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Who is the Real Civil Society? Women's Groups versus Pro-Family Groups at the International Criminal Court Negotiations

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Abstract

This article focuses on the interplay of the women's movement and the pro-family movement with state delegates in the negotiations on the International Criminal Court. It discusses the origins of their interest in the ICC, their presence at the ICC negotiations, the manner of their lobbying activities, and their relations with other NGOs and state representatives. It then discusses two issues in the negotiations in which these two movements were on opposite sides: the use and definition of the term 'gender' and the inclusion of 'forced pregnancy' as a crime in the ICC statute. In the conclusion, the article assesses this episode in order to draw some general conclusions about the right to participate in UN forums as 'civil society representatives'.

Introduction

The Statute for an International Criminal Court (further: the Statute), was adopted on 17 July 1998, and has entered into force 1 July 2002. It came about after three years of negotiation under the auspices of the United Nations (UN), first in a series of Preparatory Committee (PrepCom) sessions between 1995 and 1998, and culminating in a final conference in Rome in the summer of 1998, on the basis of a draft Statute produced by International Law Commission, a UN commission of legal experts, at the request of the UN General Assembly. The establishment of the International Criminal Court (further: ICC) can be considered as a small revolution in international law for two reasons. First, the International Criminal Court (further: ICC) will be an important step in the ongoing transition towards an international legal order that is less based on state sovereignty and more oriented towards the protection of all citizens of the world from abuse of power. Secondly, it is 'the first international treaty to recognize a range of acts of sexual and gender violence as among the most serious crimes under international law.' (Steains, 1999: 357) Both of these features of the Court have already received much attention in the writings of legal scholars, diplomats and activists. (See for instance Bos, 1999; Bassiouni, 1999; Frouville, 2000 on the significance of the Court to international law generally; on gender aspects of the Statute, see Bedont and Hall Martinez, 1999; Boon, 2001; Oosterveld, 1999; Steains, 1999).

This article will focus on *how* the gender provisions came into the Statute, discussing the ICC negotiations as a critical episode in the recurrent clash within global civil society between the women's movement and the 'pro-family' movement. The terms 'women's movement' and 'pro-family movement', used in this article, are of course oversimplifications. Both movements are pluralistic, consisting of many smaller alliances, which are sometimes at odds with each other. These terms, rather than others, are employed here because they are among the most frequently used self-

identifying terms of both groups, but without endorsing the possible connotations they might appear to have, that all women are represented by the former, or that those who are not part of the latter are somehow 'anti-family'. The term 'pro-family' was preferred over 'pro-life', as the concerns of these groups at the ICC extended beyond abortion, including opposition to the use of the term 'gender'. The term 'women's groups' was preferred over 'feminist groups' because most organisations prefer this over the narrower and polarising term 'feminist', even though they would probably subscribe to some form of feminist value system if pushed on the matter.

Both types of groups operate in the realm of civil society, and for the purposes of this article, in global civil society. Civil society, let alone global civil society, is a confusing term. As even a brief glance at the literature would show, it has many meanings. There are as many definitions of civil society, and global civil society, as there are authors – in fact there are more. (For multiple definitions, see for instance Lewis, 2002; Howell and Pearce, 2001: 13-37; Kaldor, 2003: 6-12) Nevertheless, I use this term, rather than other current ones such as global social movements (Cohen and Rai, 2000), advocacy networks in international politics (Keck and Sikkink, 1998), or global citizen action (Edwards and Gaventa, 2001) quite intentionally to characterise the ensemble of people and organisations I describe in this article. I prefer this term for two reasons.

Firstly, the history of the term civil society is bound up with the notion of rules to protect citizens. (see for instance Seligman, 1992; Keane, 1998; Kaldor, 2003) While this was initially a nation-based ideal, the post-world war notion of universal human rights, coupled with a thickening network of international rules directly affecting citizens, has given birth to the utopia of a global rule-bound society. This history of humanitarian law and human rights law has been much more a product of the activities of people outside government than is commonly accepted. (Glasius, 2003; 2004) Hence, the idea of global civil society and humanitarian and human rights law are historically connected. This connection is of obvious relevance to this article about the influence of civil society groups on the Statute for an International Criminal Court.

The second attraction of using the term civil society is that, owing to Hegel but accepted by all subsequent theorists, it suggests a separation from, but at the same time a relationship with, the state. In global civil society this relationship gets further complicated as the concept expresses the possibility of emancipation from and leverage on one's own state through cross-cutting alliances with other civil society groups as well as other states. (Kaldor, 2003; Keck and Sikkink, 1998) This too is a main theme of this article.

So what exactly *is* this global civil society? Elsewhere, with two co-authors, I adopted the following definition: 'global civil society is the sphere of ideas, values, institutions, organisations, networks, and individuals located *between* the family, the state, and the market and operating *beyond* the confines of national societies, polities, and economies.' (Anheier et al., 2001, 17) Here, I propose a definition that is both narrower and more concrete: global civil society consists of people organising to influence their world. Hence, it involves some sort of deliberate getting-together, and it is a political definition, excluding people who organise to play darts or make money. However, it suggests that (global) civil society is a contested terrain,

populated by value-driven actors, but not with a single harmonious value system: as this article will show, their values clash (See also introduction by Howell and Mulligan).

