegates on Gender, *supra* note 106 (listed in this surmised chronological order to track the arc of increasing embattlement described by Barbara Bedont and Katherine Hall-Martinez).

313. Bedont & Hall-Martinez, *supra* note 32, at 68.

314. WCGJ, Gender Justice and the ICC, *supra* note 106, at 11 (proposing to the Rome Conference that war crimes include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence . . .” (emphasis added)).

315. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 7.

316. Bedont & Hall-Martinez, *supra* note 32, at 74.

suggest that the WCGJ's stand-pat consensus position was to defend this provision by limiting its scope. What I cannot glean from the available documentation is whether this tactic was chosen in order to disable the religious conservative attack, to prevent disagreement from emerging within the WCGJ itself, or both.

The WCGJ made two moves in this direction. First, it argued that the better term was "forced pregnancy" because that term would clarify that the crime under definition "is a violent crime, committed with a violent intent"³¹⁷ Second, it offered a narrowing definition "in the spirit of compromise": "[f]orced pregnancy" should be defined to mean "rape or other sexual abuse carried out with the intent or having the effect of making a woman pregnant and/or confining, controlling or coercing a pregnant woman because she is pregnant."³¹⁸ I am aware of no other WCGJ recommendation to *protect* national gender policy from the reach of the ICC.

The resulting compromise language—which would include impregnation by rape or other sexual abuse even if the victim were not detained with the intent of making it impossible for her to obtain a timely abortion—would have been controversial with some feminists if they had known about it. An intra-feminist debate did exist, in the aftermath of the Balkan War, about the assumption of some feminists that such pregnancies imposed a particularly onerous form of suffering on the victims. The opposition worried about the homology of this view with that of the rapists themselves and about the implicit and sometimes explicit endorsement of the nationalist representation of the resulting fetus or child as an ethnic deviant.³¹⁹ I can see no trace of that debate in the available literature on the Rome Statute, published or unpublished.

iv. The Struggle over Enforced Prostitution, Trafficking, and Sexual Slavery

This was a complex set of related reforms, and—unlike "gender violence" and "enforced pregnancy"—they reveal a rift within the WCGJ, one that the norms supporting coalition and the submergence of disagreement could not completely suppress. It was the same split that divided structuralist from liberal feminists in the sex-trafficking side of penal GFeminism. In order to understand the feminist ideologies at stake here, a brief introduction is in order.

317. WCGJ, 6/98 Crime of Enforced Pregnancy, *supra* note 106.

318. WCGJ, Priority Concerns (Enforced Pregnancy), *supra* note 106.

319. See R. Charlie Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428 (2000).

Feminist disagreement about trafficking and slavery. I have been unable to discover exactly when sexual slavery was included in the draft Statute's list of enumerated sexual violence crimes. It was not included in the lists of sexual crimes that Hall reported from the Third Session.³²⁰ The WCGJ advocated its inclusion in its December 1997 Recommendations.³²¹ At the Fifth Session, held that month, the inclusion of "sexual slavery" had—according, again, to Hall—the "overwhelming support" of a Working Group on definitions and elements of crimes chaired by Adriaan Bos.³²² It is hard to avoid the inference that the criminalization of sexual slavery was the WCGJ's idea, and that its ready acceptance was a mark of the WCGJ's legitimacy as an authority on sexual violence crimes.

I also have been unable to discover when or at whose behest "enslavement" was defined to include "trafficking in persons, in particular women and children."³²³ As we will see below, the WCGJ objected to the term at the March 1998 PrepComI, and so this definition must have been introduced prior to that meeting.³²⁴

The two terms have a vexed history inside U.S. feminism, a new chapter of which was written at Rome. It is impossible to understand this history without a glance back to the classic in radical feminist activism that put the term "female sexual slavery" on the second-wave feminist map: Kathleen Barry's 1979 book by that title.³²⁵ And we need to glance sideways, at the highly successful GFeminist work, contemporaneous with the IHL/ICL work I am concentrating on here, targeting sex trafficking as sexual slavery outside the context of armed conflict.

The contemporary practice of equating sex trafficking with sexual slavery has its origins, of course, in nineteenth-century moral campaigns against the traffic of women into the "white slave trade" and the very tense relationships between the campaign for emancipation of black slaves and for the protection of white women.³²⁶ Those ideas were reshaped in the 1970s by U.S. radical structuralist feminists, who argued that not *white* women, but *all* women lived in conditions, not of a racial "slave trade" but of "sexual slavery." Barry's *Female Sexual Slavery*—

320. Hall, *supra* note 60, at 127 (quoting from the Third Session draft, the following list of enumerated sexual crimes: "rape or other sexual abuse of comparable gravity, or enforced prostitution").

321. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 7, Commentary, WC.7.1.

322. Benedetti & Washburn, *supra* note 19, at 6 (date of the Fifth Session); Hall, *supra* note 75, at 331, 333, 336 (support for inclusion of "sexual slavery").

323. Rome Statute, *supra* note 23, art. 7.2(c).

324. See *infra* text accompanying note 334.

325. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979).

326. Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 338–39 n.7.

the flagship statement of this idea—was an almost fully structuralist account of women's domination. Again, by structuralist I mean that a commitment to the view that the subordination of women is coextensive with male/female relations—is their *structure*. In a fully structuralist feminist view of sexuality, *no* sexual interaction between a man and a woman is free from the effects of male domination. In a classificatory gesture that is typical of structuralist feminism, Barry assimilated every sex-related harm suffered by women to sexual slavery: prostitution, pornography, “gynocide,” the family, domestic battery, rape, incest, veiling, and bride purchase.³²⁷ And then she summed it all up in a statement that shies just a nuance short of full structuralism:

Female sexual slavery is present in ALL situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual violence and exploitation.³²⁸

What makes this definition less than fully structuralist is that it posits a limit to sexual slavery. Barry insisted that it was not feminism's business to eliminate prostitution itself: if women could “freely leave their work any time they choose,” they should be understood to have chosen it of their own accord.³²⁹

In 1995, Barry recanted the idea that women could choose prostitution freely and credited this change of heart to her work with feminists working in human rights NGOs on global prostitution—what we are now accustomed to call *sex trafficking*. Her new book, *The Prostitution of Sexuality: The Global Exploitation of Women*, asks:

Can women choose to do prostitution? As much as they can choose any other context of sexual objectification and dehumanization of the self [The] harm . . . takes the form of forcing distinctions between what are essentially nonchoices. This is how *women actually do not consent to prostitution* or any other condition of sexual exploitation—in rape, in marriage, in the office, in the factory, and so on.³³⁰

Barry's response to her italicized question is a decisive “no.” Barry learned this, she tells us, during her work with international feminists culminating in the 1992 Plan of Action for networking on the part of the Coalition Against Trafficking in Women and the U.N. Education,

327. See BARRY, *supra* note 325.

328. *Id.* at 40.

329. *Id.* at 279.

330. KATHLEEN BARRY, *THE PROSTITUTION OF SEXUALITY* 33 (1995).

Scientific, and Cultural Organization (UNESCO).³³¹ In order to frame this new, more complete, more *structural* domination, Barry declared that she was “shifting from [her] previous work on the sexuality of prostitution to [her] new work on the prostitution of sexuality. [She is] taking prostitution as the model, the most extreme and most crystallized form of all sexual exploitation.”³³² But the shift in terms by no means renounced earlier equations. The index entry for *Female Sexual Slavery* directs us to “[s]ee also Prostitution; Trafficking in women.”³³³

In this updated structuralist-feminist framing, *there is no difference between prostitution, trafficking, and sexual slavery.*

As Chantal Thomas, Janie Chuang, and others have demonstrated, feminists have been active in advocating, legislating, and managing an increasingly widespread criminal and regulatory regime targeting sex trafficking. But this effort has been controversial within feminism devoted to the trafficking nexus. That is, Barry’s structuralism has *feminist* opposition. There is a sharp divide between feminists who see “sexual slavery” and those who see “bargained-for exchange” when a woman accepts money or some other benefit in exchange for having sex; between those who see “sexual slavery” and those who see “migratory sex work” when a woman crosses state lines and ends up engaged in the sale of sexual services. Thomas calls the latter “individualists.” They seek reforms that limit criminalization of the pimp’s and the John’s activities to instances in which the woman is coerced, and leave open the category of “nonforced prostitution.”³³⁴ Thomas calls the former structuralist for the same reason that I describe the strong depictions of gender violence analyzed in Part II.D.2.b.ii structuralist: male domination and female subordination are extensive terms, reaching for the descriptive horizon. When depicting what other feminists would describe as sex work, they see coercion. For them, prostitution and trafficking are *always* coerced. Their goal is abolition, and their rallying cry has become *sexual slavery*.³³⁵

Let us return, now, to the feminist activism in the Rome Statute process. In the remainder of this sub-section, I trace the struggles within the WCGJ over trafficking, and two crimes that became ideologically linked for WCGJ feminists: enforced prostitution and sexual slavery.

331. *Id.* at 5.

332. *Id.* at 11.

333. *Id.* at 372.

334. Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 351–60.

335. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437 (2006); Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 348–51 (indicating that Kathleen Barry co-founded one of the most influential structuralist, anti-trafficking NGOs, the Coalition Against Trafficking of Women (CATW)).

Delete "trafficking, in particular in women and children." One of the most striking annexations of human rights to the ICC enforcement arsenal appears in the definition of the crime of enslavement, a predicate crime against humanity, to include "trafficking, in particular in women and children."³³⁶ An offense that has been designed and enforced in the human rights domain would be enforceable *also* in the ICC.

