

**Gender Mainstreaming in International Institutions: developments at the UN ad hoc
tribunals and the International Criminal Court**

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ABSTRACT

Gender mainstreaming has been used as a tool by gender equality advocates in their attempt to make international legal institutions more attentive to the concerns of women as well as men. Specifically, activists have worked through the ad hoc tribunals for the former Yugoslavia and Rwanda as well as the International Criminal Court to challenge the traditional understanding of women and their interests under international law, where women have tended to be defined through their relationships with either men or with children and where gender-based crimes have been categorised as less egregious than those experienced by men. This paper looks at the efforts to entrench a gender mainstreaming approach to equality within these international legal institutions and assesses the success of the strategy in terms of the treatment and understanding of women victims of violence and conflict by these institutions. It argues that despite some limitations, these efforts have been largely successful, and provides three hypotheses for why this is the case. First, that the ‘newness’ of these institutions has made a difference to opening opportunities for gender advocates. Second, that gender advocates both inside and outside reinforced each others efforts to ensure that women’s access to justice has been placed (and remained) on the agenda. Finally, and most speculatively, that the nature of legal institutions make them more amenable than others, especially government bureaucracies, to the acceptance of new norms, such as those concerning gender justice. Despite the relative success of the gender mainstreaming strategy, the paper concludes cautiously. It suggests that in light of recent strong opposition to gender equality in the international realm, vigilance is needed to maintain these developments and also that it cannot be presumed that a greater sensitivity to gender issues can never be viewed as stable or permanent.

Traditionally, international law, including its humanitarian element, has operated along a strict gender code. Not only has it created norms and institutions which treat men and women who experience the same crimes differently, but it has also failed to address the different ways men and women experience acts of violence and conflict. Until very recently, it has overwhelmingly been the case that it is men who have been used as the standard for international humanitarian law. With the advent in the 1990s and the new millennium of new institutions to address humanitarian law, including the UN ad hoc International Criminal Tribunals for Rwanda (ICTR)

and for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC), this pattern has gradually started to change. The emergence of these institutions has provided actors concerned with gender equality with a unique opportunity to challenge the traditional gender practices and assumptions upon which international humanitarian law has been based. Feminists, and other sympathetic supporters, have taken up this opportunity and have worked to have gender 'mainstreamed' within these new institutions. This paper asks: how has gender mainstreaming been reflected in these institutions? to what extent has this effort been successful in terms making the structures and decisions of these institutions more focussed on gender equality ? And, how can these developments be explained?

The paper commences with a brief discussion of gender mainstreaming as it has been understood within international institutions and the objectives and limitations of this strategy. In order to demonstrate the shift brought about through gender mainstreaming, the paper provides an account of the way in which women have traditionally been understood under international criminal and humanitarian law, before turning to a discussion of the engagement of gender advocates at the two ad hoc tribunals and the ICC. The paper then outlines three hypotheses for explaining the generally positive outcome of this engagement. In developing the argument that gender advocates have had a relatively high degree of success in reshaping international law to make it more gender sensitive, the paper relies on primary documents including transcripts from the ad hoc tribunals, as well as documents from the preparatory committees for the Rome Statute of the ICC. It also refers to speeches and papers from activists involved in the campaign to bring about gender justice through these institutions as well as secondary analysis of these developments.

Gender mainstreaming in international institutions

Gender mainstreaming has been discussed as a strategy to achieve gender equality in certain domestic arenas, at least since the 1980s (see Burton on Australia 1991) when it was also gaining attention internationally through the women and development field. It came to the fore in the international arena in a major way at the 1995 Fourth World Conference on Women in Beijing. At this conference, it was agreed that the Beijing Platform for Action would focus on gender mainstreaming as a major strategy for the promotion of gender equality in all areas of concern including *inter alia* poverty, health, political decision-making and, importantly for this paper, armed conflict. The Platform established that ‘gender analysis should be undertaken on the situation and contributions of women as well as men in all areas for actions are planned, such as the development of policies or programmes’ (Hannan 2004). The UN formalised its commitment to a gender mainstreaming strategy in 1997 when the Economic and Social Council (ECOSOC) called on all agencies to adopt this approach to gender equality. It defined gender mainstreaming as a strategy:

For making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality (in Hannan 2004).

Gender mainstreaming is simply, as Bacchi and Eveline state ‘a commitment to guarantee that every part of an organisation assumes responsibility to ensure that policies impact evenly on women and men’ while gender analysis is ‘a tool for vetting policies to ensure that they pay due heed to the differential location and experiences of women and men’ (2003: 98). It is not

expected that mainstreaming alone will achieve equality; it relies on the simultaneous operation of other women-specific programs and policies. However, it aims to avoid the trap of 'ghettoisation' which has so often occurred with any specifically targeted approach to women's equality, by requiring that all decisions are made using a gender lens. According to Rees (1998, 27), gender mainstreaming makes an advance from earlier gender equality strategies, which focussed either on equal treatment or 'positive action', in that it aims for a thorough transformation of organisations through the recognition of their andocentricity and the need for full participation of women on equal terms. Gender mainstreaming is not only about ensuring that more women are involved in decision-making, although this is a part of the strategy. It cares less about who the decision-makers are and more about analysing the potential impact of planned actions on men and women and the relations between them 'especially in relation to access to and control over resources' (Hannan 2004).