While confrontations between women and patriarchal power-holders are as old as the hills, national policy debates about sexuality and birth control in particular emerged in the West with the second generation of women's movements in the 1960s and 1970s. The issue of abortion became the prime matter of controversy, especially in the United States. Various authors have discussed the subsequent transnational debates over feminist priorities, and the eventual convergence of many women's groups around the issue of violence against women, the controversies they faced and the strengths of what is now a vibrant global women's movement. (Bunch et al. 2001; Sen, 2003; Friedman, 1995; Joachim, 1999; Keck and Sikkink, 1998)

However, little attention has been paid to the fact that pro-family groups, both protestant and Catholic but always supported by a globally oriented Catholic church, have also come to form a transnational movement, which confronts the women's movement at every United Nations (UN) forum which has any relevance to sexual issues. (Some attention is paid to this movement in Kulczycki, 1999, 25-28 and Keck and Sikkink, 1998: 189-91) There is a clear need for further research into the beliefs, tactics and leadership of this movement generally. Such research will be helpful in understanding that global civil society is not the exclusive domain of 'progressive' human rights, environmental, social justice and women's rights activists, it is a space co-inhabited by conservatives, anti-abortionists, and religious fundamentalists. More particularly, knowing more about the pro-family movement will be helpful to the transnational women's rights activists who continually have to confront them. This article will attempt to make a small contribution towards these aims by focusing on the interplay of the women's movement and the pro-family movement with state delegates in the negotiations on the International Criminal Court.

The surfacing of two social movements with contradictory aims at the same venue highlights the significance of recurring questions about civil society participation in international fora: Who is legitimate? Who is representative? Who has a right to be there? Women's groups have been confronted with diverse voices from within the movement, but they still tend to be collectively considered at UN fora as the sole representatives of women's concerns. Some pro-family groups explicitly question this notion. REAL (Realistic Active for Life) Women of Canada, for instance, argues: 'No one organization or ideology can represent the views of all women any more than any one organization can represent the views of all men. Until the formation of REAL Women of Canada, there was no voice to represent the views of those many thousands of women who take a different point of view from that of the established feminist groups.' (REAL Women website) The remainder of this article will look into the claims to legitimacy and representativeness of both types of groups, as well as the manner and success of their lobbying activities, in the negotiations on the International Criminal Court.

The two movements at the ICC negotiations

Women's groups

The emergence and main focuses of the present-day global women's movement has been described by others. This article will focus on the interest women's groups came to have in emerging international criminal law, which brought together two sets of transnational advocacy experiences.

On the one hand, this interest built on the United Nations conferences, often described as crucial to the emergence of a global women's movement. After the earlier conferences of the UN Decade for Women (Mexico City 1975; Copenhagen 1980; Nairobi 1985) had played a major role in building women's networks, it was particularly at the World Conference on Human Rights in Vienna in 1993 and the Fourth World Conference on Women in Beijing in 1995 that progress was made in actually inserting gender concerns into the final declarations of the conferences. (Bunch, 2001: 219-221; Keck and Sikkink, 1998:186-188) These were not treaty-making conferences, however, and the challenge for women's rights groups was to take the progressive texts of these 'aspirational' declarations into the 'mainstream big-boy venue of hard-core international law' of the ICC negotiations. (Interview Hall Martinez; cf. also Steains, 1999: 360)

On the other hand, experiences with the Yugoslavia tribunal were a particular inspiration to women's groups' advocacy for an ICC. While it had been pointed out before that women are always particularly vulnerable to abuse in conflicts (See for instance Erb, 1998: 401-2 for a harrowing catalogue of war-related violence against women in the twentieth century), the use of rape as a component of ethnic cleansing in the former Yugoslavia brought the lack of legal protection to international attention. (Steains, 1999: 359) Although the statute of the Yugoslavia Tribunal did not contain any gender-specific mandate, its functionaries recognised that an ostensibly gender-neutral justice system would in fact fail to address gender-specific abuses, and took on board some of the concerns of women's groups. An officer for gender issues was appointed within the prosecutor's office, and it was decided to allow rape victims to give testimony anonymously, and to prosecute rape as a war crime, an issue to which the first prosecutor, Richard Goldstone, was particularly committed. (Sharratt and Kaschak, 1999: 12-13; 31, 54) It was in their relations with the tribunal in The Hague that Yugoslav women and their European supporters had their first experience of enscribing women's concerns into international criminal law, an experience they built on at the ICC negotiations in New York and Rome. Later, the Akayesu case before the Rwanda tribunal provided further illustrations to the case for gender justice: the suspect was convicted of genocide in the form of systematic rape and sexual violence after probing but sensitive questioning of witnesses by the only female judge, Navi Pillay. (Bedont and Hall Martinez, 1999).