I had always assumed that the inclusion of trafficking in women and children had been an objective of the WCGJ. After all, structuralist feminists had made sex trafficking a central focus of their GFeminist activism over the course of the 1990s. It seemed obvious that they would think the Rome process a rich opportunity to extend their abolitionist campaign. The opposite, however, occurred: the WCGJ at first advocated alternative language and then actually *opposed* the inclusion of trafficking in the statute.

In its December Recommendations to the PrepCom, the WCGJ sought to prohibit "enslavement and slavery-like practices in all their forms, including by sale, deception, coercion or threat."³³⁷ The will to reach cultural gender, the will to reach "peacetime," and the strong structuralist vision of male domination are evident in the rationale for the "including" clause: "For example, women and girls are not only sold into forced marriage, but also kidnapped, coerced, threatened or deceived into 'accepting' it."³³⁸

No mention of trafficking appears here. The WCGJ was not advocating its inclusion. Moreover, by the March 1998 PrepCom, the WCGJ actively opposed inclusion of trafficking in the Statute. Its new definition of enslavement included "sexual slavery, forced labor and domestic service, trade in and coercive or deceptive transport of persons, and other slavery-like practices"³³⁹ The proposed language made no mention of trafficking and it came with a positive reason to omit trafficking: "Because of the need for review of the international definition of trafficking, the Women's Caucus suggests instead that the crime be described as 'trade in and coercive or deceptive transport of persons.'"³⁴⁰ Clearly disagreement about the range of the term trafficking had emerged within the WCGJ. As we will soon see, the same disagreement emerged over the term "enforced prostitution."

336. Rome Statute, *supra* note 23, art. 7.2(c).

337. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 8.

338. *Id.* WC.8.2.

339. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 14.

340. *Id.* at 15; *see also* WCGJ, Gender Justice and the ICC, *supra* note 106, at 16 ("Because of the need for review of the international definition of trafficking, the Women's Caucus suggests instead that trafficking be later defined as 'trade in and/or coercive or deceptive transport of persons.'").

What had happened? The annexation of human rights to ICL was, as I have deduced and argued above, motivated by the FU vision, with its structuralist understanding of women's sexual subordination and its horizon-wide reach from war to "peacetime." One of the paradoxes of this development in the strand of GFeminism committed to installing feminist-derived rules into IHL and ICL was that it brought to the fore human-rights-based feminists who were veterans of the intra-feminist sex-trafficking wars of the early-to-middle 1990s. This cadre included liberal feminists who *opposed* structuralist feminists in those struggles. Three of the nineteen signatories to the WCGJ's encyclopedic June 1998 submission to the Rome Conference, *Gender Justice and the ICC*,³⁴¹ had just a few months earlier participated in a human-rights/liberal-feminist roundtable which resulted in a highly sophisticated published position paper.³⁴² Disagreement emerged, I would infer, and was muted by a decision to offer only wan objections to the inclusion of trafficking in the ICC Statute.

The problematics of consent in enforced prostitution and sexual slavery. The 1993 CUNY Clinic Memorandum had insisted on the separate criminalization of enforced prostitution, and the 1993–94 Green/Copelon Working Group Proposals had quite composedly offered definitions of forced prostitution for inclusion in the ICTY Rules of Procedure and Evidence.³⁴³ But Oosterveld documents the surge in feminist desire to use the Rome Statute process to *retire* "enforced prostitution."³⁴⁴ At the March PrepCom, the WCGJ advocated precisely this position, and precisely for structuralist reasons:

[E]nforced prostitution is often a misnomer—it usually applies to situations where women (and sometimes young men) are, in fact, subjected to sexual slavery even though the individual person taking advantage of that thinks it is enforced prostitution which does not reflect the degree of possession and control implied by sexual slavery.³⁴⁵

Structuralists like Barry thought that all prostitution—and certainly any sex between enemies in wartime—is forced, rendering the distinction

341. Ali Miller & Alison N. Stewart, *Report from the Roundtable on the Meaning of "Trafficking Persons": A Human Rights Perspective*, 20 WOMEN'S RTS. L. REP. 11, 19 (1998); WCGJ, *Gender Justice and the ICC*, *supra* note 106, Introduction.

342. Miller & Stewart, *supra* note 341, at 16 (reporting that "the notion that one could be trafficked even *with* one's consent was . . . rejected").

343. CUNY Clinic Memorandum, *supra* note 37, app. B at 236–37; *id.* at 185, 192–93 (Green/Copelon Working Group Proposals).

344. Oosterveld, *Sexual Slavery*, *supra* note 21, at 616–22.

345. WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 8.

between legitimate and forced prostitution invidious. That position clearly had support in the WCGJ.

But other WCGJ documents manifest disagreement over this position, combined with a ready willingness to paper this intra-feminist tension over. For example, the December 1997 WCGJ submission to the PrepCom argued both the structuralist and the liberal positions on prostitution:

[S]exual enslavement has been diminished by calling it only "enforced prostitution."

The term "enforced prostitution" muffles the degree of violence, coercion and control that is *characteristic of sexual slavery*. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. When, as in the Geneva Conventions, forced prostitution is equated with the "performance" of degrading acts, the term also suggests that sexual services are offered rather than brutally exacted. It hides the fact that *this is rape*, serial rape, physically invasive and psychologically debilitating in the extreme, and that *women are reduced to and sexually bludgeoned as property*, and that *they are completely under the control of the perpetrator*.

History has taught us that *most* so-called "forced prostitution" during armed conflict constitutes sexual slavery.³⁴⁶

In denouncing enforced prostitution *as* sexual slavery, identifying it with rape, and insisting that women participate in it "completely under the control" of male attackers, the WCGJ merges enforced prostitution *into* rape and sexual slavery: Barry's structuralist position exactly. But when these paragraphs proceed to a conclusion that *most* forced prostitution is sexual slavery, they open up the possibility that *some* acts of forced prostitution are *not* enslaving or the equivalent of rape. The December position paper advances *both* positions, well understood to be the subject of intense feminist disagreement in other contexts, as if they were consistent.

This puzzling contradiction tracks precisely the structuralist/individualist tension, but deducing substantive disagreement from it may be hasty. Bedont and Hall-Martinez indicate that the WCGJ faced a tactical concern: what if sexual slavery ended up being defined too narrowly to encompass everything included in "enforced prostitution"?³⁴⁷

346. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 5, WC5.6-9-6.11 (emphasis added).

347. Bedont & Hall-Martinez, *supra* note 32, at 73.

Clearly the structuralist legal ideal was to include as many sexual wrongs as possible under the most stigmatic term that they could find. The WCGJ strategists knew, however, that they would not necessarily control the ICC's eventual definition of rape, sexual slavery, sexual violence, or gender violence. If those were defined narrowly, a lesser included offense of enforced prostitution might undergird broader criminal liability. This strategic hesitation seems to animate the WCGJ's December 1997 rule recommendations that *some* coerced sex might not constitute slavery and that prosecutors should have the discretion to charge the lesser crime and still prosecute less obviously coerced prostitution:

But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them *little more than sex slaves*. The decision whether to charge someone with forced prostitution, sexual slavery or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.³⁴⁸

The WCGJ position, then, was that enforced prostitution should be retained but that sexual slavery should be added, "to highlight the importance . . . of distinguishing sexual slavery from enforced prostitution which requires different, and a lesser degree of proof than slavery or serial rape."³⁴⁹

Was this a concession to legal practicalities or a sign of emergent liberal-feminist voices within the WCGJ core? The opposition to "trafficking, in particular in women and children," on grounds that its definition is contested, strongly suggests the possibility that liberal feminists were at the table. We know from other traces in the record that they were indeed there. Oosterveld, for instance, argued that rape is a violation not of a woman's honor or dignity but of her *bodily integrity and autonomy*.³⁵⁰ This thinking is consistent with the notion that a woman can consent to prostitution and that the law should respect her choice. And the annexation of a human rights agenda brought to the table human-rights-based GFeminists, a cadre which was, by the mid-1990s, highly

348. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 5, WC5.6-12 (emphasis added).

349. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, WC7.2, Commentary to Recommendation 7.

350. Oosterveld, *Sexual Slavery*, *supra* note 21, at 650-51; see also Kristin Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 630-31 (2001) (calling for "a new paradigm for the international criminalization of sexual crimes—one based on broader principles of human dignity, autonomy, and consent").

familiar with the intra-feminist structuralist/individualist conflict on the trafficking battleground and which, as we have seen, included people committed to the individualist camp. It is not to be imagined that they forgot their position on trafficking when time came to work out the WCGJ's position on the very same issue and on the related term "enforced prostitution."

The introduction to *Gender Justice and the ICC* alludes to consensus formed in the context of individual and group disagreements, and it seems plausible to infer that some of these disagreements tracked the structuralist/individualist divide.³⁵¹ What is so striking is how muted these disagreements were. In the context of trafficking, opposed camps exist and are willing to go public with their disagreements. Feminist NGOs dedicated to conflicting views are easily visible even to an outsider and feminist struggle goes on within the law-making processes.³⁵² Yet none of this fractiousness—often thought to be virtually definitive of feminism itself—is detectable in GFeminism at Rome. It has taken me many weeks of sleuthing through the record to construct the highly inferential argument just set forth.