Despite high level commitment over the past decade to gender mainstreaming internationally and in many states, it has not been an unqualified success. Recently, Carolyn Hannan, the Director of the Division for the Advancement of Women, the agency with the task of overseeing gender mainstreaming in the UN, pointed to a range of problems with its implementation in UN agencies. These included: the failure to systematically use gender analysis as the basis for policy development; lack of integration of gender perspectives in sector policies and strategies; lack of capacity to identify and address gender perspectives in many crucial areas; failure to use training; inadequate resources; ineffective utilization of gender specialist resources; and lack of reporting requirements and accountability mechanisms (Hannan 2004: 3). Many of these problems have also been identified in other contexts (see Bacchi and Eveline 2003: 99). An additional problem, identified by numerous authors discussing implementation at the domestic level, has been the

way in which gender mainstreaming has been used as an excuse by many governments to dismantle women specific policy machinery in such a way that it diminishes gender analysis expertise in the state and renders gender issues invisible (see Teghtsoonian 2003; Bacchi and Eveline 2004).

Interestingly, in the case studies presented here, in relation to the ICTY, ICTR and ICC the gender mainstreaming efforts of gender-justice advocates seem not to have experienced the same hurdles. As becomes obvious in the following discussion, activists have had to fight hard to ensure gender has been mainstreamed and cannot claim that the strategy has been a complete success. Nevertheless, especially when it comes to the ICC, much ground has been achieved in a relatively short period of time in terms of transforming the international law to take account of gender differences. The reasons for this outcome are spelled out in detail in the last section of the paper but in summary include: the newness of the institutions, the role of activists and the legal nature of the institution.

The Construction of 'Woman' Under International Law

It is not the case that women have been entirely excluded in international law. However, where they have been included, women have been narrowly defined in limited roles and always situated in terms of their relationship with others – especially men or children. Charlesworth and Chinkin (2000, 308) succinctly summarise women's position thus:

...women's presence on the international stage is generally focussed in their reproductive and mothering roles that are accorded 'special' protection. The woman of international law is painted in heterosexual terms within a traditional family structure...She is constructed as 'the other', the shadow complement to the man of decision and action.

International law has incorporated women primarily as victims of armed conflict and as mothers but never as independent actors. Women have neither been entitled to the protection afforded to

men in similar circumstances, nor has the law taken into account their unique and varied experiences of and participation in armed conflict.

This construction of women as 'other' is obvious within the various key documents that have, until the International Criminal Court (ICC) Statute, formed the basis of international humanitarian and criminal law. A few examples will help illustrate this point. In all four 1949 Geneva Conventions as well as the 1977 First Protocol to the Conventions, women are accorded 'special consideration' on account of their sex. Each of these measures is based on an underlying assumption about the ways biological differences between women and men define their appropriate behaviour and roles. Special measures include: separate quarters for women internees and prisoners of war, protection of women from sexual assault and protection for pregnant women and mothers of young children. The latter category, which emphasised women's reproductive capacity, provides the rationale for many of the provisions relating to women. The extent to which women as individuals are subsumed in law by a mothering role is revealed by the fact that of the forty-two provisions of the four Geneva Conventions that address women, nineteen of these deal with women as mothers (Gardam and Jarvis 2001, 96).

Women have also been defined in international law through their relationship with men. Although the notion of what constitutes a 'special consideration' of women is left unstated in the conventions, official commentaries on this provision make the intention clearer: special consideration is "no doubt that accorded in every civilized country to beings who are weaker than oneself and whose modesty and honour calls for respect" (in Gardam and Jarvis 2001, 63). In other words women are seen as the weaker sex and dependant upon men in situations of conflict.

Moreover, they are assumed to possess gender-specific virtues derived from an archaic (that is, chivalrous) and male-centred moral code.

This construction of women is especially obvious in existing provisions to protect women from sexual violence in armed conflict. Although sexual assault has been defined as a crime under international law¹, until recently it has not been considered equivalent to other war crimes. Indeed, under the Geneva Conventions, rape along with other forms of sexual assault is categorised as a 'lesser crime' and not as a 'grave breach' of international law, subject to universal jurisdiction exercisable in national courts. Rape and sexual assault more broadly have been treated as a form of 'humiliating or degrading treatment' (in Geneva Convention I) or as an offence against a woman's honour. According to Article 27 of Geneva Convention IV, women must be 'especially protected against any attack of their honour, in particular against rape, forced prostitution or any form of sexual assault'. In neither the Geneva Conventions nor in international case law has rape been treated as a crime of violence (Boon 2001, 627).

The emphasis on rape as an attack against honour, rather than a crime of violence illustrates much about the way international law has constructed gender identities. Honour is not a neutral term but, especially in this context, a highly gendered and dichotomised one. As Gardam and Jarvis (2001, 11) note, for men honour relates to bravery, fortitude and self-reliance but for women it implies chastity, modesty and dependence. By referring to rape as a breach of honour, international law has treated it as an act that is wrong because it brings shame upon a woman, to the men in her community, and more widely, to her ethnic or national group. A woman who experiences rape is shamed because it is an offence against her chastity, while her male protector is also shamed because he has not defended her as a brave and chivalrous soldier should.

Traditionally, international laws on rape are not about protecting individual women from an act of violence but about the protection of dependent women by dependable men.