The main civil society interest in the ICC negotiations came from human rights organisations. Lawyers (for instance bar associations), global governance organisations, peace groups, and faith-based organisations were also represented. (Glasius, 2002: 140-4) In 1995, an NGO Coalition for an International Court (CICC) was formed, which grew into a loose but very effective lobbying body, of which nearly all NGOs and individuals who took an interest in the Court were members. At the final conference in Rome, it split in three types of groups: regional caucuses, who lobbied state representatives from their own regions; thematic caucuses, including the Women's Caucus, and twelve working groups on different parts of the draft Statute. The last of these shadowed the corresponding working groups of state representatives

on different sets of articles and made daily reports available to NGOs and state delegates (Pace and Thieroff 1999: 394).

While some women's groups, such as Equality Now, had been involved since the first state negotiations on the ICC in 1995, most were relative late-comers to the process. The Women's Caucus for Gender Justice was formed at the initiative of a small group of women's rights activists present at the February 1997 PrepCom, who realised that without a much stronger effort, gender concerns were not going to be adequately represented in the negotiations. It quickly grew to be a coalition within a coalition, with hundreds of member organisations by the time of the Rome conference. (Bedont and Hall Martinez, 1999; Durham, 2000: 829)

While the Women's Caucus was born out of the idea that gender concerns were not adequately represented by members of the existing Coalition, the Coalition did support the organisation and lobbying efforts of the Women's Caucus, made it a member of its Steering Committee, and eventually adopted as one of its Basic Principles that the ICC 'should ensure that all aspects of its work take gender concerns into account.' (CICC, 1998)

The Women's Caucus could accurately claim to be representative of a global audience, as shown by a geographic breakdown of the women's organisations accredited to the Rome Conference (figure 1). This figure gives only a very partial picture of the make-up of the Women's Caucus, for two reasons. Firstly, it is only a snap-shot of organisations present at Rome, not showing organisations who were active before and after Rome, or only at the domestic level. Secondly, the Women's Caucus was a network of individuals and organisations - one of its most active members, Rhonda Copelon, for instance, was not affiliated to any NGO - and this figure only shows the latter. Nevertheless, it shows that women's groups from every region were represented, with the exception of North Africa and the Middle East. The lack of representation from this region, while unfortunate, is hardly surprising. In many of the countries in this region, there is not enough political space for civil society groups to operate freely, and the situation for progressive women's organisations is even bleaker.

The Women's Caucus was highly visible in Rome: it had between 12 and 15 people at Rome at all times. (Facio 1998: 3-4). The delegation, moreover, included both women from conflict areas and experts on the 'hard-core legal stuff' (Interview Hall Martinez). While the former could speak with moral authority about violations of women's rights, the latter could invoke emerging precedents in national and international law. The Women's Caucus was also able, due to its large numbers and energy but also its natural advantage in often—but by no means inevitably!—finding allies in female state delegates, to get many states on its side. One member of the Caucus mentions Australia, Bosnia, Canada, Costa Rica, Mexico, the Netherlands, European countries generally, South Africa for ten Southern African countries, and Sweden among the countries the Caucus had very good relations with. (Interview Hall Martinez). This list is particularly formidable because it includes the two countries chairing the negotiations (first the Netherlands and later Canada), two other countries that chaired working groups on different parts of the Statute (South Africa and Sweden), and the country chairing the special negotiations on gender issues, Australia. ('List of Contributors', 1999) One person from the Women's Caucus (the

'snake', see below) became a member of the Canadian state delegation, another went on the delegation of Costa Rica. (Facio, 1998, 14) All this suggests that there was a strong overlap in values and aspirations between the Women's Caucus and the so-called Like-Minded Group of states which drove the negotiations.

'Family' groups

While abortion is the primary focus of the pro-family movement, some of the groups it comprises also campaign against euthanasia, contraception and cloning, promote what they call a Christian approach to politics, encourage women as home-makers, advocate for marriage and against co-habitation and homosexual and transsexual lifestyles, and favour the prohibition of prostitution and pornography. (See websites REAL Women of Canada; Catholic Family and Human Rights Institute; Campaign Life Coalition; Human Life International.) In the latter two areas, their aims are by no means diametrically opposed to all parts of the women's movement. (See Sen, 2003, 138-140; 145 on divisions within the women's movement over the sex industry)

