A Fair Representation: Advocating for Women’s Rights in the International Criminal Court

Members of the Women’s Caucus for Gender Justice gathered at a hastily organized meeting in a cramped conference room in a building down the street from the UN Headquarters in New York. The tension in the room as women’s human rights advocates prepared to debate a proposal that two governments, Liechtenstein and Hungary, had put forth that day regarding voting procedures for election of judges to the International Criminal Court (ICC) intensified the mugginess of the July heat. Diplomats from Liechtenstein and Hungary were trying to break an impasse during negotiations on the establishment of the Court between states that favored a quota system to ensure the election of women judges and States that favored open elections based on nominations of the “most qualified” candidates. Experience indicated that an open nominations process, with no provisions for gender balance, would favor male candidates who had comparatively more judicial experience as well as more access to the decision makers in the states that had joined the Court.

Pam Spees, Program Director of the Women’s Caucus, studied the Liechtenstein/Hungary proposal carefully in order to make a recommendation to the group. Spees, a journalist turned lawyer, was leading the group’s lobbying effort on the elections issue. After covering domestic violence stories during her years as a reporter for the Lake Charles American Press in her home state of Louisiana, Spees had chosen to study law “to get a grasp at how people were framing the legal issues in creative ways regarding violence against women.” Her interest in these issues led to her involvement in the Women’s Caucus as part of a legal clinic during her third year of law school at City University of New York (CUNY).

Spees was part of a talented team of international lawyers and activists, including Rhonda Copelon, who had been Spees’s law professor at CUNY and who had an international reputation for her work on several cutting edge human rights cases, Alda Facio, a legal analyst and feminist writer from Costa Rica, as well as Eleanor Conda of the Philippines and Vahida Nainar of India.

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That team had successfully navigated the Women’s Caucus through many strategic decisions regarding gender fairness in the development of this new international institution. The Women’s Caucus, a coalition representing more than 200 international women’s organizations, had become a significant player in every phase of the negotiations concerning the law and procedure of the Court and its reaction to this proposal could affect the Court’s very composition.

The leaders of the Women’s Caucus now had to consider whether the proposed voting procedures would be adequate to ensure “a fair representation” of women as judges, a principle that the Women’s Caucus had fought to establish in the ICC Statute, or whether structural inequities within political systems and the international diplomatic community that had favored men as nominees to every other body would make the fair representation provisions of the statute ring hollow.

Spees’s recommendation would not just be based on the desire to see women fairly represented in the robes of international justice. During the 1990s, the Women’s Caucus had witnessed the vital role that women judges had played in the development of international criminal jurisprudence, especially in cases of violence against women. A handful of women had served as judges on the two independent criminal tribunals created by the Security Council on the Former Yugoslavia and Rwanda. The purpose of the tribunals was to try those responsible for ordering and carrying out crimes, including administrative, military and political leaders who directed or encouraged massacres, torture and systematic sexual violence.

From 1991 to 1999, civil war raged in the region that was formerly Yugoslavia before it broke apart into several smaller States. Among the victims of the bloody Yugoslav war were an estimated 20,000 women and girls who suffered systematic rape and sexual slavery by armed groups on all sides. Stories appeared throughout the 1990s in the world media describing the personal horror suffered by women held as sexual slaves, raped daily and forced to watch helplessly as their mothers, daughters and friends were also raped by their captors. Similar stories of systematic rape emerged from the genocidal conflict in 1994 in Rwanda, in which between 500,000 and a million persons were killed by the Interahamwe—the infamous Hutu militia groups—and by soldiers in the Rwandan Armed Forces.

**The Akayesu Case: Genocide based on Sexual Violence**

One example of the impact a women judge had on the development of international law played out in a courtroom on October 23, 1997 in Arusha, Tanzania, site of the International Criminal Tribunal for Rwanda (ICTR). The public room in the courthouse was filled to capacity that morning. Judge Navanethem Pillay took her seat along with two fellow judges in the first trial chamber that was presiding over the trial against Jean-Paul Akayesu. As bourgmestre, or
mayor of the town of Taba, Akayesu oversaw the killing of more than 2,000 Tutsis by Hutu militias and government agents between April 7 and June 30, 1994. In this day of trial, witnesses were scheduled to testify about acts of sexual violence that took place during Akayesu’s reign of terror. The first witness, Witness JJ, prepared to take the stand.