The key conventions and jurisprudence of existing international law have obviously helped to actively construct women as mothers and dependents. But they have also contributed to the process of defining women and their rights in a more subtle way; that is, through silences and omissions. There are many examples of how this has occurred. The exclusion of any reference to gender specific crimes such as rape and sexual assault in the Genocide Convention is a case in point. The fact that the Refugee Convention does not include flight from continued sexual abuse as constituting a 'well founded fear of persecution' elides women's experience of armed conflict and leaves them without the ability to claim legitimate refugee status. Nowhere does international law address the fact that women are often as vulnerable to personal attack from 'friendly' as well as 'hostile' forces. When women experience violence from within their community in times of armed conflict, it is too often treated as a 'private' matter, or seen as an acceptable feature of the spoils of war (see MacKinnon 1994). Moreover, international law does not address the economic and social hardships that are created for non-combatants by armed conflict (see Charlesworth and Chinkin 2000, 255). The notion of women as objects rather than subjects of war and armed conflict has also been emphasised through their historical exclusion from combat roles (and the expectation that men will fulfil these positions) as well the lack of attention paid to women as the perpetrators of crimes. Whereas women's mothering roles have been embedded within international legal documents, there is a distinct absence of any reference to men's responsibility as fathers. Silences about many of the realities of women's lives in situations of armed conflict has served to reinforce a narrow view of women as victims, rather than active subjects in war, and has served to render them invisible in international law.

Through acts of commission and omission, international criminal and humanitarian law has helped to define men and women in distinct, gendered roles. However, the law, as with other institutions, is not fixed but dynamic and open to challenge. Opportunities to contest gender assumptions can arise periodically either through the development of case law or from the creation of new institutions. When the two occur simultaneously – such as with the development of jurisprudence at the International Criminal Tribunals for Yugoslavia and for Rwanda and the creation of the ICC – a window of opportunity emerges and the chances of challenging existing assumptions appear all the greater. The possibility for making use of this window of opportunity has not been lost on gender-justice activists. They have worked hard both at the *ad hoc* tribunals as well as the Rome Conference and preparatory committees (prepcoms) to establish the ICC to see that the structures and decisions of these institutions reflect an understanding of the construction and operation of gender-based norms.

Gender and the War Crimes Tribunals for Yugoslavia and Rwanda

Throughout the 1990s, as part of a broader gender mainstreaming agenda, women's NGOs advocated for a reassessment of international humanitarian law which took account of women's experiences of war and conflict. Advocacy around gender and the law was a feature of the 1995 Fourth World Conference on Women in Beijing, where feminist activists called for the international community to recognise women's rights' as 'human rights' including the recognition of sexually based crimes as egregious violations of humanitarian law (Copelon 2000, 219; Freeman 1999). At the same time, feminists were attentive to the creation by the UN Security Council of the International Criminal Tribunal for Yugoslavia (ICTY) (1993) and the International Criminal Tribunal for Rwanda (ICTR) (1994) to prosecute war crimes arising from

the conflicts in these countries. They set to work, lobbying to have gender taken into account in the structures and processes of these institutions. It was hoped that through these initial steps, a gender-based legal culture could emerge which would be reflected in the jurisprudence of these new international bodies.

One of the first ways that actors concerned with gender equality engaged with the *ad hoc* tribunals was to ensure that they better reflected women's unique and often ignored experiences of war and conflict. Relying on extensive evidence of the use of mass rape as an instrument of war and genocide in both the conflict in Yugoslavia and Rwanda², women's groups successfully lobbied to have rape recognised as a war crime and a crime against humanity in the statutes of the ICTY and ICTR (Freeman 1999). Given the way in which the law has historically ignored this gender-specific crime, the recognition of rape as a war crime was a significant act. By including rape as a crime against humanity³ meant that women experiencing this form of violence outside times of war also had some recourse under international law.

However, this first step of including the gender-based crime of rape in the *ad hoc* statutes did not mean that gender-based violence such as rape was automatically prosecuted in applicable cases at either tribunal. While gender-based crimes, especially those experienced solely by women, were brought to the attention of prosecutors, they were initially reluctant to proceed with such charges due to 'a lack of evidence' (Williams 1999). This reluctance meant NGOs, such as Human Rights Watch, had to intervene to draw attention to these issues and to seek support for pursuing these cases from the bench.

The efforts of NGOs and lawyers pursuing gender equality have been rewarded with some significant developments in the jurisprudence of sexual violence in international law. At the ICTR, the case of *Prosecutor v. Jean Paul Akayesu* has been one particularly noteworthy case. Akayesu, who served as the equivalent of a mayor at the Taba commune, was tried and convicted of ordering, instigating and aiding and abetting crimes against humanity and acts of genocide against Tutsi's during the 1994 Rwandan Civil War. The prosecution did not initially include charges of sexual violence in this case. However this changed after the only female judge on the tribunal, Judge Navanethem Pillay, heard initial witness testimony of the use of rape and other forms of sexual violence by the accused. While Judge Pillay pursued the testimony of witnesses, women's NGOs, including the International Women's Human Right Clinic (IWHR) developed an *amicus curiae* brief for the tribunal, outlining the need to include rape in charges against Akayesu (Copelon 2000, 225). When the tribunal handed down its judgement in 1998, it reflected some of the key arguments made by gender advocates involved in the case. The tribunal made three significant findings: first, that sexual violence was an integral part of the genocide in Rwanda; second, that rape and other forms of sexual violence were independent crimes constituting crimes against humanity and third, that rape should be defined in a broad and progressive manner (Askin 1999).