At least one pro-family group, the Catholic Family and Human Rights Institute, has a permanent office at the UN in New York, and keeps a close eye on all UN processes that touch on its concerns. Its aims include 'act[ing] as a liaison and network referral service on behalf of similar organizations worldwide.' (C-FAM website) In November 1997, this group published an appeal by the Vatican for stronger involvement of pro-family NGOs in UN Conferences. A month later, it warned that 'the strong presence of many feminist NGOs in the preparation for the upcoming ICC conference' should be of concern to pro-family activists. (C-FAM, 1997a; 1997b) The pro-family groups came to the scene even later than the Women's Caucus. They came not just with an anti-abortion agenda, but also with concerns about 'forced social change by feminist, homosexual and other radical groups' (Campaign Life Coalition quoted in 'ICC: Promise of Justice or Threat of Tyranny?', 1998). While they came to the negotiations in order to oppose what they saw as dangerous proposals by the Women's Caucus, they did not so much strive for a Statute that would reflect their concerns, as oppose the agreement of a Statute and establishment of a Court generally, as 'many pro-lifers also see the court as a crucial step in the abandonment of national sovereignty, and the establishment of a tyrannical world government.' ('ICC: Promise of Justice or Threat of Tyranny?', 1998)

It is difficult to establish exactly how many pro-family groups attended the Rome Conference, because of the peculiar accreditation procedure for this conference. At the request of the legal office of the United Nations, the coordinator of the NGO Coalition for an International Criminal Court himself vetted groups for accreditation, a unique form of self-regulation not attempted before at international conferences (Pace 1999: 209). According to the Coordinator, he 'tried to treat groups that were coming to undermine the process on an equal footing with others. I only turned down one or two government-organised NGOs' (Interview Pace). However, it was also made possible for groups who did not wish to go through this procedure to apply directly to the UN official in charge of organising the conference, Roy Lee: 'a few came in directly through Roy Lee, sixteen or so were added to the list in that way'. (Interview Pace)

The tolerance of the NGO Coalition for an ICC for a wide range of views among its members went beyond accreditation: it allowed the pro-family groups to participate in

its meetings and make use of its facilities unless it became clear that they were hostile to the idea of a just, effective and independent court, in which case it would 'try to have such groups leave through the back door.' (Interview Pace)

At least two pro-family groups, REAL Women of Canada and the International Right to Life Federation, were accredited through the CICC. (United Nations, 1998). Others may have been accredited directly through the UN's legal office. Finally, particularly because of the special privileges accorded to pro-family groups through their close links with the Vatican (see below), it is also possible that there were groups present and lobbying who were not properly accredited. Either way, it is clear that at least two more groups were at Rome, the Campaign Life Coalition from Canada, and the Catholic Family and Human Rights Institute. (Evans, 1998; C-FAM, 1998a) According to one participant, Human Life International was also there, which seems likely as it is the largest international pro-family organisation. (Interview Hall Martinez; HLI website)

Although this may not be an entirely exhaustive list of the pro-family groups represented, two things stand out immediately in the comparison with the women's groups: there were far fewer of them, and they only appeared to come from two countries: Canada and the United States. Although the views of the pro-family contingent may be shared by many worldwide, the groups actually at the ICC negotiations were very far from being globally representative in the same way the Women's Caucus was. As the Canadian pro-family publication LifeSite Daily News acknowledges: 'During the conference, the Women's Caucus outnumbered the pro-life/family contingent and were well-prepared and effective in their lobbying of the normally pro-family African and South American delegates ... The small band of pro-family lobbyists ... was prevented from achieving even more because of a crucial absence of any Spanish-speaking members and having only two French-speaking [presumably Canadian] members' (Lifesite Report, 1998)

While tolerated by the Coalition, the pro-family groups were not exactly welcomed. Most NGOs and many state delegates greeted them with irritation and hostility. The Australian delegate who chaired negotiations on gender issues, for instance, called their lobbying an 'unfortunate departure from the generally constructive role played by NGOs throughout the Conference.' (Steains, 1999: 368)

However, they also had some very strong state allies, particularly in the Vatican and to a lesser extent other Catholic and Arab countries. (Bedont and Hall Martinez, 1999; C-FAM, 1998c) Their links with the Vatican gave them a privileged position: they were given their own office in the building of Food and Agricultural Organisation in Rome, where the negotiations took place, while all other NGOs had to share one room, and very few state delegations had offices. (Interviews Pace and Hall Martinez) According to one source, moreover, it was rumoured that the Pope personally placed phone calls to leaders of Latin-American countries on the issue of forced pregnancy. (Interview Hall Martinez)

Relations between the two movements

Relations between representatives of the women's groups and the pro-family groups were an exception to the general spirit of camaraderie among civil society delegates to the Rome conference. They can be described as hostile, even vitriolic. Members of the

Women's Caucus have described the involvement of the opposition as an 'intense and sustained attack by an alliance of religious fundamentalists and conservative organisations' (Oosterveld, 1999, 39), 'intent on undermining the Court's ability to appropriately address sexual and gender crimes', by making 'misleading linkages' (Bedont and Hall Martinez, 1999, 67).

The pro-family groups usually referred to the opposition simply as 'feminists' or 'radical feminists' (probably a swearword in their circles), but occasionally they became more venomous: one article for instance claimed that a Canadian Women's Caucus member was being referred to as 'the snake' behind her back (REAL Women, 1998b), while another referred to the women's groups as the 'anti-life, anti-family movement'. ('ICC: Promise of Justice or Threat of Tyranny?').