Let us take Oosterveld once again, as an example of GFeminist thought in the Rome process. As we have just seen, her highest-order commitment is to female sexual autonomy—a liberal feminist ideal. But she was also entirely sympathetic with the WCGJ's structuralist positions, from the broad scope of "gender violence" to the inclusion of "sexual slavery" in the Rome Statute. Her express position on sexual slavery is exactly analogous to that of the structuralist NGOs in the anti-trafficking effort. For the latter, here is Thomas's description of their position on consented-to prostitution:

351. WCGJ, *Gender Justice and the ICC*, *supra* note 106, Introduction. The Report indicated that

[t]he Caucus' [sic] structure has been fundamental to creating a document that reflects the consensus of participants in the Women's Caucus who have attended the Preparatory Committee meetings, and many others, throughout the world, who participated in inspiring [sic], developing, vetting or subscribing to the recommendations. This means that on particular points, some individuals or groups may differ with the Caucus's position but, on the whole, the Core Principles which form part of these recommendations, are supported by thousands of men and women around the world

Id.

352. Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 348–60, nn.29–83. Ann Jordan, a member of the Miller/Stewart roundtable and the WCGJ, testified before the Homeland Security Committee of the House of Representatives against the structuralist position on trafficking. See Testimony of Ann Jordan, Director, Initiative Against Trafficking in Persons, Global Rights, Before the Subcommittee on Border, Maritime and Global Counterterrorism, <http://homeland.house.gov/SiteDocuments/20070320165954-38416.pdf> (last visited Nov. 4, 2008).

Structuralists called for a definition that included all commercial sex automatically within the ambit of sex trafficking—an explicit finding of coercion would not be necessary since, according to the structuralist approach, all commercial sex was necessarily coercive. The structuralist proposal also called for an explicit statement disregarding any manifestation of apparent consent by the trafficking victim. Just as one cannot legally consent to one's own enslavement, consent could not be a basis for validating commercial sex since it was "female sexual slavery."³⁵³

Now compare Oosterveld's position on consented-to sex in ICC prosecutions for sexual slavery:

By definition, an exercise of . . . [the powers attaching to the right of ownership] involves a negation of consent, which is why the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices in armed conflict stated:

As a *jus cogens* crime, neither a State [n]or its agents, including government or military officials, can consent to the enslavement of any person under any circumstances. Likewise, a person cannot, under any circumstances, consent to be enslaved or subjected to slavery. Thus, it follows that a person accused of slavery cannot raise consent of the victim as a defense.

If a judge finds that the actions of the perpetrator fall within the first element of the crime of slavery, an evaluation of whether a defence [sic] of consent can apply to the sexual acts of the second element is not necessary The fact that consent cannot serve as a defense to the crime of sexual slavery is another advance in international law.³⁵⁴

Oosterveld performs the structuralist argument as choreographed by Thomas with on-point precision. And Oosterveld's thinking is, in turn, perfectly in line with the WCGJ December 1997 position on sexual slav-

353. Halley, Kotiswaran, Shamir & Thomas, *supra* note 4, at 351.

354. Oosterveld, *Sexual Slavery*, *supra* note 21, at 640 (quoting ECOSOC, U.N. Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Prot. of Hum. Rts., *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, ¶ 51, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000)) (citations omitted).

ery: "Under international law, it does not matter whether a slave-like status was initiated by an 'agreement' or involved some exchange."³⁵⁵

Note an important implication here on another issue that has been highly contentious inside legal feminism: should there be a defense for consent in rape prosecutions? As I explain elsewhere, the hard-line structuralist feminist position on litigation in the ICTY was that there should be no consent defense *at all*. The argument was that women who had sex with combatants from the other side of an armed conflict were operating in coercive circumstances, and any consent they gave was meaningless, not real consent at all. Evidence of it should be inadmissible because no valid inference of actual consent could be drawn from it.³⁵⁶ The ICTY very briefly adopted the no-consent-defense position, only to shift rapidly to a complex of rules that presume non-consent from the coercive circumstances and that allow defendants to offer their proof on the issue only after it had been found to be probative in an *in camera* hearing and to be devoid of any admissions by the complaining witness.³⁵⁷ The WCGJ sought only to keep the Rome Statute from being more permissive to the defense than the ICTs had been,³⁵⁸ thus accepting a partial defeat for the structuralist feminist position on evidence of consent in rape cases. But Oosterveld's understanding of sexual slavery suggests that some WCGJ elements may well have intended this new crime to offer an alternative to the rape rules. In our most authoritative report on the WCGJ line on sexual slavery, Oosterveld insists that consent is not a defense to sexual slavery.³⁵⁹ The implicit prescription for WCGJ/WIGJ

355. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 5, WC5.6-7.

356. Halley, *Rape in Berlin*, *supra* note 1, at 86-91.

357. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/Rev.41 (Mar. 8, 2008). Rule 96 states that, in cases of sexual assault,

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence if the victim
 - (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted in evidence.

Id.; see also Sellers, *The Context of Sexual Violence*, *supra* note 138, at 310-16.

358. WCGJ, Gender Justice and the ICC, *supra* note 106, at 45.

359. Oosterveld, *Sexual Slavery*, *supra* note 21, at 640.

influence on ICC prosecutions: make an end run around rape, with its consent defense, by charging sexual slavery.

It is perplexing to see such an illiberal line being implied if not explicitly adopted here, by one of the Rome process's liberal feminists. Oosterveld's positions leave us with a complex ideological picture. She supported structuralist reforms in structuralist terms. She argued for a shift to autonomy that would strengthen the liberal feminist variant, but the implications of that shift are latent in her published GFeminist writings. Her interventions *during* the Rome Diplomatic Conference—as a scholar, as a member of the WCGJ, and later as a member of the Canadian delegation to the Conference—are strongly structuralist. Consensus at Rome meant performed solidarity with the structuralist line.

c. Conclusion

Looking back over the vast expansion of the feminist sexual violence agenda in the Rome process, what can be said in retrospect? Let us note the omissions first. Neither Charlesworth nor the WCGJ advocated an emphasis on rape as genocide. Here, Charlesworth and the WCGJ were heirs to the Copelon line. Copelon had opposed the genocidal rape framing pursued by Catharine A. MacKinnon and others; Copelon led what Engle calls the “everyday rape camp” in the early 1990s. But Engle is right that the feminist disagreement over genocide was followed by consensus on almost everything.³⁶⁰ I have uncovered nothing to indicate that the WCGJ was interested in reopening the questions about genocide that had so agitated feminists in the early 1990s.

Most striking, however, is the coherence of the positive agenda over the course of the 1990s. When the WCGJ train got going, it left not a single piece of the Copelon/Charlesworth agenda at the station. Though controversy among feminists did emerge, the performed consensus was dominated by structural feminism. The FU vision animated almost every legal novelty. The 1990s saw a rich elaboration of what this worldview meant for ICL reform: the re-imagination of conflicts in which rape occurs as continuous not with those conflicts, but with a male war against women going on all the time and everywhere; and a very capacious conception of male domination. This is a very radical line. That it became virtually the only visible feminist line represented at Rome by the lead feminist organization, the WCGJ, is one of the most remarkable findings of this research.

360. Engle, *Feminism and Its (Dis)Contents*, *supra* note 116, at 798.

E. Feminist Successes and Defeats in the Rome Statute

So how did the feminists' agenda fare in the Rome process? The Rome Statute gave the new ICC jurisdiction to prosecute and punish genocide, crimes against humanity, war crimes, and aggression. Crimes of aggression were not defined and their negotiation was postponed.³⁶¹ Feminists did not intervene in the construction of the article prohibiting genocide, but they made significant inroads in the definition of crimes against humanity and war crimes, and in many ways influenced the institutional provisions. What follows is a rule-by-rule summary of their gains and losses, taking up the panoply of reform goals explained in Part II.D above. I reverse my normal procedure here by looking at the horizontal reforms first, because they provide the political backdrop against which the vertical reforms become intelligible. This Part concludes with a brief summary assessment of feminist influence on the ICC Rules of Procedure and Evidence and the Elements of Crimes.³⁶²

1. Horizontal Reforms

The structure of the article defining war crimes is divided into four main subparts, each of which derives from a distinct body of IHL.

Article 8.2(a) grants the ICC jurisdiction to try individuals for grave breaches of the Geneva Conventions³⁶³ and, for this reason, presumably applies only in international conflicts. Article 8.2(b) is expressly limited to international conflicts and gives the ICC jurisdiction to try individuals for violations of the laws and customs of war. Both set forth definitive lists of predicate crimes.³⁶⁴

Articles 8.2(c) and 8.2(d) apply to armed conflict "not of an international character."³⁶⁵ The former gives the ICC jurisdiction to try individuals for violations of Common Article 3 of the Geneva Conventions, and is therefore aimed expressly at the protection of noncombatants. The latter gives the ICC jurisdiction to try individuals for violations of the laws and customs of war. Again, both subparts set forth definitive lists of predicate crimes.

One item on those lists is of particular interest to us here—the subsections criminalizing specifically sexual offenses. Both of the

361. See Sadat & Carden, *supra* note 22, at 437 (discussing the "rather clever compromise" over a particularly contentious issue); see also Benedetti & Washburn, *supra* note 19, at 19.

362. See also Brook Sari Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154, 176–79 (1998) (assessing feminist victories and defeats).

363. Rome Statute, *supra* note 23, art. 8.2(a).

364. *Id.* art. 8.2(b).