The tribunal's decision that Akayesu had committed genocide through acts of sexual violence and rape was especially significant. For the first time, the law recognised that rape and sexual violence could:

constitute genocide in the same way as any other act so long as they were committed with the specific intent to destroy in whole or in part, a particular group targeted as such. Indeed rape and sexual violence...certainly constitute one of the worst ways of inflict[ing] harm on the victim as he or she suffers both bodily and mental harm...Sexual violence was an integral part of the process of destruction targeting Tutsi women and specifically

contributing to their destruction and to the destruction of the Tutsi group as a whole (Akayesu judgement in Askin 1999).

This judgement moved international law away from the idea of rape as an injury against a woman's honour. First and foremost it recognised the serious bodily and mental harm of rape on individual women. Moreover, it linked these acts to the destruction of the group, thus demonstrating an awareness of the connection between gender and ethnic identity. In other words, it accepted that these acts could be used to specifically destroy the women members of the community – that they were gender -based. It also found that the physical and mental aspects of the acts were such that they were intended to prevent births within the group (Gardam and Jarvis 2001, 195). Through its judgement, women were recognised as individuals, as members of a group as well as having a reproductive role. For once, the woman of international law was seen as being multi-dimensional.

The tribunal's definition of rape in the *Akayesu* case also represented a breakthrough in terms of recognising women's experience of this form of violence. The tribunal found that rape was “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. In January 2000, the ICTR upheld this definition in the case of *Prosecutor v. Musema* stating that “the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion” (in Boon 2001, 649). The definition was an advance on the existing international legal definition that had failed to recognise the violent and individual aspects of rape. It was also an improvement on most common law definitions in that it removes the focus on acts of penetration, which views rape from the perpetrator's point-of-view and replaces it with ‘invasion’ which takes a victim perspective (Boon 2001,650). The emphasis on coercion rather than the more problematic notion of consent used in most common law definitions of rape further shifts the

definition towards a victim perspective of the crime. While it is apparent that adopting this perspective of rape reinforces the notion of women as ‘victims’, it does at the same time construct women as subjects, rather than just the objects of the law.

The decisions of the ICTY have also brought about some important developments in jurisprudence related to women and international law. The tribunal has convicted several people on charges of rape as a form of torture which, in this context, is considered a war crime and thus a ‘grave breach’ of the Geneva Conventions (Nahapetian 1999, 131). In 2001, in the case against *Kunarac, Kovac and Vukovic*, the ICTY convicted the accused on charges of rape as a war crime and rape as a crime against humanity (ICTY 2001). In sentencing Kunarac at the ICTY, Judge Florence Mumba stated:

By the totality of these acts you have shown the most glaring disrespect for the women’s dignity *and their fundamental right to sexual self-determination*, on a scale that far surpasses even what one might call, for want of a better expression, the “average seriousness” of rapes during wartime (emphasis added, ICTY 2001, 5).

Mumba’s reference to women’s right to sexual self-determination is a radical shift in international law as it rejects the notion that women are naturally submissive to men. Her statement demonstrates that there is a growing understanding on the part of some judges that the construction of women as either the dependents of men or mothers of children under international law is overwhelmingly constrictive and that they have the right to control their own bodies.

Gender mainstreaming in the International Criminal Court

The ICTY and the ICTR provided the background against which the ICC was developed. The tribunals offered both the framers of the ICC and activists wanting to challenge existing norms of international law a good basis from which to proceed – they not only learned from the limitations of the tribunals but were keen to ensure that advancements in terms of gender sensitive legal

structures and jurisprudence served as the foundation for the new Court. Lobbying hard for a gender inclusive approach to international law, equality activists helped to shape the ICC statute in significant ways –in terms of its criminal articles, structures and processes –and ensured that the Court became the most gender sensitive of any international legal institution to date.

After first being mooted in 1937, the ICC statute was adopted in Rome on 17 July 1998 and the Court came into being on 1 July 2002 after 60 countries ratified the statute⁴. The ICC is a unique institution, different to other international legal bodies such as the International Court of Justice (ICJ) as well as other previous and existing *ad hoc* international criminal law tribunals. One of its key features, which differentiates it from the ICJ, is its ability to hold *individuals* (and not just states) accountable for criminal acts under international law. Unlike the *ad hoc* tribunals, the court is a permanent, treaty-based organisation. It has jurisdiction over crimes committed within the territory of a ratifying state or by a national of a state to the treaty operating in other countries⁵. The statute also gives the UN Security Council the ability, under certain circumstances, to refer a crime to the court that involves a non-state national or occurs on the territory of a non-signatory state. An important feature of the ICC statute is that it attempts to balance state sovereignty with a system of international justice through the notion of complementarity. As outlined in Articles 17 to 19 of the statute, the ICC cannot exercise jurisdiction over a case if a national court addresses it. The ICC can only intervene to prosecute an alleged criminal when a state has demonstrated its *inability* or *unwillingness* to carry out an investigation (see Robertson 2000, 350). The ICC statute upholds the principle of double jeopardy, which means that once a national court has heard a case, so long as the proceedings were legitimate, it cannot be re-heard by the ICC.

The offences over which the ICC has jurisdiction fall into four main categories: genocide, crimes against humanity, war crimes and aggression⁶. Some of these crimes have been previously codified under international law such as in the Geneva Conventions and Protocols, the Convention on Genocide and the Convention against Torture⁷. However, these instruments have been difficult to enforce, allowing violators to escape justice. The ICC therefore provides the first permanent court with the capacity to enforce penalties against these execrable crimes. Also, under the Rome Statute and its two subsidiary documents - the Elements of Crimes (EOC) and the Rules of Procedures and Evidence (RPE) - these crimes have been restated to give them greater currency (Lee 2002, 751). At least in relation to the first three categories of crime, the ICC statute also reflects important recent developments in international criminal jurisprudence, especially those arising from the ICTY and ICTR. As the following discussion illustrates, the elaboration of these categories of crimes in the *ad hoc* tribunals and their codification in the Rome Statute have provided an important opportunity structure for the reconfiguration of gender norms under international law.