Both sides accused the other of having privileged access to certain state delegates. The women's movement complained about the close links of the pro-family groups with the Vatican, and in particular that, as described above, the pro-family groups were given their own office. The pro-family groups complained that two members of the Women's Caucus had been made members of the official delegations of Canada and Costa Rica, and more particularly that the Women's Caucus had been allowed to address a closed 'informal' meeting of thirty states at the Canadian embassy, a grievance discussed in a number of pro-family publications. (Evans, 1998; REAL Women 1998b; 'Rome Conference Ends without Consensus', 1998) The implications of these links on both sides will be discussed in the conclusion.

A member of the Women's Caucus also made more damaging accusations that 'a bunch of them has UN accreditation, but their tactics are dirty. They will make hand-outs with no name of the group on it which is against the regulations' and 'they would for instance dump a pile of ... documents into the garbage'. She acknowledged however that this did not apply to all pro-family groups: 'other groups also disagreed with us, other Catholics, but they were tolerant, they played by the rules.' (Interview Hall Martinez) Again, the implications of such accusations will be discussed in the conclusion.

The issues

The original draft for the ICC, drawn up by the International Law Commission in 1994, paid no explicit attention to the gender dimensions of any of the areas of law it covered (United Nations, 1994). This reflected the existing state of humanitarian law and international criminal law, as codified in the The Hague and Geneva Conventions and the statutes of the ad hoc tribunals for Yugoslavia and Rwanda. The practices and jurisprudence of these tribunals between 1995 and 1998 were beginning to change this situation, however, and provided inspiration for the demands of the women's rights groups united in the Women's Caucus for Gender Justice. (Steains, 1999: 359)

Gender concerns related to many parts of the Statute. This section will focus on three of them: the definition of gender, references to the gender balance and gender-specific expertise of the judges and other staff of the Court, and inclusion of a sub-paragraph on gender-specific crimes, including forced pregnancy, in the definition of war crimes and crimes against humanity. Other concerns of the women's groups, including a reference to gender in a general non-discrimination clause, a gender dimension to the definition of slavery, the inclusion of persecution on the basis of gender as a

component of crimes against humanity, and protection for and gender-sensitive treatment of victims and witnesses, will not be dealt with here. All of these concerns, however, came to be reflected in the final statute in a way that either completely or partially satisfied the Women's Caucus. (Bedont and Hall Martinez, 1999; Oosterveld, 1999)

Use and definition of gender

The Women's Caucus wanted to integrate a gender perspective into the entire Statute, and specifically to use the term gender, for two reasons. Firstly, '(i)t is precisely because the vast majority of laws, legal instruments and institutions have been created without a gender perspective that the everyday violations of women's human rights are invisible to the law and the most atrocious violations have been rendered trivial.' Secondly, 'since the vast majority of those who commit the crimes or are responsible for them are men, one of the probable causes of these crimes may well be the social construction of the masculine gender and therefore one of the solutions may well lie in creating mechanisms that will help construct less violent men.' (Facio, 1997)

The women's groups involved in the ICC negotiations came primarily out of the movement to combat violence against women, and the issue of gender crimes was therefore their primary focus. However, they also had institutional concerns, such as having a 'gender balance' in the panel of judges, as well as gender expertise among the judges and in the prosecutorial office.

Pro-family groups objected to the use of the term 'gender' anywhere in the Statute. One group expressed fears that it might 'provide protection for "other genders" including homosexuals, lesbians, bisexuals, transgendered, etc.' (REAL Women of Canada, 1998b). Another group went even further, stating that use of the term gender 'could be interpreted as criminalizing any national laws or policies that favor heterosexual marriage over homosexual couplings, on the grounds that homosexuality is a recognized "gender" '. (C-FAM, 1998b)

The pro-family groups did not begin to challenge the term gender until the early weeks of the Rome conference, when many, especially less controversial, clauses of the Statute had already been decided upon. (Oosterveld, 1999, 39) Hence, the term has been retained in article 7 (persecution on the basis of gender as a crime against humanity), article 21 (no gender discrimination in the application of the Statute), article 42 (gender expertise in the prosecutor's office) and articles 54 and 68 (treatment and protection of victims and witnesses). In some instances, the pro-family groups succeeded in excising the g-word. The Statute now speaks of 'a fair representation of female and male judges' and 'the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.' (articles article 36.8 (a) iii 36.8 b, Rome Statute) While this really makes no difference to the substance of the first of these clauses, women's groups would argue that 'expertise on gender violence' is broader than 'expertise on violence against women', as it also encompasses violence targeted specifically against men, whether it be forced recruitment, execution or sexual violence. Even this was unacceptable to some delegates but at this point, the delegate from Burundi made an emotional appeal, describing the experiences of his own country, and insisting that special attention to women and children must not be abandoned.