Akayesu had been indicted on charges of genocide, direct and public incitement to commit genocide and several other crimes against humanity. Despite extensive reports of sexual violence in Rwanda, the prosecutors at first felt that they did not have enough evidence to support a charge against Akayesu based on rape. During the trial on the initial charges against Akayesu, one of the witnesses mentioned accounts of rape at the Taba cultural center. Judge Pillay, a South African who was the tribunal’s only female judge, drew out the details from the witness about how Akayesu encouraged sexual violence in the attacks against the Tutsi women in the community. Based on this evidence, the ICTR Prosecutor amended the indictment against Akayesu to add three new charges of sexual violence, including the charge of rape as an act of genocide. Several women’s human rights organizations, concerned over the historical exclusion of rape and other forms of sexual violence from war crimes prosecutions, had been instrumental in urging the Prosecutor to bring the additional charges against Akayesu.

The audience at the October hearing was hushed as Witness JJ told her story. She was driven from her home by her Hutu neighbors who attacked her and her family after a representative of the bourgmestre ordered all Tutsis out of the neighborhood. Witness JJ fled when saw her Tutsi neighbors killed. She sought refuge first in a nearby forest and then at the bureau communal, or town hall. There she found more than sixty others lying wounded after the Interahamwe had beaten them. Witness JJ testified that she and several others were so distraught that they actually appealed to Akayesu to be killed as the others had been. Akayesu responded to this plea by telling that there were no more bullets and that even if there were bullets they would not waste them on the refugees. Witness JJ testified that the Interahamwe had raped her and a group of young women in a nearby forest. The details of her story were graphic and horrible.

Judge Pillay listened to the testimony with her head bent, her hand on her forehead. Witness JJ testified that she and fifteen other girls and women were taken by force and raped again at the cultural center within the compound of the bureau communal. “We walked past Akayesu. He was in the courtyard in front of the bureau. He saw that the Interahamwes took us there.” Witness JJ testified that she could not count the total number of times she was raped. She said, “Each time you encountered attackers they would rape you,” in the forest, in the sorghum fields. One of the times she was taken to the cultural center to be raped, Witness JJ recalled
seeing Akayesu standing at the entrance of the cultural center and hearing him say loudly to the Interahamwe, “Never ask me again what a Tutsi woman tastes like.”

Judge Navanethem (Navi) Pillay had heard many stories from victims of violence during her thirty years as a human rights lawyer and a judge in South Africa. The first woman to start a law practice in her native province of Natal, South Africa, Pillay provided legal defense for anti-apartheid activists, for political prisoners at the infamous Robben Island Prison, and for women who fought back against their batterers. In 1971, Pillay successfully brought a *habeas corpus* application on behalf of her husband who was detained under South Africa’s Terrorism Act. The application was supported by affidavits of ten persons detained under the apartheid system who testified about the torture and ill treatment they had received in detention.

While her human rights practice had brought her unwelcome attention from the apartheid government that denied her a passport for many years, Pillay’s legal and personal credentials served her well after South Africa’s transition to a multicultural democracy. In 1995, Pillay, an ethnic Indian, became the first non-white woman to serve on the bench in South Africa, where she presided over criminal and civil cases. The UN General Assembly elected her later that year as a judge at the International Criminal Tribunal for Rwanda. Over the next eight years, Judge Pillay served as a judge in eight major ICTR trials.

On September 2, 1998, the ICTR came down with its judgment in the Akayesu case. Not only did it find Akayesu guilty of genocide—the first genocide conviction by an international court—but the genocide conviction against him was also based in part on the rape and other acts of sexual violence carried out under his control. The Akayesu decision was a critical legal advance. International law scholar Kelly Askin heralded the judgment as “the most important decision rendered thus far in the history of women’s jurisprudence,” and its jurisprudential reasoning has been the basis for several subsequent convictions in the Yugoslav and the Rwanda tribunals.