365. *Id.* arts. 8.2(c), 8.2(d).

laws-and-customs-of-war sections codify this body of law for purposes of ICC enforcement, and both include a distinct subsection dedicated to sexual offenses. The two lists of specific crimes are identical: they make it a crime to commit "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence"³⁶⁶ "[A]ny other form of sexual violence" is further limited: when committed in international conflict, it is criminal only if it "also constitute[s] a grave breach of the Geneva Conventions"³⁶⁷ and in internal armed conflicts, it is criminal only if it "also constitute[s] a serious violation of article 3 common to the four Geneva Conventions."³⁶⁸

Finally, Article 7 defines crimes against humanity as subject to ICC jurisdiction when they are "committed as part of a widespread or systematic attack directed against any civilian population."³⁶⁹ Article 7 includes a subsection on sexual offenses that is virtually identical to that appearing in the laws and customs of war articles. The enumerated crimes are: "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."³⁷⁰

Within that framework, what did the feminists gain and where were they defeated? In this Part, I set out the specific horizontal reforms, turning to feminist triumphs first, and ending with feminist defeats.

a. Delink Honor and Dignity from Sexual and Gender Violence Crimes

The Rome Statute makes it a war crime—a violation of the laws and customs of war in international conflicts—to commit "outrages upon personal dignity, in particular humiliating and degrading treatment."³⁷¹ The next enumerated predicate crime *separately* houses the sexual offenses. The Rome Statute thus significantly modifies the equivalent language in the ICTR: "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." One of the original grievances of feminists looking at IHL during the formation of the ICTs has been addressed here. The WCGJ won its goal of delinking honor from sexual offenses. Bedont and Hall-Martinez quite properly credit the WCGJ with creating "a separate category for rape, sexual slavery, enforced prostitution, en-

366. *Id.* arts. 8.2(b)(xxii), 8.2(e)(vi).

367. *Id.* art. 8.2(b)(xxii).

368. *Id.* art. 8.2(e)(vi).

369. *Id.* art. 7.1.

370. *Id.* art. 7.1(g).

371. *Id.* art. 8.2(b)(xxii).

forced pregnancy, enforced sterilization, and any other form of sexual violence.”³⁷² Relieved not only of the offending specifics but also of the Commentaries to the Geneva Conventions and of the Additional Protocols, the Rome Statute has no necessary commitment to the distinctive sorts of sexual dignity traditionally accorded to women. Feminists may have to work to keep those associations delinked, but for the first time there is nothing in the statutory language to invoke them.

b. Reforms of the Enumerated Crimes

As we ascertained in Part II.D above, the WCGJ had a complex horizontal reform agenda for the enumerated crimes. And as we have seen, this agenda was subject not only to external controversy, but also to real if muted internal debate. I take up the terms on the laws-and-customs-of-war list of sexual offenses first, and then turn to sexual crimes that appear elsewhere in the Statute.

i. The List of Sexual Offenses

The specification of sex-related crimes that can constitute crimes against humanity and war crimes clearly shows the influence of the WCGJ agenda. “[R]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” are predicate crimes of crimes against humanity.³⁷³ To be sure, the limitation on “any other form of sexual violence” varies, but it is always there.

The GFeminist hand can be seen clearly here. Count the victories: rape is specifically included. Sexual slavery ditto. Forced pregnancy and forced sterilization are also new. As noted above, there is no mention of outrages on human dignity, to honor or to morals. Instead the new overarching rubric is “sexual violence.” Although the WCGJ did not get “gender violence,” they did install the term that had been central to feminist thinking on the subject for much longer.

Defeats? “Enforced prostitution” is on the list. As we have seen, structural feminist thinking had worked itself pure enough by the time of the PrepComI to realize that this terminology was problematic. But, as we have also seen, feminists had decided not to oppose its inclusion.

Feminists were also aggrieved at the language requiring “other form[s] of sexual violence” to be “of comparable gravity.” This limitation had been insisted on by States objecting that, without it, the ICC could legitimately prosecute sexual harassment and genital mutilation.³⁷⁴

372. Bedont & Hall-Martinez, *supra* note 32, at 73.

373. Rome Statute, *supra* note 23, art. 7.1(g).

374. Sadat & Carden, *supra* note 22, at 433 n.316.

That might seem fanciful, but feminists objected to this language precisely because they wanted the ICC to have apparently unlimited jurisdiction over sexual harms. Thus the WCGJ argued that “of comparable gravity” “would potentially limit the range of sexual and gender violence and abuse” that the ICC could punish.³⁷⁵ Jocelyn Campanaro specifically regretted the WCGJ’s defeat here, on the grounds that the provision “makes prosecutions more difficult and, even more worrisome, implies that some amount of sexual violence is expected and tolerated in times of war.”³⁷⁶ Unlimited jurisdiction over “other sexual violence” emerges in this *ex post* feminist assessment of their achievements at Rome as a new goal with a strong feminist-universalist cast. The (defeated) aim was to give the ICC plenary jurisdiction to prosecute people for sexual violence, *but not other violence*, without *any limit* as to its gravity.

Forced pregnancy is new also, although it is given a narrower definition than the WCGJ sought in its proposed compromise text. States seeking to protect restrictions on abortion, including the Vatican, were active in limiting the scope of this new crime. Apparently, the WCGJ did not have enough state allies on this point to stop them.³⁷⁷ In the statutory definition, “[f]orced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.³⁷⁸ As we have seen, the WCGJ had objected to making confinement a necessary element. And it had at first resisted the conservative States’ protection of national laws governing abortion from attack in the ICC, but ultimately conceded defeat.

None of the other new crimes is defined in the Statute. I have detected no trace of a debate over whether and/or how to define these new crimes, so it is impossible to say whether the WCGJ was satisfied or not with their non-definition. They are, however, defined in the Elements of Crimes.³⁷⁹

375. WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 7, Commentary, WC.7.3 (objecting to the use of a standard rather than a rule here: “of comparable gravity” would “sow confusion”); *see also* WCGJ, 3/98 Recommendations on Crimes Against Humanity, *supra* note 106, at 8; WCGJ, Gender Justice and the ICC, *supra* note 106, at 17.

376. Campanaro, *supra* note 196, at 2590.

377. *See* Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 31 (1999); Bedont, *supra* note 51, at 196–99; Bedont & Hall-Martinez, *supra* note 32, at 74; Sadat & Carden, *supra* note 22, at 433 n.316.

378. Rome Statute, *supra* note 23, art. 7.1(f).

379. *See infra* Part II.E.1.e.

Looking back over the enumerated crimes together, how did the feminists fare? Let us take as a template Askin's 2003 list of crimes that she wanted to read into the Geneva Conventions for ICT purposes: "... other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking."³⁸⁰ The crimes on Askin's list that did not make it into the Rome Statute's three lists of sexual offenses were forced maternity, forced abortion, forced marriage, forced nudity, sexual molestation, and sexual humiliation. The WCGJ had not advocated for any of these.³⁸¹ Almost across the board, the WCGJ sought what it could get and got what it sought. The one great exception was "gender violence."

ii. Gender Violence

As we have seen, the WCGJ effort to include "gender violence" in the list of criminal sexual offenses drew fire from an adamant cohort of States. With a large contingent of friendly States, the WCGJ pushed back. The result was an intense controversy at Rome—controversy that aroused indignation among WCGJ stalwarts and that provoked them to break out of their compartment as advisors/consultants/experts and to dig in for battle.

Oosterveld was a member of the Canadian delegation at this moment in the Rome process, and her article explaining and defending the outcome is my source for the rest of the story. Oosterveld helps us to see that the *definition of gender* became the terrain for the crucial compromise. Battle lines were drawn between the feminists, for whom "gender" referred to the "socially constructed" dimensions of the male/female distinction, and conservatives, who would tolerate use of the term only if it referred to the sheer biological fact of maleness and femaleness. The standoff was resolved by the adoption of a definition of gender that gave both sides what they wanted: "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."³⁸² This compromise includes the conservatives' crucial point—gender is "the two sexes, male and female"—and the feminists': "in the context of society." The ferocious tautology with which the definition closes was, Oosterveld reports, drawn up to

380. See Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 304–05.

381. But see WCGJ, 12/97 Recommendations, *supra* note 105, pt. III, Recommendation 6, Commentary, WC.6.3 (advocating that forced marriage be triable in the ICC not as an enumerated crime, but by defining sexual slavery broadly enough to include it).

382. Rome Statute, *supra* note 23, art. 7.3.

stave off a last-minute revolt by the conservatives.³⁸³ This patently patchwork provision has been lavishly assailed by feminists, always on the ground that it gave up too much criminalization (never that it sought too much). Oosterveld collects this literature, offers a strategic *apologia* for the compromise, and points the way to feminist-friendly interpretations for future use.³⁸⁴

Why define gender if “gender violence” was not included in the lists of sexual offenses? One gender crime did make it into the Statute: it is a crime against humanity to commit persecution on the basis of gender.³⁸⁵ I discuss this achievement in the next subsection as the very highest-order vertical reform gained at Rome. But as we have seen, “gender violence” hit the cutting room floor. It does not appear in any of the crime-defining lists of enumerated crimes.