Drawing on their experience with the two *ad hoc* tribunals, gender-justice activists were persistent in their efforts to have a gender perspective incorporated into the ICC statute. One organisation, the Women's Caucus for Gender Justice (WCGJ) was particularly active in this regard. Created in 1997, it included over 300 women's organisations and 500 individuals and had a mandate to 'ensure that the International Criminal Court will be able to effectively investigate and prosecute crimes of sexual and gender violence' (WCGJ, 2000). As Justice Pillay, formerly of the ICTR and now on the ICC bench, explained:

the painfully graphic evidence of the crimes emerging in trials before the ICTR and the ICTY horrified the international community -- in part because of successful lobbying and

pressure exerted by the Women's Caucus and other human rights advocates – and played a pivotal role in influencing the Statute for the International Criminal Court, signed in Rome in July 1998 (2002).

In order to achieve its objectives, the WCGJ played an active role at the 1998 Rome Conference and the numerous subsequent prepcoms to establish the EOC and PRE for the ICC. Since the ICC came into being in July 2002, the Women's Initiatives for Gender Justice (WIGJ) has replaced the WCGJ, but has continued to closely monitor developments at the Court.

Mainstreaming gender into the Criminal Articles of the Rome Statute

The WCGJ and other like-minded activists have had some success at mainstreaming gender concerns throughout the ICC statute as well as the Element of Crime and Rules of Procedure and Evidence documents both in terms of the nature of crimes and in procedural and structural matters. In relation to the crime aspect, the ICC statute has come to reflect a degree of gender-sensitivity not found in earlier international humanitarian law documents. For instance, Article 7, relating to crimes against humanity and Article 8, concerning war crimes, includes reference to sexual violence as acts constituting such crimes. These articles remove the moral element of these offences - which linked such acts to 'honour' and the lesser crimes of 'humiliating and degrading treatment' - found in the Geneva Conventions and places them in the category of grave breaches of international law. Further, to emphasise the gravity of sexually based crimes against humanity, these crimes were enumerated in a separate sub-paragraph (Moshan 1998, 177).

In addition, for the first time the ICC also includes a broad-based definition of types of sexual violence constituting war crimes and crimes against humanity. In relation to war crimes these include:

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (Article 7 (h))

Similar crimes are enumerated under the category of crimes against humanity (see Article 8 (b) (xxii)). The codification for the first time of the offences of sexual slavery and forced pregnancy⁸ as an element of war crimes and crimes against humanity represents a significant shift toward international law better reflecting women's experience of armed conflict. As witnesses had testified at both the ICTY and ICTR, these crimes were used extensively in both the Yugoslavian and Rwandan conflicts (for a full discussion see Boon 2001, 656-667). Before the crime of forced pregnancy was adopted into the statute, feminist activists had to battle with lobbyists from the Vatican as well as Islamic representatives and American anti-abortion groups who feared that the enumeration of this crime would interfere with national anti-abortion laws (Stanley 1998; WCGJ 1998; Chappell forthcoming). The eventual inclusion of forced pregnancy represented a major victory for the WCGJ.

Gender has been mainstreamed into other criminal articles as well. For instance, Article 7 (h) includes gender as a ground for persecution, alongside political, racial, religious and other such categories, that is now impermissible under international law. Again the WCGJ were active in pushing for the inclusion of these provisions and again, in doing so had to battle Catholic, Islamic and conservative lobbyists. Due to the intervention of these latter groups, a narrower and somewhat more muddled definition of gender⁹ than that proposed by women's activists was accepted. Nevertheless, its inclusion was an important advance given gender had never before been defined in any international legal statute.

The mention of gender as a form of persecution in the ICC was significant not least because of its potential use in other contexts including women's claims to refugee status which, until now, have

not included gender specific forms of persecution (Charlesworth and Chinkin 2000, 320). It is possible that this article will also prove helpful in the prosecution of war criminals who rape or otherwise violate women as an expression of their misogyny, rather than as a means of persecuting a particular ethnic or religious group (Moshan 1998, 182). Similarly, Article 21, which prohibits discrimination based on gender in the application and interpretation of the statute reflects an attempt to ensure that gender concerns are included within all criminal aspects of the statute. It is hoped that this article will be applied in cases where state parties may prove to be ‘unwilling or unable’ to investigate and prosecute gender-based crimes. The incorporation of this clause was another hard won victory for the Women’s Caucus against the Vatican and Arab League countries¹⁰. Opposition to the article was based on a fear that by replacing the terms men and women with ‘gender’ would challenge the traditional roles and expectations of the two sexes in various cultures and would also open the door to claims of persecution based on homo and transexuality (Copelon 2000, 236).

Mainstreaming gender into the Structure of the ICC

Alongside the crimes aspect of the Court, the ICC statute also reflects sensitivity to gender in terms of its structure. The statute includes a statement that there should be ‘[a] fair representation of female and male judges’ (Article 36 8(a) (iii) and notes that in nominating judges, state parties ‘shall also take into account the need to include judges with legal expertise on specific issues including...violence against women or children’ (Article 36 (8) (b). Article 42 determines that the Prosecutor will appoint advisers with expertise in sexual and gender violence while Article 43 states that the Registrar of the court shall provide a victims unit which shall ‘include staff with expertise in trauma, including trauma related to crimes of sexual violence’.