After protracted negotiations, in which some delegates (and their civil society allies) insisted that the term gender be rejected altogether, while others (and the Women's Caucus) insisted that the term was in general use throughout United Nations documents, and generally understood, the following definition of gender was agreed: 'the term gender refers to the two sexes, male and female, within the context of society. The term gender does not indicate any meaning different from the above.' The Australian coordinator of these negotiations later wrote:

'While the Statute's definition of "gender" appears, on its face, to be rather unusual (with the tautological second part of the definition), it represents the culmination of hard-fought negotiations that managed to produce language acceptable to delegations on both sides of the debate. At the end of the day, it was the only definition of "gender" to which the Arab states and others were willing to agree. At the same time, the reference to "within the context of society" satisfied those delegations that wanted the definition to encapsulate the broader sociological aspects of the term, along the lines of earlier definitions.'

(Steains, 1999, 374-375)

Forced pregnancy and other gender crimes

Deciding which crimes should be subject to the Court's jurisdiction, and how they should be defined, was one of the core issues in the ICC negotiations. Early proposals relating to the definition of crimes made scant reference to rape as an 'outrage on personal dignity', and none to other gender-related crimes. This changed with a joint proposal in February 1997 by New Zealand and Switzerland to include rape directly as a war crime. This proposal was taken over almost verbatim from a paper by the International Committee of the Red Cross (ICRC, 1997), reflecting developments in the Yugoslavia tribunal, in particular. The Women's Caucus was just beginning to be formed at that time, and probably did not play much of a role. The United States, however, favoured a more restrictive definition of war crimes in general, and the whole text remained bracketed. At the same time, 'rape, other sexual abuse and enforced prostitution' were included, unbracketed, as a crime against humanity. (Hall, 1998: 127-8)

In a paper for the December 1997 PrepCom, the Women's Caucus first proposed a separate sub-paragraph on sexual and gender crimes in the definition of war crimes, which was to include 'rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other sexual or gender violence or abuse.' It recommended this extra paragraph, partially based on the prosecutorial practices of the Yugoslavia and Rwanda tribunals, because 'sexual and gender violence are severe and particular and their particularities should not be lost by mainstreaming. Where not explicit, they are too often ignored, even today' (Women's Caucus, 1997) The sub-paragraph adopted by this PrepCom, which was substantially more comprehensive than the earlier proposals, mirrors almost exactly the wording proposed by the Women's Caucus in their preparatory paper, and it can safely be assumed to have been proposed at their instigation. It was included in the draft text on war crimes for the Rome conference, without brackets, that is, reflecting widespread consensus among states, despite an objection from the Vatican to 'enforced pregnancy'. (Prepcom, 1997) In the next PrepCom, the Vatican sought to replace the term with the more restrictive 'forcible impregnation', the implication of which was that it was the impregnation

alone that was criminalised, not any attempt to coerce the woman to carry the baby to full term. (Steains, 1999: 364-366)

Pro-family groups joined the Vatican in voicing objections to the inclusion of forced pregnancy as a war crime, calling it a 'code word for criminalizing any denial of access to abortion'. (C-FAM, 1998*d*). To support this view, they cited a U.S. domestic case against the state of Utah, in which the American Civil Liberties Union had defined the term as '... forcing women to continue pregnancy against their will for the purpose of serving the state's declared interest in preserving unborn human life', i.e. to describe an anti-abortion law or policy. (REAL Women, 1998*a*). Although supporting the Vatican's 'interim maneuver', pro-family groups were hoping that 'the language will be dropped altogether, and UN veterans cite growing sentiment even among liberal delegations to do just that.' (C-FAM, 1998*a*).

This became the most contentious gender issue at Rome, with opponents, including the Vatican and some Catholic and Arab states arguing that making enforced pregnancy into a crime implied a state obligation to permit abortion. Proponents of the clause, including many western states, but also conflict states like Bosnia and Rwanda, and Muslim states such as Azerbaijan and Turkey, argued that it was meant to codify a terrible crime, such as witnessed in Bosnia, and had nothing to do with viewpoints on abortion. (Steains, 1999: 366) Bosnia issued a paper documenting the practice and calling for retention of enforced pregnancy as a separate crime in the Statute, and lobbied other Muslim countries on the issue. (Oosterveld, 1999, 39; 'National Abortion Laws', 1998)

After three weeks in Rome, an informal working group was formed, chaired by an Australian delegate, to bring the two positions on gender-related issues closer together and try to define forced pregnancy in a mutually satisfactory way. The definition that came out of these negotiations in the final week of the conference was '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.' The second sentence was clearly inserted to protect the anti-abortion laws of the objecting countries. (Steains, 1999: 366-8) The sub-paragraph was then included both in the war crimes section and in the crimes against humanity.

While the insertion of the clause on gender crimes into the treaty can be ascribed to the influence of the Women's Caucus, its preservation over strong opposition, against forced pregnancy in particular, probably owed more to a few crucial state representatives than to the Women's Caucus, although the Caucus's statement in Rome that 'this will not affect national abortion laws' ('National Abortion Laws', 1998), may have been helpful. The strong advocacy of Bosnia, which had the moral high ground on this issue, and the patient but tough negotiating by Australia kept the comprehensive clause on gender crimes in the treaty.