I think it is clear that the WCGJ paid a heavy toll to fight out the definition of gender violence because, however roundly defeated at Rome, it has long-term ambitions for this new crime. As I indicated above, even after taking this reform off of the table, the WCGJ continued to use the term when it explained what it meant by “sexual violence.” And it was vigilant to include the defeated term “gender violence” in *other*, non-criminal provisions of the ICC. For example, the prosecutor is required to appoint advisors with expertise about *gender and gender violence*.³⁸⁶ The prosecutor and the ICC are required to take into account the *gender* of witnesses in protecting their safety, especially in cases involving charges of *gender violence*.³⁸⁷ These non-criminal provisions of the

383. Oosterveld, *The Definition of “Gender” in the Rome Statute*, *supra* note 54, at 58–66. Oosterveld notes that, as of July 11 and 13, 1998, the delegations in alliance with the WCGJ were Australia, Belgium, Canada, Chile, Columbia, Costa Rica, Finland, France, Greece, Italy, Kenya, Mexico, Mozambique, the Netherlands, New Zealand, Norway, Samoa, Senegal, Slovenia, South Africa, and the United States. *Id.* at 63 n.48. Those opposed were Bahrain, Brunei, Egypt, Guatemala, Iran, Kuwait, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Turkey, the United Arab Emirates, Venezuela, and Yemen. She also indicates that the conflict was unusually fraught. *Id.* at 83 n.164 (“In the author’s experience, some have viewed the debate on the term ‘gender’ as overly confrontational (and emotional) within a U.N. context that works on the basis of consensus.”).

384. *Id.* at 70–84.

385. Rome Statute, *supra* note 23, art. 7.1(h).

386. *Id.* art. 42.9 (requiring the prosecutor to “appoint advisors with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”).

387. *Id.* art. 21.3 (requiring the Court to apply the law “without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”); *id.* art. 54.1(b) (requiring the prosecutor, in conducting investigations, to “respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”); *id.* art. 68.1 (requiring the Court, during trials, to “have regard to all the relevant

Statute may—but need not—give the defeated term some legitimacy as the object of feminist expertise in the office of the prosecutor.

GFeminist law review publications are carrying on the campaign for gender violence. Bedont and Hall-Martinez blaze the feminist literary fiction trail forward by describing the Statute to include “gender crimes.”³⁸⁸ Well, it does—persecution based on gender is a crime. But gender violence crimes were otherwise *defeated*. On this front, the WCGJ returned from Rome bloodied but unbowed. We can expect the ICC to be the next forum in which GFeminists joins battle over gender violence.

iii. Enslavement, Trafficking, and Sexual Slavery

“Enslavement” was included as a predicate crime of crimes against humanity³⁸⁹ and was defined with specific reference to trafficking in women and children: “‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of *trafficking in persons, in particular women and children*.”³⁹⁰ As we have seen, the WCGJ did not advocate for the inclusion of enslavement as a crime, and offered mild but consistent demurrals from the inclusion of trafficking.

I would offer three observations about this interesting reform. First, as Bedont points out, the Rome Statute contains a broader definition of trafficking than exists in the 1951 Traffic in Persons Convention,³⁹¹ in which it is limited to *sex* trafficking.³⁹² Sex-work and liberal feminists consistently argue for this shift. They want the international law of labor migration to consider all forced labor and labor migration to be problematic to the extent that it is forced, confined, brutal, unpaid, and/or underpaid, all without reference to whether it involves *sexual* services. *But* the Statute goes on to specify trafficking in persons, “in particular women and children,” language which those tendencies in

factors, including age, gender as defined in article 2, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children”).

388. Bedont & Hall-Martinez, *supra* note 32, at 68. According to Bedont and Hall-Martinez, “As a result of this negotiated definition, the terms ‘gender’ and ‘gender crimes’ were utilized in many provisions of the Rome statute instead of the narrower terms ‘sex’ and ‘sexual violence.’” *Id.*

389. Rome Statute, *supra* note 23, art. 7.1(c).

390. *Id.* art. 7.2(c) (emphasis added).

391. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951).

392. Bedont, *supra* note 51, at 200 (arguing for an expansive interpretation that includes “trafficking in persons for other forms of exploitation, such as forced domestic services, should be included in the crime of enslavement”).

feminism unequivocally oppose. The ideological possibilities of this term in ICC enforcement are quite open-ended.

Second, note that trafficking, and especially *sex* trafficking, have heretofore been a matter of human rights law. This reform installs directly in the Rome Statute a positive nexus between the two regimes. It may well be the first place that the Copelon/Charlesworth project, interweaving ICC criminality with the complex skein of regulatory structures enforcing feminist-defined human rights,³⁹³ will begin.

Finally, "sexual slavery" ranks right after rape in the three lists of sexual offenses. It can be charged as a war crime in international and internal conflicts and as a crime against humanity. It remains to be seen how feminists inside the ICC and those putting pressure on it from the outside will manage the structuralist/individualist tension in the WCGJ's interpretations of this crime.

2. Vertical Reforms

The WCGJ agenda for horizontal reforms was, on the whole, very successful. By comparison, the vertical reforms were less so.

a. Push Rape and Other Sexual Violence Crimes up the Hierarchy of Crimes

As we have seen, since the beginning of our story in the early 1990s, feminists have wanted to install sexual violence crimes at the highest possible echelon in the hierarchy of international crimes. I assess their achievements on this project at Rome, starting with their successes.

i. Add Persecution Based on Gender to the Predicate Crimes Against Humanity

As we have seen, the WCGJ encountered intense resistance to the inclusion of "gender violence" in the lists of sexual offenses. But it is a crime against humanity to engage in persecution, and persecution was substantially redefined:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection

393. See generally Halley, Kotiswaran, Shamir & Thomas, *supra* note 4 (describing the patterns of regulation and the feminist politics that helped to produce them).

with any act referred to in this paragraph or any crime within the jurisdiction of the Court³⁹⁴

There are, in all, four new grounds of prohibited persecution: national, ethnic, cultural, and gender. There seems to have been no controversy over the single “gender crime” that appears in the crime-definition articles of the Statute. It not only delivers horizontally, but may well be the WCGJ’s most important vertical-agenda victory.

Persecution based on gender *alone* is now prosecutable as a crime against humanity. The orthogonal framing of an ethno-national conflict as a war against women is now a possibility for ICC prosecutors. The only statutory fly in the ointment for the feminists here is the invocation of the Article 7.3 definition of gender. Feminists have expressed their concern that it will hamper the use of this provision going forward.³⁹⁵

ii. Classify Rape as a Grave Breach

The list of grave breaches that the ICC can prosecute is virtually identical to that in the Geneva Conventions: no sexual violence crimes were added. At first glance, it appears that the feminists have been absolutely denied this long-standing *desideratum* yet again.

To constitute crimes against humanity, “other forms of sexual violence” must be “of comparable gravity” to the specified ones, and to constitute a violation of the laws and customs of war in non-international armed conflict, they must “also constitute a serious violation of article 3 common to the four Geneva conventions.”³⁹⁶ The WCGJ consistently opposed these provisions for “singling out” sexual violence and for adding to the burden of proof borne by the prosecutor. But it did not oppose the parallel condition on “other forms of sexual violence” constituting a violation of the laws and customs of war in international conflict. There, the Statute requires—without WCGJ opposition—that they “also constitute a grave breach of the Geneva Convention.”³⁹⁷

No other violation of the laws and customs of war is saddled with this heavy additional burden of proof, so, at first glance, this looks like a

394. Rome Statute, *supra* note 23, art. 7.1(h) (emphasis added). The WCGJ opposed the restriction to universally recognized grounds. WCGJ, Call to Delegates on Gender, *supra* note 106.

395. Campanaro, *supra* note 196, at 2591. According to Campanaro,

Specifically qualifying only gender, and not the other forms of persecution listed, implies that gender-based persecution is in some way different than other forms of persecution. Implications of this sort encourage the attitude that harms committed on the basis of gender are of a lesser quality and do not demand equal attention.

Id.

396. Rome Statute, *supra* note 23, arts. 7.1(g), 8.2(e)(vi).

397. *Id.* art. 8.2(b)(xxii).

loss, plain and simple, for the WCGJ. The WCGJ clearly was concerned, in part, it seems, because Amnesty International took this pessimistic view and advocated deleting what it saw as a purely burdensome requirement:

Amnesty International has raised a concern that if the terms “also constituting a grave breach of the Geneva Conventions” are understood as restricting the scope of “any other form of sexual violence,” this would inappropriately limit the coverage of the Statute by excluding the broader protections offered by Protocol I. It might also be read as limiting the scope of jurisdiction over sexual violence in international conflict to exclude such forms of sexual violence that qualify as “humiliating and degrading treatment” If, as Amnesty suggests, the negotiated language intends to make clear that the range of sexual violence is itself a grave breach and can also be charged as grave breaches as well as violations of Protocol I, then the language is acceptable. Since in our view, the latter is the only logical interpretation, we do not advocate any change in the Statute.³⁹⁸

Thus the WCGJ construed the additional requirement as a boon, precisely because it was the first international law acknowledgement that “other forms of sexual violence” *can* “constitute a grave breach of the Geneva Convention.” *A fortiori*, perhaps, the specified sexual crimes can too constitute a grave breach. To be sure, feminists will not have netted their quarry until they get positive holdings in the ICC, but it is just a matter of connecting the dots. So a chief reform near to the heart of feminist reform efforts in IHL/ICL is now invited by the Rome Statute itself.³⁹⁹

398. WCGJ, Gender Justice and the ICC, *supra* note 106, at 11–12.

399. It is unclear whether the “of comparable gravity” provisions will be interpreted to aid or impede feminist aims in ICC prosecution and adjudication. In the aftermath of Rome, some feminists have argued that the grave breaches provision actually declares that the listed sexual violence crimes *are* grave breaches. *See, e.g.,* CHARLESWORTH & CHINKIN, *supra* note 250, at 333 (arguing that this provision declares that these sexual violence crimes *are* grave breaches); Bedont & Hall-Martinez, *supra* note 32, at 72 (arguing the same). Technically that is incorrect: Article 8.2(xxii) requires the prosecutor to *show* that the particular crimes in a particular case are grave breaches. *See* Rome Statute, *supra* note 23, art. 8.2(xxii). Feminist litigators are likely to seek an ICC holding that this element need not be shown because the sexual crimes are grave breaches *per se* or as a matter of law—but that has not happened yet.