The seriousness with which state parties treat these representative issues was first tested with the call for the nomination and the election of judges to the first bench of the ICC. The rules governing the elections identify gender, region and field of expertise as minimum voting requirements. They also specify that at least 6 men and 6 women are to be elected to the ICC bench. When nominations closed on 30 November 2002, 10 women had been nominated out of 45 candidates. Elections for the first bench of the ICC were held between 3 and 7 February 2003. In the event, seven women and eleven men were elected as judges in a long and drawn out process that took five days and 33 rounds of voting. When six female judges were elected in the first round of voting, the results were met with spontaneous applause from the floor. Many of the female judges that have been elected to the ICC including Navanethem Pillay (South Africa), Maureen Clark (Ireland), Elizabeth Odio Benito (Costa Rica) and Anita Usacka (Latvia) have an extensive background in women's human rights issues. Moreover, some of the male judges such as Adrian Fulford, the first openly homosexual judge to be appointed to the High Court in Britain, also have a background in issues related to violence against women (ICC 2002).

Concerns about gender representation have also been evident in the efforts of the first ICC Prosecutor, Luis Morento Ocampo, to ensure women are appointed to senior roles in the office. In 2004, the Prosecutor nominated three women for the second post of Deputy Prosecutor to ensure the Assembly of State Parties would elect a woman. (Schense 2004:3). Ocampo's efforts were backed up, if not influenced, by a strong campaign led by the WIGJ to encourage female applications for the position. The WIGJ compiled information on the experience and skills of the applicants and held panels for candidates to address delegates to the Assembly (Inder 2004:4). When the Assembly met in September 2004, it elected Ms Fatou Bensouda from Gambia, who

has a strong background in gender issues and the law, to take on the position of Deputy Prosecutor, Head of Prosecutions.

A final area where gender concerns have been reflected in the ICC statute is in relation to procedural matters. Drawing on (mostly negative) experiences from the *ad hoc* tribunals, equality activists pushed, primarily through the WCGJ, to ensure that the prosecutor was obligated to address gender issues. As a result, the Statute charges the prosecutor to investigate and prosecute crimes in a way that “respect[s] the interests and personal circumstances of victims and witnesses, including...gender”. He or she is also required to “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children” (Article 54 (1) (b)). Article 68 of the statute, which gives the court the authority to protect victims and witnesses, specifies the need to give due attention to victims of sexual violence, which may include the use of *in camera* evidence to shield victims from confronting their aggressors in the court room.

It is still too early in the life of the Court to assess how well it will address gender concerns related to procedural matters. The initial signs are encouraging with the Prosecutor making clear in relation to the Court’s first referrals, concerning Uganda and Democratic Republic of Congo, that issues related to ‘rape and other forms of sexual violence’ are being investigated (Moreno Ocampo 2004). The Prosecutor has also made mention of the importance of ensuring that victims and potential witnesses are provided with adequate protection (ICC Update 2004:1).

The WCGJ and other feminist activists have obviously made some important advances in shaping both the crime and procedural aspects of the ICC statute. However, it would be wrong to assume

that activists have achieved all their aims or that the ICC resolves every problem relating to women and gender issues under international law. One of the major disappointments for women's activists in relation to influencing crimes under the statute is the absence of any reference to sexual violence in Article 6 relating to the crime of genocide. In part, its absence can be explained by the fact that the *Akayesu* judgement of the ICTR, which created new jurisprudence on the issue, was handed down after the issue of genocide was settled at the Rome Conference. Having missed the opportunity to influence the statute itself and armed with the judgement of the ICTR, women's activists then turned their attention to having the matter clarified in the Elements of Crimes document. The WCGJ prepared a detailed submission on the issue for the February 1999 prepcom. Its submission used similar reasoning to the ICTR to argue for the inclusion in the EOC of sexual violence as a feature of this offence¹¹. In the event, the Coalition was unsuccessful in having a general statement to this effect included in the EOC, but had to be satisfied with a footnote stating that genocide may include "acts of torture, rape, sexual violence or inhuman treatment" (Copelon 2000, 235). More optimistic observers, such as Warbrick and McGoldrick (2001, 421), hope that the omission of sexual violence from the body of the EOC text on genocide was maintained "only because it was felt unnecessary to expressly state something that clearly represented current law". Whether their view is correct will be an important test of how far gender issues have been 'mainstreamed' into international criminal law.

Other problems are also inherent in the existing statute and supporting documents. Feminists have expressed concern that the ICC Statute qualifies crimes of sexual violence and gender-based persecution in such a way that they are not *automatically* considered as grave as other war crimes and crimes against humanity but will have to be proven to be so (Moshan 1998, 182-3).

Moreover, the rules relating to crimes against humanity state that such crimes must be part of a

‘widespread and systematic attack’ and committed with the knowledge of the attack. This could create problems for addressing women’s experiences of armed conflict because attacks on them are often isolated events and, at least in the case of the crime of forced pregnancy, a perpetrator can use a defence of not having knowledge of actually impregnating the victim (Moshan 1998, 183).