Conclusions

As a result of the compromises reached, the Women's Caucus and the pro-family groups could both claim victory. The definition of gender is described in one

publication as a compromise produced by ‘hard work from pro-lifers’, although ‘the phrase “within the context of society” worries some pro-lifers, who fear it will be used to get around the qualification, and to promote redefinitions of marriage and family.’ (Evans, 1998) A leading member of the Women’s Caucus, on the other hand, writes that the definition ‘is unfortunate, [but] having the term in a legal or “hard” international document as opposed to a policy or “soft” document ... is a gain for real justice.’ (Facio, 1998)

In the case of forced pregnancy, members of the Women’s Caucus celebrate the fact that the ‘Rome Statute is the first international treaty specifically listing the crime of forced pregnancy’ (Bedont and Hall Martinez, 1999); while a pro-family group points out that ‘virtually all the sting has been removed ... courtesy of strictly limited definitions.’ (C-FAM, 1998*d*) While both positions had gained something in the compromise, it is clear that the results were more disappointing for the pro-family groups. While publications by members of the Women’s Caucus bear titles such as ‘The Making of a Gender-Sensitive Court’ (Oosterveld, 1999) and ‘Ending Impunity for Gender Crimes’ (Bedont and Hall Martinez, 1999), the post-Rome commentaries by pro-family advocates are titled ‘The International Criminal Court – World Nightmare’ (REAL Women of Canada, 1998*a*) or ‘ICC: Promise of Justice or Threat of Tyranny’ (1998). The latter article states that ‘while the ICC could be a wonderful tool for building true justice and freedom everywhere, in the context in which the court has been established and will be used, we fear it will be an extremely powerful weapon in the hands of the international anti-life, anti-family movement.’

The pro-family groups’ main tactics had been to equate use of the term ‘gender’ with endorsement of homosexuality (an argument strengthened by the fact that ‘gender’ is difficult to translate into other languages, including Arabic), and use of ‘enforced pregnancy’ with support for the right to abortion. This probably had some impact in the last preparatory negotiations and early in Rome, but it was countered by the tactic developed by the Australian delegate of negotiating an agreed definition to both terms to allay fears of such interpretations. Once such definitions had been agreed, their role was pretty much played out, and although the Women’s Caucus might have preferred more progressive definitions, it can not be said that these groups had a noticeable influence on the wording of the Statute.

A few lessons can be drawn from this of episode of civil society involvement in international negotiations. First of all, there is a pervading sense in the women’s movement generally that those who work on gender concerns are necessarily disadvantaged and marginalised. UN High Commissioner for Human Rights Mary Robinson echoed this idea when she congratulated the Caucus for ‘overcoming intense opposition from many representatives’ in ensuring that gender violence was included in the Statute (Robinson, 2000). This sense of being the underdog, undoubtedly justified in many local, national and international settings, should not be assumed to be applicable to every situation, however.

The Women’s Caucus did not, in fact, meet with intense opposition from many representatives, it met with intense opposition from very few representatives. The Women’s Caucus may initially have had to overcome indifference and lack of understanding from many delegates, but it did not meet with widespread hostility. Moreover, the hostility did not come from the permanent members of the Security

Council, whose position on the ICC was considered crucial in the negotiations, but from the Vatican, a few Arab states, and in the case of forced pregnancy, some 'Catholic' states, with Ireland playing a particularly prominent role. (Bedont and Hall Martinez, 1999, 75; endnote 44, for a full list of states with objections to forced pregnancy) As discussed above, it had a powerful list of allies among state delegates, some of which, including Canada, the Netherlands and South Africa, were the main drivers of the negotiations. It also had the backing of the CICC, which worked closely with this 'like-minded' group of states. (Glasius, 2002, 152-153; Glasius, 2004)

Despite their close links with the Vatican, it was, in fact, the pro-family groups who were marginalised at this particular forum. The coordinator of the CICC speaks of 'the very large majority of advanced women's organisations and a minority of organisations absolutely devoted to preventing any international policy that would in any way endorse abortion' (Interview Pace). As demonstrated in the quote of the Australian delegate above, they were disliked not just by the NGOs, but generally by the 'likeminded' delegates in favour of a strong ICC, who realised that while these groups were at the negotiations to influence debate on gender issues, they did not favour the establishment of an ICC generally.

This article does not wish to suggest that these groups did not deserve to be marginalised, or that they should have been made more welcome by states or civil society actors. Since not only their narrow aims, but indeed their whole worldview, was diametrically opposed to that of most state and civil society delegates at the conference, that was not to be expected, and the author of this article is firmly with the majority on the substance of these issues. However, global civil society is not a harmonious entity with a single set of shared values. It is populated by actors with strongly held values, 'organising to influence their world' (see above), but these strongly held values are not all the same. They may diverge or even clash. Plurality and even discord are part and parcel of global civil society.