It is also unclear whether the other two restrictions on “other forms of sexual violence” will actually hinder prosecutors. The “comparable gravity” language in Article 7 (crimes against humanity) is a completely open-ended standard. *See id.* art. 7. There is more law to the requirement that, in an internal-conflict, war-crimes prosecution, conduct constituting “other forms of sexual violence” also violates Common Article 3 of the Geneva Conventions. Given the huge range of conduct that arguably does violate Common Article 3—it includes not only the four specific prohibitions, but also a positive requirement that noncombatants “be treated

b. Annex Human Rights Law to IHL/ICL

Here, the WCGJ made significant inroads, opening up connections between the ICC and the human rights legal order that are rife with future possibility for mutual enmeshment.

i. Install Human Rights and Nondiscrimination on the Basis of Sex in a *Chapeau* Applicable to the Entire Statute

The Rome Statute does not include a statement of general principles. The language that the WCGJ would have introduced in a general *chapeau* lived on, however, in Article 21 of the statute. Here, for ease of comparison, is the WCGJ's hyper-*chapeau*:

The application and interpretation of the general principles of law must be consistent with international human rights standards and the progressive development thereof, which encompasses the prohibition on adverse discrimination of any kind, including discrimination based on gender and gender-stereotyped conclusions.⁴⁰⁰

And here is Article 21.3 of the Rome Statute:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded upon grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.⁴⁰¹

It is quite clear that this final language is a modification of the *chapeau* provided by the WCGJ. The WCGJ scores a number of clear victories here, but also suffers several defeats.

humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria"—this provision could open up rather than restrict the scope of the Statute. *See* First Geneva Convention, *supra* note 180, art. 3; Second Geneva Convention, *supra* note 180, art. 3; Third Geneva Convention, *supra* note 180, art. 3; Fourth Geneva Convention, *supra* note 177, art. 3. It does seem clear that, though there was an upside for GFeminism in the requirement that "other sexual violence" be shown to constitute grave breaches, there is no such upside here. It has always been clear that sexual crimes are within the purview of Common Article 3. The 1958 Commentaries explicitly addressed sexual crimes long before the Additional Protocols added their voices to the chorus. *See supra* text accompanying notes 178–179.

400. WCGJ, 12/97 Recommendations, *supra* note 105, pt. II, art. L-T, § 2, Suggested Text.

401. Rome Statute, *supra* note 23, art. 21(3).

ii. Invoke Human Rights Law

Perhaps the most important, most structural reform introduced in Article 21(3) is the requirement that all applications and interpretations of the statute be governed by human rights law. This language invites a large annexation of human rights law to IHL/ICL. The ICC is instructed to interpret law—a classification that is much broader than the Rome Statute itself—to be “consistent with internationally recognized human rights.”⁴⁰² Note that a more conservative interpretive norm is adopted than the WCGJ wanted: human rights as “internationally recognized” is presumably less saturated by GFeminist ideas than human rights in their “progressive development.” Nevertheless, this is an extremely open-ended requirement and it may produce much litigation. It may authorize the full-scale downloading of the immense body of human rights instruments into the interpretive process affecting the sexual violence crimes in the ICC, the scope of persecution based on gender, and all of the gender violence provisions scattered throughout the non-crime-defining articles of the Statute. Everything from the Beijing Conference to the U.N. Trafficking Protocol⁴⁰³—if deemed to be “internationally recognized”—could be held to be relevant to the interpretation of all law in the ICC. The ICC could refuse to give this provision any real teeth, of course. It could give a permissive interpretation to “consistent” and an expansive one to “internationally recognized,” and so on. But the door is open to bringing human rights instruments, doctrine, and experts into the IHL/ICL regime.

Article 21(3) falls far short of full annexation, however. It only leaves the Rome Statute subject to interpretation by human rights concepts, norms, and assumptions. Full annexation would have opened the door from IHL/ICL to human rights law as well, authorizing criminal enforcement in the ICC of violations of human rights, both in war and in peace. *That* aspect of annexation did not happen.

iii. Reach Peacetime

As we have seen, an important motive for annexation was the WCGJ's ambition to extend war crimes and crimes against humanity jurisdiction to “peacetime.” The WCGJ argued that war crimes should be prosecutable whether or not they occur in armed conflict. It wanted crimes against humanity to be prosecutable if committed in widespread

402. *Id.*

403. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

or systematic attack, not just on a *civilian* population, but on *any* population. The goal was to reach the war against women that extends from wartime to “peacetime.”

These proposals had no success at Rome. All of the restrictions objected to appear in the statute.⁴⁰⁴ And there is further limiting language: armed conflicts “not of an international character” are expressly defined to exclude “situations of internal disturbances and tensions, such as riots, isolated or sporadic acts of violence or other acts of a similar nature.”⁴⁰⁵ The section that codifies laws and customs of war for internal conflicts—this is the section that includes sexual violence crimes—is further limited so that “[i]t applies to armed conflicts that take place in the territory of a [S]tate when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”⁴⁰⁶ To be sure, genocide is not tethered to armed conflict but has its own demanding threshold requirements.⁴⁰⁷ Articles 7 and 8 provide a *lot* of law to invoke against the feminist war against women in “peacetime” line.

iv. Add Nondiscrimination on the Basis of Sex

Far more successful was the WCGJ effort to require that all applications and interpretations of the statute be *nondiscriminatory on the basis of gender*. Article 21(3) requires that the ICC apply and interpret law “without any adverse distinction founded on . . . gender.”⁴⁰⁸ This is a significant victory and will doubtless be part of the feminist litigation strategy before the ICC.

The language actually adopted does, however, include three changes that the WCGJ must have mourned. One leaches out some of the feminist normativity in the WCGJ’s language: its “discrimination” has become “adverse distinction.” Second, gender is not the only prohibited ground of discrimination, and Article 21(1)–(2) invoke other, more general norms of interpretation.⁴⁰⁹ And, third, gender is subject to the compromise definition and is the only prohibited ground with a special definition. Feminists have deplored the last of these modifications as potentially sending the message that discrimination on the basis of gender is less serious than the other listed forms of discrimination.

404. Rome Statute, *supra* note 23, art. 7.1; *id.* arts. 8.2(a)–(c), 8.2(e).

405. *Id.* art. 8.2(d) (limiting Article 8.2(c)).

406. *Id.* art. 8.2(f) (limiting Article 8.2(e)).

407. *See id.* art. 6.

408. *Id.* art. 21(3).

409. *See id.* arts. 21.1, 21.2 (directing the Court to apply the Elements of Crimes and Rules of Procedure and Evidence, applicable treaties, general principles of national law, and principles and rules established in its own cases).

Feminists are prepared to argue that, in armed conflicts involving fatal violence against civilian men and sexual violence against civilian women, the failure to prosecute the crimes against women constituted discrimination based on gender.⁴¹⁰ In the early days of *Tadić* and *Akayesu*, feminists had nothing but moral suasion and expertise on sexual violence to wield against prosecutors with other priorities. Now they have a *legal* argument. But how can they put it before the court if the problem they face is prosecutorial failure to investigate or indict?

v. Add NGO-Initiated Review of Prosecutorial Inaction

At this point, yet another WCGJ agenda item—providing for review of the prosecutor's decisions not to proceed—comes up for examination. As we saw in Part II.D above, the WCGJ sought to enable victims and NGOs to seek review of prosecutorial decisions not to investigate or indict. Its concern was neglect of sexual violence cases, but the general tendency of such review would be much broader: to tilt the whole apparatus towards more prosecutions generally.

The Statute does include a mechanism for review of decisions not to investigate and not to prosecute. Article 53 is a very complex piece of legal machinery, and its intricacies need not detain us here. Suffice it to say that victims and NGOs are not entitled to move for review by the Pre-Trial Chamber: only the Security Council and signatory States may intervene from the outside and only in cases that they have referred to the Court.⁴¹¹ The Pre-Trial Chamber can initiate review *sua sponte*.⁴¹² If the motion comes from outside of the Court, the Pre-Trial Chamber can require the prosecutor to reconsider.⁴¹³ If, however, the motion is initiated by the Pre-Trial Chamber, it appears that the Chamber can reverse the prosecutor's decision.⁴¹⁴

It is impossible to say whether these mechanisms will make it more or less likely that prosecutorial inaction will be susceptible to political pressure from interest-group NGOs. If the WIGJ is able to recruit a State or the Pre-Trial Chamber to object to neglect of sexual violence accusations (it is hard to imagine the Security Council agreeing to make such an intervention), it could invoke the antidiscrimination provision in Article 21 as a legal basis for "requiring" prosecution.

410. See, e.g., Askin, *Prosecuting Wartime Rape*, *supra* note 81, at 293; Oosterveld, *Sexual Slavery*, *supra* note 21, at 823 n.86.