**War Crimes against Women**

For as long as human history, women and girls have been victimized during wartime through rape, sexual slavery, forced pregnancy and other forms of brutal gender-based violence. Women’s bodies were considered the “booty” of war—looted like personal property by the conquering armies. Yet concerns about violence against women were rarely given voice in the international negotiations concerning the conduct of war.

International law only marginally addressed war crimes against women. Provisions prohibiting rape and other forms of sexual violence were vague and were couched in language calling for the protection of “family honor.” The Hague Convention (1907), Article 46, mandated
respect for “family honour and rights,” which was commonly thought to include a prohibition against rape. At the end of World War II, the Allied Powers organized military tribunals to prosecute war crimes by the Nazis and the Japanese militaries. Despite widespread sexual violence in Europe, the Nuremberg prosecutions did not consider gender-based crimes. The Tokyo Tribunal did consider evidence of sexual violence carried out as part of the Japanese army’s invasion of Nanking. Although the evidence entered by the prosecution was very vague, the “Rape of Nanking” had already become part of the international lexicon. The judgment against General Iwane Matsui, leader of the Nanking invasion, established that “approximately 20,000 cases of rape occurred within the city during the first month of occupation.” Matsui was sentenced to be hanged.

After the experience of World War II, the Fourth Geneva Convention Relating to the Protection of Civilian Persons in Time of War (1949) was more specific in its definition of crimes of sexual violence: Article 27 stated that women were to be especially protected from any “attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.” Still, acts of sexual violence were not listed as grave breaches of the Geneva Conventions—crimes so significant that they concerned the international community as a whole—and the duty of States to investigate and prosecute such crimes remained vague. Women’s advocates argued that the characterization of sexual violence as a crime against honor diminished the significance of the physical and emotional harm sexual violence caused, and instead constructed a stereotype that focused on the shame of being raped.

The statutes of the tribunals on Former Yugoslavia and Rwanda, established in 1994, included the crime of rape as a crime against humanity but, again, failed to include sexual violence as a war crime, a grave breach of the Geneva Conventions or an act of genocide. The result was a continuation of historical legal classifications regarding sexual violence: rape was not deemed to be a violation of the laws of war, and crimes of sexual violence other than rape were not enumerated in the statutes of the tribunals.

Organizing to Promote Women’s Human Rights

During the same decade that these events were occurring, organizational developments of profound significance in the human rights movement were taking place on women’s rights issues. Advocates of women’s human rights from around the world, including Rhonda Copelon, Alda Facio, Eleanor Conda and their colleagues, sought out every opportunity to place violations against women squarely within the mainstream agenda of the international human rights movement. Because most violence against women takes place in the private sector, these violations had not previously been recognized as international human rights violations in the way
that state-sponsored violations, such as torture and disappearance, had been. Women’s groups organized internationally to change interpretations of international human rights law to include violations against women committed in the private as well as the public sphere.

The first major opportunity for women’s advocates to lobby for their expanded human rights positions was the 1993 World Conference on Human Rights that took place in Vienna, Austria. Under the slogan, “women’s rights are human rights,” these advocates created a forceful campaign to challenge prevailing human rights paradigms and to convince states attending the conference to integrate gender issues throughout the Vienna Declaration and Programme of Action. The Programme of Action was intended to serve as the authoritative statement of the international community’s long-term human rights objectives. Navi Pillay, then a human rights lawyer, attended the Vienna Conference and was impressed by the gains made by women’s advocates: “Women were able to convince the governments of the world that violence against women for instance was as much a public issue, a concern for the world community, as political torture.” Up until the Vienna Conference, said Pillay, the international community had considered violence against women as within the private, not the public, domain. “This is why our local police will not take a woman’s complaint seriously. When she complains of assault they would say to her oh, go and kiss and make up.”