For Charlesworth and Chinkin (2000, 334), problems with developments at the *ad hoc* tribunals and the development of the ICC are more generalised. First, they note that violence against women in situations of armed conflict and peace time is “part of the same spectrum of behaviour”. By focussing on violence in times of conflict, recent developments do little to challenge the “acceptability of violence and... the private order of the domination of women” at other times. Second, in their view, international criminal law continues to emphasise women’s sexual and reproductive identities. The emphasis on sexual violence, including acts of forced pregnancy, keeps women in the role of ‘other’ – identified only through their relationship with men and children. Finally, the social burden that falls on women in armed conflict remains unacknowledged and women continue to be cast as passive victims rather agents of change or survivors. Gardam and Jarvis agree that recent advances do little to alter the social, economic and health aspects women experience as a result of armed conflict (2001,229).

Gender mainstreaming: some hypotheses for explaining the developments at the ICC

It is clear that the ICC Statute does not fully meet the expectations of gender equality advocates nor does it have the capacity to expand women’s rights in every aspect. However, as has been outlined in detail in this paper, it does reflect a more gender sensitive approach to international law than anything that preceded it. Having gender concerns embedded within the criminal,

structural and procedural aspects of the Court is a major development compared to the stalled efforts to mainstream gender within analogous UN institutions, including Human Rights treaty bodies (for a discussion see Rahmani 2005), let alone within domestic-level bureaucracies. What factors might explain these developments, and what do these tell us about the relationship institutions and gender norms more generally?

The first hypothesis suggested by this study is that the success of a gender mainstreaming strategy may have a temporal element; that it might relate directly to the age of the institution as well as the context in which it is being argued. The fact that the ICC is a new institution provided a positive opportunity structure for gender advocates wanting to influence the nature of the Court. While these advocates faced opposition and even hostility to the inclusion of gender based approach to the law, this opposition did not spring from defending the *status quo* within an existing institution. As such, the opposition to the inclusion of a gender perspective was weaker than it is in established institutions where other norms achieve, as March and Olsen (1989) put it, a ‘logic of appropriateness’. Moreover, in this case there was an effort not only from gender advocates, but others involved in the process of developing the court to ensure that the court reflected contemporary legal thought and practice, not just to replicate what had gone before. Given this was happening in the context of general debates about the need for gender mainstreaming in other fora, and significant gender-based legal decisions at the ad hoc tribunals, it appears that tide was flowing with, rather than against the demands of the advocates. As we know, tides can turn, and quickly, so it was an opportune moment for those pursuing this strategy to get something in place before the environment changed.

A second hypothesis is that to be successful, any gender mainstreaming strategy requires the co-operation of insider and outsider advocates to work towards its incorporation. It was very obvious in the case of the both the ad hoc tribunals and the ICC, that gender advocates, especially in the latter case, WCGJ, played a pivotal role in bringing to the attention of official delegates the importance of considering gender issues in their discussions. The WCGJ were tireless in its efforts throughout the drafting process, and now the WIGJ has taken up the challenge of monitoring the activities of the Court. However, as was demonstrated with the ad hoc tribunals, having gender-based crimes formally recognised is not the same as having them prosecuted; in other words, there is a limit to the effectiveness of lobbying as a strategy on its own. In order to translate the demands of gender advocates into reality, it is necessary to have ‘insiders’ – especially senior prosecutors and judges - take up these demands in their decision-making processes. As was seen in relation to the decisions of Justices Mumbo at the ICTY and Pillay and the ICTR, sympathetic judges can have a significant effect on the outcome of cases by being alert to the gender-based aspects of crimes. The fact that the bench of the ICC contains a number of women and some men who have expressed a concern about the need to achieve gender justice bodes well for future ICC decisions. Similarly, the current ICC Chief Prosecutor, who has demonstrated a willingness to address gender issues in investigations can potentially make an important difference to the way women are dealt with under international law. So long as there are advocates lobbying from outside and supporters inside to take up a gender sensitive position, the chances of having these issues taken seriously is significantly heightened.

The third, and most contentious hypothesis that requires further testing is that gender mainstreaming is easier to achieve in legally, rather than bureaucratically based institutions. This hypothesis is based on the view that compared with government bureaucratic institutions, which

exist to provide a permanent, regularised and consistent framework for implementing government decisions, legal institutions are more amenable to change. It is true that legal norms related to women's equality remained static for centuries. However, through judicial decision-making they can *potentially* be reframed and redefined. Over time, a body of jurisprudence can develop that can significantly alter the understanding of social, economic and political relationships. For instance, in relation to this study, it has been shown how judicial rulings made at the *ad hoc* tribunals played a central role in re-shaping existing legal norms around gender-based crimes in general and rape in particular. These decisions effectively broke through the silence on women's experiences of war and conflict, and after having been raised, these experiences could not be ignored in the development of the first permanent international criminal law tribunal. Obviously, a necessary prerequisite for achieving this normative shift was the presence of sympathetic judges on the bench who were capable of identifying gender-based crimes and naming them as such. This is not to argue that gender mainstreaming cannot be achieved in bureaucratically based institutions. However, the permanent pattern of decision-making leads to the 'congealment' of existing norms. Trying to unsettle these practices requires the co-ordinated effort of supportive governments, insider and outsider gender advocates, as well as sympathetic senior bureaucrats. Aligning these forces may be more difficult than the strategic selection of legal cases by advocates and judges to challenge existing laws.