411. Rome Statute, *supra* note 23, arts. 53.1, 53.2, 53.3(a).

412. *Id.* art. 53.3(b).

413. *Id.* art. 53.3(b).

414. *Id.* ("[T]he decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.").

c. Expand the Scope of ICL Vis-à-Vis National Law

As we have seen, the WCGJ gave examples of gender violence that would, if enforced, introduce into the ICC the review of national law on the family, employment, public safety, and the like. Of course every international crime enforced as such displaces national law. For instance, the local definition of rape may require resistance by the victim, but IHL/ICL does not. The special purpose of the WCGJ was to reach gender practices that they deemed detrimental to women. Except for persecution on the basis of gender, there is no obvious way for the ICC to pursue this project, given the otherwise complete failure of the gender crimes project.

d. Classify Rape as Rape?

There is no separate article granting the ICC jurisdiction to try sexual violence crimes. The WCGJ did not seek this in any direct way, and it is almost unimaginable that they could have won it if they had tried.

e. Continued Skirmishes in the Elements of Crimes and Rules of Procedure and Evidence

The Statute provides for adoption of an Elements of Crimes document and Rules of Procedure and Evidence by two thirds of the signatory States in discussions subsequent to the Rome Conference.⁴¹⁵ The Rules of Procedure and Evidence purport to be a code settling myriad substantively important issues. The Elements of Crimes includes definitions of many crimes that are new elements of IHL/ICL traceable, at least in part, to feminist expertise and activism. They give us new legal definitions of enslavement, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence. They define outrages upon personal dignity newly shorn of their primary association with female honor. Yet clarity is, I would suggest, *not* what these documents will bestow on the litigation or adjudication of these crimes. They are instead highly ambiguous texts, the mesh of language upon which future struggles will be waged.

First, it is not clear whether the Elements of Crimes is formally binding on the Court or merely advisory. The Statute directs that the Elements of Crimes "shall assist the Court in the interpretation of articles 6, 7 and 8."⁴¹⁶ That is, the articles defining genocide, crimes against humanity, and war crimes as triable in the ICC. If we compare this instruction with the directive that the Rules of Procedure and Evidence

415. *Id.* art. 9; *id.* art. 51.

416. *Id.* art. 9.1.

"shall enter into force" after being promulgated, "shall assist" seems to fall far short of a mandate. Perhaps the Elements of Crimes is merely advisory. Then again, it may be more binding: Article 21 provides that "[t]he Court shall apply . . . [i]n the first place, this Statute, Elements of Crimes, and its Rules of Procedure and Evidence."⁴¹⁷ That sounds more like a rule.

Further ambiguity is introduced by the fact that the Elements of Crimes is simply littered with footnotes indicating that various interpretations of the language above the line are "understood" or "intended." One is left to infer that the contents of these footnotes secured enough support for their inclusion *as footnotes only*. Either they ran into opposition, met with sheer drag, or were not particularly controversial but did not have enough support to land in the text itself. The Court could interpret their inclusion as a reason to heed them, or could interpret their inclusion as footnotes as a reason to regard their contents with suspicion.

Third, the Rules of Procedure and Evidence sometimes veer away from rules and toward standards in ways that indicate a failure of consensus among the negotiators. Even if the Court does not detect the weakness of PrepComII delegate support for the many standards we find in the final document, they, like all standards, are themselves open to a wide range of outcomes in the ICC. The rule governing the consent defense to charges of sexual violence is, as we will see below, full of mandatory factual inferences that would operate to constrain the Court legally. Read as a rule, this provision would require the Court to adopt a number of structuralist-feminist conclusions about the possibility of women's actual consent to sexual encounters with men. But the very same provision begins with the following language: "In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles"⁴¹⁸ The Court "shall" merely "be guided by" these "principles" and need "apply" them only "where appropriate."⁴¹⁹ A panel of the ICC could read this "rule" to be merely advisory or even irrelevant, even in an unambiguous rape case.

A recorded conflict over WCGJ aims can help explain how such ambiguous entries came to be drafted. According to Pace and Schense, the WCGJ agenda underwent its first major period of serious conflict during the negotiations of the Elements of Crimes at the Fifth Session of PrepComII, held in December of 1997. At that meeting, a major jurisdictional battle about the scope of the ICC's jurisdiction over

417. *Id.* art. 21.1(a).

418. Int'l Crim. Ct., Rules of Procedure and Evidence, Rule 70, ICC-ASP/1/3/ (2002) [hereinafter ICC Rules of Procedure and Evidence].

419. *Id.*

crimes against humanity was joined. A group of States in which Islamic legal influences have produced gender differentiations that are quite legitimate in the legal order—Bahrain, Iraq, Kuwait, Lebanon, Libya, Oman, Saudi Arabia, Sudan, Syria, and the United Arab Emirates⁴²⁰—sought to restrict ICC jurisdiction over crimes against humanity and to exempt religious practices and “cultural norms within families or between spouses.”⁴²¹ I will call this alliance the opposing group of States. They refused to discuss the specific sexual crimes until the PrepComII had drafted a *chapeau* that met their demands. The United States and other States offered compromise threshold language requiring a positive state policy to promote or encourage the charged conduct.⁴²² That is, the proposed compromise would have limited crimes against humanity triable before the ICC to a *subset* of those recognized under IHL. The proposal was met by intense opposition from Like Minded Group States and CICC NGOs.⁴²³ Pace and Schense tell a story of ensuing intense activity by the CICC and the WCGJ to resist the restrictive threshold. On the final day of the Fifth Session, WCGJ members appeared in battle dress, wearing t-shirts emblazoned “No compromise on justice!” and “Gender justice now!”⁴²⁴

What were the opposing States thinking, when they linked the threshold for crimes against humanity to the definition of sexual crimes? These confrontations emerged well before the battle over gender violence in the March/April 1998 PrepComI, and thus, before the WCGJ’s reluctant decision to concede defeat in its effort to include that term in the crime-defining articles of the statute. In December 1997, the WCGJ was actively arguing that marriage achieved by force or threat be included within the scope of sexual slavery, that cultural practices that subordinate women be included in the definition of gender, and that war crimes and crimes against humanity be extended to peacetime. The opposing States were not acting arbitrarily when they linked the threshold for crimes against humanity to the definition of specific crimes proposed by the WCGJ. They plausibly anticipated efforts to criminalize the gender-differentiating elements of their domestic legal orders. In short, resistance that appears on its face to be general, aimed at the scope of ICC war crimes jurisdiction, was probably also (and maybe even primarily) motivated by very specific fears that the WCGJ gender agenda would prevail and expose officials in these States to prosecution for their maintenance of gender-differentiating legal orders.

420. Pace & Schense, *supra* note 126, at 721 n.37.

421. *Id.* at 721.

422. *Id.*

423. *Id.* at 721–22.

424. *Id.* at 722.

Pace and Schense deduced from the opposing States' management of these interventions that "the proposed exemptions for individual crimes were meant to serve as a pressure point to secure concession on the higher overall threshold."⁴²⁵ If that is correct, the opposing State group understood support in PrepComII for the WCGJ's horizontal agenda to be so strong that they could hold it hostage in order to obtain a major, highly controversial restriction in the scope of the ICC's jurisdiction.

The foregoing analysis counsels us to construe the Elements of Crimes in light of the very acute political significance that this conflict gave to minute differentials in the definitions of sexual crimes. Not surprisingly, when it comes to the WCGJ agenda, these ancillary documents are *pastiche*: victories for the WCGJ lie side by side with defeats at the level of minute detail. Predicting the actual behavior of the Court in construing—or simply ignoring—the resulting language is quite impossible.

One example, the definition of rape, will have to suffice. Rule 70 of the Rules of Procedure and Evidence places limits on a consent defense to charges of sexual violence, and thus seems to assume such a defense exists. All three limitations hew the near-structuralist-feminist line that became the controlling rule in the ICTY Rules:

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual offense⁴²⁶

Consent is a defense, but it is legally precluded by a list of feminist-inspired conditions. The Court is required to find for the prosecution if "genuine" consent was not possible or—and this rule is probably broader—when a victim's ability to give "voluntary and genuine consent" was "undermined" not only by force, threat of force, or coercion, but by "taking advantage of a coercive environment."⁴²⁷ All of these rules transform the fact of consent into a legal issue and direct the Court to

425. ICC Rules of Procedure and Evidence, *supra* note 418, Rule 69.

426. *Id.* Rule 70.

427. *Id.*

find even express consent irrelevant. Of course, the Court can decide that they are not rules but "principles," determine that their invocation in a particular case would be "inappropriate," and decline to be "guide[d]" by them.

As if that weren't confusing enough, the Elements of Crimes fragments the legal picture further. There we have a definition of rape that seems actually to preclude a consent defense:

1. The perpetrator invaded* the body of a person 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.
2. The invasion was 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. **⁴²⁸

The asterisk marks footnote fifteen, which reads, "The concept of 'invasion' is intended to be broad enough to be gender neutral." The double asterisk marks footnote sixteen, which reads, "It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."

This formulation goes considerably further in the structuralist-feminist direction than the ICC or the ICTY Rules of Procedure and Evidence. It makes ill-gotten consent the legal equivalent of coercion. "Taking advantage of a coercive environment" is no longer the prosecutor's required response to a consent defence: it is *the factual predicate for a finding that the accused used* "threat of force or coercion."⁴²⁹ The substantive crime has been redefined to include a positive duty to obtain meaningful consent. Whether the Court will construe the definition this way, and how it will reconcile it with the inconsistent provisions of the Rules of Procedure and Evidence, remain to be seen.