After their victory in raising the significance of women’s human rights issues at the Vienna Conference, women’s human rights advocates focused their efforts on another international opportunity, the 1995 World Conference on Women in Beijing, to gain further international recognition for the human rights of women. More than 25,000 women’s activists attended the NGO conference in Huairou, a town near Beijing, and in one unified voice they called on international policy makers to recognize that violence against women was a human rights violation. Largely as a result of this international show of support, the Beijing Platform for Action contained strong language prohibiting violence against women. One of the most significant accomplishments of women’s advocates was the inclusion in the Platform of Action of language that identified rape as a war crime and an act of genocide. The Platform for Action also encouraged gender balance in the nomination and promotion of candidates for judicial positions and other staff positions in international bodies including war crimes tribunals.

**Working to Codify Women’s Rights in the ICC Statute**

Though it was merely a statement of political intent, and not a legally binding instrument, the Beijing Platform of Action was an important reflection of the shift that had taken place in the international diplomatic community regarding crimes against women. To build on their successes, women’s advocates found another important arena for their work—the international
campaign to establish a permanent International Criminal Court (ICC). The proposed court would have jurisdiction over the most heinous international crimes: genocide, war crimes, and crimes against humanity. The leaders of the Women’s Caucus saw the ICC drafting process as a perfect opportunity to codify as international law the significant advances they had achieved by mainstreaming gender issues into an important new treaty. According to Pam Spees, the timing of the drafting process regarding the ICC was “fortuitous and critical.” Unlike the Vienna Declaration and the Beijing Platform for Action which are considered by States as “soft law”—law that declares the goals of the international community but does not bind States to specific actions—the proposed statute creating the International Criminal Court would be “hard law,” binding and enforceable on States that ratified it. States that ratified the proposed ICC Statute would have to bring their own national laws into conformity with the treaty, providing women’s advocates new legal tools to use in their home communities to investigate and prosecute gender-based violence.

Women’s organizations, having established a strong transnational advocacy network in Vienna and Beijing, mobilized their constituents once again, this time to put pressure on states to support the inclusion of gender issues in the ICC Statute. The treaty drafting process used to create the ICC was an entirely different type of forum than the massive policy conferences in Vienna and Beijing. Instead, the process involved lots of detailed legal drafting, and advocates often brought their influence to bear on the language of the statute through expert lobbying, not mass demonstrations of political power. The ICC proved to be a difficult process for this mass movement. According to Pam Spees, “the women in the movement were used to mass political events like Beijing or Vienna and, in the highly technical and legal arena of the ICC, we were feeling our way in the dark.”

The women’s advocates worked within a larger NGO coalition that had formed to promote the ICC, called the Coalition for an International Criminal Court (CICC). The CICC was a powerful force in the ICC negotiating process, ultimately representing more than 1000 organizations from every region. The CICC represented the voice of civil society in the ICC negotiations, and among its members were experts on every relevant area of law, representing every major legal system.

As part of the Coalition, Rhonda Copelon organized a handful of women’s rights activists to lobby on gender issues at the February 1997 session of the Preparatory Commission (PrepCom), or pre-conference, where States were working to draft the proposed statute to establish the ICC. Copelon, easily recognizable by her shock of prematurely gray hair, was a graduate of Yale Law School and an experienced human rights litigator who had been active with
women’s advocates both in Vienna and Beijing. Copelon had a lawyer’s understanding of the importance of integrating a gender perspective in the statutory language of the ICC. Shortly after the February PrepCom, Copelon mobilized a few international activists to do just that by founding the Women’s Caucus for Gender Justice in the ICC. The Women’s Caucus developed strategic advocacy positions on issues affecting women, intent on keeping women’s issues at the center of the negotiations regarding all aspects of the Court—substance, procedure and structure.