These three hypothesis all require further testing both through comparative studies with other legal and non-legal institutions, and through on-going monitoring of developments at the ICC. Whether or not the institution brings about the reform in women's rights that advocates have been hoping for is yet to be seen. While it can be argued at this point in time that the traditional *masculine* norms underpinning international humanitarian law have been unsettled through the

effort of gender mainstreaming advocates, there is no assurance that a more gender-sensitive approach to women and the law is a permanent one. At the same time as these developments have been taking place at the ICC, there have been counter-moves in other UN forums, especially UN sponsored international women's conferences, to push for a retreat from a gender or women's rights focus. The use of 'cultural relativist' and/or religious arguments have been used successfully to challenge and limit the international understanding and incorporation of women's rights issues in terms of notions of equality, women's role in the family and access to health and reproductive services (see Chappell 2004). The challenge to furthering women's equality has been so successful that plans to hold a 5th International Women's Conference in 2005 never eventuated due to a fear that the existing documents on women's rights, such as the 1995 Beijing Platform for Action, could be watered-down as a result the combined lobbying effort of the United States, certain Muslim populated states and the Vatican. Just as the law has been capable of advancing toward a more gender-sensitive focus, it can equally swing back in the other direction. What may make the difference is the ongoing vigilance of insider and outsider advocates to ensure that the current positive direction is maintained through careful monitoring, evaluation and judgement of the cases that come before the ICC.

Conclusion

The norms that shape institutions can change overtime. As this paper has shown the masculine assumptions upon which international law is based have been challenged through the efforts of advocates arguing for gender justice inside and outside the ICTY, ICTR and ICC. Landmark cases in the two tribunals have recognised rape and other sexually-based crimes as punishable under international law. The ICC, in its Statute, recognises these rulings and seeks to ensure that women's experience of war and conflict is treated on equal grounds with that of men. Moreover,

the ICC recognises the need to have women represented at all levels of its organisation and to incorporate gender not only in the criminal but also procedural aspects of its work. These developments did not come without a struggle from gender advocates, and nor are they necessarily secure. Experience suggests that formal rules, such as the ICC statute can be ignored, or fall by the wayside when the environment changes. It is hoped that the ICC will continue to set a standard in international arena about how gender mainstreaming can be achieved. However, in order for this to occur, the institution and those who engage with it must continue to demand that gender is taken seriously in all its functions.

¹ Although rape has not been given serious attention under international law it has been prohibited by the law of war since the time of Richard II in 1385. It was treated as an infringement of the Lieber Code of 1863 during the American Civil War. More recently, it was prosecuted as a war crime under the Tokyo Tribunal after World War Two, and included in the Geneva Conventions(Merom 1993, 425).

² The UN estimates that upwards of 20,000 women were raped between 1992-94 in the former Yugoslavia (quoted in Nahapetian 1999, 127). Figures for Rwanda are difficult to find, but estimates indicate that hundreds of thousands of women experienced some form of sexual violence during this conflict (Nahapetian 1999)

³ Crimes against humanity are defined as ‘inhumane acts of a very serious nature committed as part of a widespread or systematic attack against a civilian population on political, ethnic or religious grounds. They may be committed in times of peace or war (in Robertson 2000, 295).

⁴ It should be noted however that the USA has refused to sign the statute for fear of frivolous or politically-motivated prosecutions of its nationals. This is despite the fact that under the Clinton administration the USA played a prominent role at the Rome Conference and significantly influenced the court’s rules and structures (for a discussion see Robertson 2000, 325-327). Under the Bush Administration the USA has, controversially, used its dominance in world affairs in 2002 and 2003 to pressure the UN Security Council to grant US military personnel immunity from the court under Section 98 of the ICC statute. It has also entered into bilateral agreements with some signatory states for the same purpose.

⁵ In other words, “crimes committed by a national of a non-State party on the territory of a State Party are subject to the Courts jurisdiction” (Dieng 2002, 683). Moreover, crimes committed by a national of a state party on the territory of a non-state party are also subject to the court’s rules.

⁶ This latter category is yet to be defined under international law, and will not come under the jurisdiction of the court until state parties to the ICC can agree on its meaning.

⁷ The full title of these treaties are: *The Convention of the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277; *Geneva Conventions I-IV* 12 August 1949 and *the Protocol I and II to the Geneva Conventions of 12 August 1949*, June 1977; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 10 December 1984, 1465 UNTS 85.

⁸ Article 7 (2) (e) defines forced pregnancy as: ...“the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”. To satisfy conservative delegates an additional rider was added: “This definition shall not in any way be interpreted as affecting national laws relating to pregnancy” .

⁹ Article 7 (3) states ‘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’. By including mention of the two sexes anti-gender delegates were hoping to exclude sexual orientation from the definition of gender persecution (Copelon 2000, 237). Whether they will be successful in their aims is yet to be tested.

10 For further discussion on this point see Chappell, 'Women's Rights and religious opposition: the Politics of Gender at the International Criminal Court', forthcoming in Yasmeen Abu-Laban ed. *Gendering the Nation State: Canadian Comparative Perspectives*. University of British Columbia Press

¹¹ In its submission the WCGJ carefully documented how sexual violence is an instrument or means of committing genocide in respect to each of the five enumerated acts of genocide including: genocide by killing, genocide by inflicting serious bodily or mental harm, genocide by inflicting conditions of life calculated to bring about the physical destruction of the group, genocide by imposing measures to intended to prevent birth and genocide by forcibly transferring children of the group. The Akayesu judgement considered sexual violence to constitute the first four of these. (see WCGJ 1999).

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Glossary

WCGJ Women's Caucus for Gender Justice
 ICC International Criminal Court
 EOC Elements of Crimes Document
 RPE Rules and Procedures Document
 PrepCom Preparatory Committee
 ICTY International Criminal Tribunal for Yugoslavia
 ICTR International Criminal Tribunal for Rwanda