The second footnote to the Elements of Crimes definition provides further ambiguity. It carries many feminist messages: not merely consent but genuine consent is needed for an acquittal; it is up to the Court's discretion ("may") to determine whether the victim's consent was vitiated

428. ICC Elements of Crimes, *supra* note 170, art. 7(1)(g)-1 (rape as a crime against humanity); *see also id.* arts. 8(2)(b)(xxii)-1 (rape as a war crime), 8(2)(e)(vi)-1 (rape as a war crime in conflicts not of an international character).

429. *See supra* note 428.

by incapacity; and a person with "induced . . . incapacity" cannot give the required genuine consent. All of this is "understood." Will the footnote presentation of these understandings strengthen or weaken their grip on the ICC's judicial minds? That remains to be seen.

Taken as a whole, the ancillary documents' rules on rape show that—even though the WCGJ may have been losing its effort to reach peacetime—it was able to introduce provision after provision suited to its actual or performed structuralist-feminist consensus. Rarely did these provisions come in without provisos, however. Far from settling on particular ideologies of rape and sexual slavery, the Elements of Crimes and the Rules of Procedure and Evidence leave the ICC—and GFeminists working inside of it and outside of it—considerable interpretive room for further struggle over the incorporation of feminist aims in international criminal law.

CONCLUSION

This Article has addressed law on the books. Of course, there is also law in action. What will actually happen remains to be seen. That is, *by themselves*, these rules do nothing to change the meaning of IHL, ICL, their enforcement, or the level and types of violence in which people engage. The degree to which one very specific set of feminists were able to inscribe into the Rome Statute legal language compatible with their very specific set of ideological commitments is quite remarkable. But whether ICC will understand these words in a feminist way, and certainly whether the world will thereby begin looking more like one envisioned by the feminist reformers, are entirely distinct questions.

There are indications, however, that the ICC Prosecutor's Office is interested in trying out at least one of the new crimes. One of the first cases on the ICC's docket charges Germain Katanga with war crimes and crimes against humanity that he allegedly committed in the Democratic Republic of Congo in 2003.⁴³⁰ One hundred percent of the sexual crimes alleged in this case are charged under the new rubric, introduced by GFeminists working in the Statute's drafting process, sexual enslavement.⁴³¹

430. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest for Germaine Katanga (July 2, 2007), available at <http://www.icc-cpi.int/cases.html> (last visited Dec. 13, 2008).

431. *Id.* The same can be said of the *Prosecutor v. Ngudjolo* case. Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, at 6 (July 6, 2007). As of the time that this Article went to press, several other arrest warrants had charged defendants with rape, sexual enslavement, and, in two cases, outrages upon personal dignity. See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Warrant of Arrest of Jean-Pierre Bemba

It is too soon to predict how the ICC will handle the new rules. Too soon, also, to speculate about what they or their enforcement, if any, will mean to men and women contemplating, engaging in, or suffering armed conflict. Still, I close this Article with a few words about why, nevertheless, I worry about the institutional and legal stories told in this Article. I provide first some comments on the ideology of GFeminism as it has emerged in IHL/ICL institutional culture and its current legitimacy amongst IHL/ICL-promoting elites, and second, some comments on the rules.

Many aspects of Rome Statute GFeminism have been controversial *within feminist discussions*, in the U.S. domestic context, and around the world. Its structuralism has been rejected as magical realism by many feminists. I have written a book giving an account of this controversy in the United States and sided with those who want to demote the structuralist thesis to a hypothesis.⁴³² The abolitionism of this branch of GFeminism strikes legal realists as equally magical realist.⁴³³ Its carceral vision of feminism in power—the supreme emphasis that this branch of GFeminism puts on criminalization, prosecution, and punishment—has been criticized for inviting feminists to forget about having a positive vision of human, or female, life well lived.⁴³⁴ Feminists have criticized it for relying on state forms of power to the exclusion of more dispersed ones, ones that might actually lie within the reach of actual women—and men—leading their everyday and their wartime lives.⁴³⁵ The assumption that feminists in the West know which cultural practices differing from their own constitute gender violence has provoked intense and voluminous resistance from the rest—and within U.S. feminism as well.⁴³⁶ The

Gembo, at 7 (May 23, 2008) (outrages upon personal dignity, in particular humiliating and degrading treatment); Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Muhammad Harun, at 7, 7–8, 13–14 (Apr. 27, 2007) (rape and outrages upon personal dignity); Prosecutor v. Harun & Abd-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for for Ali Kushayb, at 8–9, 14–15 (Apr. 27, 2007) (rape); Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, at 12–13 (Sept. 27, 2005) (rape and sexual enslavement); Prosecutor v. Otti, Case No. ICC-02/04-02/07, Warrant of Arrest for Vincent Otti, at 12–13 (July 8, 2005) (rape and sexual enslavement). All of these documents are available at <http://www.icc-cpi.int/cases.html> (last visited Dec. 13, 2008).

432. See HALLEY, *supra* note 77.

433. DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* (1995) (providing a non-feminist version of this objection).

434. See, e.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

435. See, e.g., Pamela Haag, “Putting Your Body on the Line”: *The Question of Violence, Victims, and the Legacy of Second-Wave Feminism*, 8 *DIFFERENCES* 23 (1996); Sharon Marcus, *Fighting Bodies: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385 (Judith Butler & Joan W. Scott eds., 1992).

436. See Engle, *Feminism and Its (Dis)Contents*, *supra* note 116, at 784–89, 794–96 (giving detailed accounts of two such encounters).

goal of using IHL and/or ICL to displace domestic law implies a loss of faith in domestic politics and a will to supplant domestic law and politics with law made in deals with carceral humanitarians amongst IHL/ICL elites.⁴³⁷

None of these often fractious differentials within feminism make *any mark whatsoever* in the legal materials I have handled in my research on the ICT and Rome statutes. They simply don't appear in the materials that I have studied to write this Article. Case in point: my colleague Martha Minow has asked U.S. legal feminists to reflect on the apparent tension between their policy choices that would uniformly forgive women who kill their batterers and their policy choices that would uniformly avenge women sexually assaulted in war by men.⁴³⁸ Why, Minow asked, is forgiveness always right in the first setting and vengeance always right in the second? I have been unable to uncover one single law review response to this core question.

GFeminism, at least the branch of it that is devoted to IHL/ICL criminalization, has hewed to the CICC/NG normative commitment to coalition formation and wise compromise. It has been willing to put up a fight with non-feminists, but if there was tension among GFeminists at Rome—and I argue that there was—the consensus view was that this tension was an internal matter, best muted to virtual silence in the public program of a quasi-official feminist entity. This is a new development in feminism, one that I think feminists should debate about. Is this a good thing for feminism? For women?

Of course the ascendancy of these positions was made possible only by a Gramscian hegemony involving the complicity of those of us who might have dissented and resisted. As we have seen, controversy *among feminists*, even in international law circles, is possible when the topic was sex trafficking. Is rape so sacrosanct that it has unnerved the opposition?

I hope not. So let it be said: that the representation of the controversial substantive positions taken by the WCGJ as the object of objective expertise and smooth feminist consensus was less than forthright—and that feminists and others who would question them (me included)—with few exceptions⁴³⁹—have acquiesced.

437. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

438. See Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 972–76 (1997).

439. See WOMEN, VIOLENCE AND WAR: WARTIME VICTIMIZATION OF REFUGEES IN THE BALKANS (Vesna Nikolić-Ristanović ed., 2000); Carpenter, *supra* note 319; Engle, *Feminism and Its (Dis)Contents*, *supra* note 116; Engle, *Liberal Internationalism*, *supra* note 116; Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998); Vesna Kesic, A

And what about the rules themselves? As I have said, this Article, with its focus on law in the books, is not the proper place for the—I believe highly desirable—consequentialist assessment of what these rules might actually *do* in the world. Elsewhere I have sketched some of the assumptions in GFeminism that would have to be put in question for such an inquiry to proceed.⁴⁴⁰ As for the rules themselves, I applaud the immense achievement GFeminism made at Rome, in ensuring that the distinctive harms that women suffer in armed conflict are expressly included in positive IHL/ICL. But I want also to put on the table my deep disagreement with feminist universalism and its war-against-women understanding of conflicts like the Balkan War. This framing reproduces in reverse the blind-spotted moral vision that it contests. It is completely inattentive to the possibility that women have been the instigators or perpetrators of conflict. Worse, it involves a—to me absolutely chilling—indifference to the suffering and death of men. As Nathaniel Berman and David Kennedy have argued, in the shadow of positive IHL, critical thought and actual armies have detected a matrix of rules for privileged killing.⁴⁴¹ ICL will not be immune from this kind of effectiveness. War as legally justified vengeance for the intensely illegal rape of women? It has happened before and, if the Rome Statute has the moral grip on the world that its proponents want it to have, it will happen again—but now with the new possibility that feminist labors may stoke the fires of war. It's not clear to me what feminists should do about this possibility. But it is dismaying that they have so dramatically failed to worry about it.

Response to Catharine MacKinnon's Article: "Turning Rape into Pornography: Postmodern Genocide", 5 HASTINGS WOMEN'S L.J. 267 (1994).

440. Halley, *Rape in Berlin*, *supra* note 1, at 110–20.

441. See generally DAVID KENNEDY, *OF WAR AND LAW* (2006); Nathaniel Berman, *Privileging Combat?: Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1 (2004).