Therefore, if multilateral institutions like the United Nations are serious and sincere about being 'open to civil society', they should be open to all civil society representation, not just the kind of representation that is deemed desirable by most delegates. This is important for two reasons. Firstly, although civil society involvement is not a substitute for democracy (this will be elaborated in Glasius, forthcoming 2004), it is an important element of the legitimacy of multilateral institutions. In global decision-making, it is no longer enough that we are represented by our diplomats, appointed by our – in most cases elected – governments. As world citizens, we can now claim a right to participate either directly or through people we support and trust, by becoming active in an existing organisation or network, or forming one, and making our voices heard.

The United Nations, although more in some parts than in others, has in recent years explicitly embraced the notion that civil society participation is one of the elements of its legitimacy. It has modernised its accreditation system, and more recently the Secretary-General has invited a Panel of Eminent Persons to 'review past and current practices and recommend improvements for the future in order to make the interaction between civil society and the United Nations more meaningful.' (Secretary-General's Panel, website) If we believe that there is such a right to participate or interact, then excluding certain types of groups from participation would infringe on this right. If

women's groups have a right to be active at forums such as the ICC negotiations, and they have fought hard for that right, then so do pro-family groups.

Secondly, if one believes that multilateral institutions are, however much they may be in need of reform, still the best place to make international decisions, then it is encouraging, and to be encouraged, that groups who are in principle hostile to such institutions make a strategic decision to participate in multilateral forums and subject themselves to the procedures that prevail there. This, at the same time, should be the criteria for accreditation and participation: it does not matter that pro-family groups would prefer to see the United Nations abolished, or even that they are working actively towards that goal, as long as they play by the rules of the game.

Therefore, any accusations that any kind of group, liberal, conservative, secular religious, pro-life or pro-choice is not playing by the rules, such as the accusations of dumping documents in the rubbish levied against some pro-family groups in the ICC case, should be taken extremely seriously. Routine breaking of the rules could undermine the legitimacy of civil society participation as a whole. It might be advisable if, within its NGO liaison office, the United Nations would appoint an NGO ombudsman who would actually be present at all major conferences, who could deal with such complaints, and if necessary, withdraw accreditation.

While in the first two decades of United Nations lobbying, the women's movement found adversaries only among states, and could count on the solidarity, or at least neutrality, of fellow NGOs, the presence of pro-family groups at UN forums is now a reality that is not likely to go away. But it is not just a painful reality. The women's movement should recognise that these groups' right to participate in these forums is a logical corollary of their own right to do so. As long as pro-family groups play by the rules, activists in the women's movement should fight them not by putting their energy into vitriolic attacks, but simply by being better: being more present, more energetic, more global, more grassroots, more expert, and continue to solicit more support from mainstream NGOs. They did so at the ICC negotiations, winning a gender-sensitive Statute, and they can do it again.

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Panel on Civil Society



The Panel has concluded its work and launched its final report on 21 June 2004 at UN Headquarters in New York and in Geneva. The following links provide copies of the Report and press materials from the launch event.

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Secretary-General's Panel of Eminent Persons on Civil Society and UN Relationships

In his report to the 57th General Assembly ([A/57/387](#)), the Secretary-General highlighted the engagement of civil society as an aspect of the UN Reform process and announced that he would “assemble a group of eminent persons representing a variety of perspectives and experiences to review past and current practices and recommend improvements for the future in order to make the interaction between civil society and the United Nations more meaningful.” In February 2003 the Secretary-General appointed Mr. **Fernando Henrique Cardoso**, former President of Brazil, to chair a panel of individuals with backgrounds that span across governmental and non-governmental sectors: Ambassador Bagher Asadi (Iran), Dr. Manuel Castells (Spain), Ms. Birgitta Dahl (Sweden), Ms. Peggy Dulany (USA), Ambassador Andre Erdos (Hungary), Mr. Juan Mayr (Columbia), Ms. Malini Mehra (India), Mr. Kumi Naidoo (South Africa), Ms. Mary Racelis (the Philippines), Mr. Prakash Ratilal (Mozambique), and Ms. Aminata Traore (Mali). ([Bios](#))



The Panel's main task was to produce a set of practical recommendations for the Secretary-General on how the UN's relationship with civil society, as well as with private sector and parliaments, could be improved (see the [Terms of Reference](#)). At the first meeting in June 2003, the Panel agreed on a [Work Program](#) that emphasized an open, transparent and consultative process. The final report of the Panel was released as document [A/58/817](#) and launched on 21 June 2004 in New York and Geneva.

For further information contact civilsocietypanel@un.org

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Survey of Civil Society

The Survey is now closed. Panel Secretariat extends its THANKS to all those who responded. Those interested in the Survey can still [download](#) a copy. [Survey Report](#) -based on responses as of 1 Dec. 2003.

Other materials

- ▶ Mr. Cardoso's [Statement](#) on the UN Optical Disk System
- ▶ Mr. Cardoso's [keynote address](#) to the DPI-NGO Conference 8/9/2003.

▶ Background Papers

[Civil Society and Governance](#) (contextual paper by F. H. Cardoso)

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