After the 1997 PrepCom, the Women’s Caucus increased its visibility at all the drafting sessions in the ICC negotiation process and expanded rapidly to include women’s human rights advocates with specific regional, legal and thematic expertise. By the time of the Rome Diplomatic Conference in July 1998, at which the ICC Statute was to be adopted, the Women’s Caucus had expanded its base of support to include approximately 200 women’s organizations from all geographic regions. Though few constituent organizations actually lobbied at diplomatic meetings, the Women’s Caucus generated critical lobbying efforts within country capitals, efforts that proved critical at key moments in the ICC campaign. The Women’s Caucus relied on web-based organizing to keep its constituents informed and up to date on the status of negotiations. The caucus’s website (www.iccwomen.org) was a major instrument of the campaign. In the period leading up to the 1998 Rome Conference, the Women’s Caucus used action alerts as well as direct personal contacts to call on its constituent groups to urge their governments to support gender issues in the debates.

The Rome Conference

One hundred and sixty states participated in the diplomatic conference to establish the International Criminal Court. The Conference took place over a period of five weeks in June and July 1998, in Rome. Hundreds of representatives of non-governmental organizations participated in the process, including Copelon, Facio and Conda as well as about twenty-five other members of the Women’s Caucus. The draft text submitted to the diplomatic conference was rife with competing options, including over 1400 brackets indicating disagreements on the text. The Women’s Caucus told its people to “lobby the brackets.” (Brackets are fragments of text placed in brackets to denote disagreement over language.

The Women’s Caucus had several objectives going into the Rome Conference. An overarching objective was the explicit inclusion of the term “gender” throughout the document. Women’s advocates felt strongly that the term gender was preferable to the term “sex” because it incorporated not only the biological differences between men and women but also the differences that arise from their socially constructed roles. The term “gender crimes” was also favored over
“sexual violence” because the term included crimes that were targeted at either sex because of their assigned gender roles.

Another objective for the Rome Conference was to gain international legal recognition of the effects of armed conflict on women, and to push for the inclusion of certain forms of gender-based violence as genocide, war crimes, and crimes against humanity. This objective was a response to earlier international treaties that were considered at best inadequate and at worst demeaning for women. The Women’s Caucus sought to de-link gender-based crimes from notions of honor, focusing on the rights of the individual woman and not just her position within her family or her community.

Finally, in order to ensure an institutional commitment to the equal rights of women, the Women’s Caucus demanded gender expertise on the new court as well as the equal representation of women as judges. Many in the international community saw equal representation of male and female judges on the court as a goal in and of itself. Women were drastically underrepresented in international courts at the time of the Rome Conference, with one woman judge on the International Court of Justice, one on the Yugoslav Tribunal, and three on the Rwanda Tribunal. Of 173 judges on twelve principal international and regional courts, only 26 were women, of whom ten were judges on the European Court of Human Rights in Strasbourg and five were judges of the European Court of Justice in Luxembourg (Linehan 2001, 1).

More than just appearance, however, was at stake. Recent history, including the role of Judge Pillay in encouraging hearings on rape in the Akayesu case, showed that women in decision-making positions were frequently more attuned to the need to investigate and prosecute gender-based crimes than were their male counterparts. Judge Pillay herself observed:

Who interprets the law is at least as important as who makes the law, if not more so…. I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.

Because of their effective lobbying and because of the universal horror at the accounts of systematic sexual violence against women and girls in Rwanda and former Yugoslavia, most state delegations attending the Rome Conference were initially supportive of giving increased prominence to issues affecting women within the statute they were drafting. Despite this support, the Women’s Caucus faced strong opposition to many of its goals in Rome. The opposition came primarily from delegations representing states where religious traditions supported discriminatory treatment of women, including the Vatican (which, under the designation “Holy See,” has status as an observer state at the UN), countries heavily influenced by the Vatican’s policies, and a
group of Islamic States. This bloc of opponents took action against several of the issues being promoted by the Women’s Caucus.

The debate regarding the term “gender” was central to these states’ concern about the women’s agenda; the opposition delegations strongly protested its use in the ICC Statute. Some Islamic states objected to the term because, they argued, it could be understood to include legal protection based on sexual orientation. After weeks of backroom discussions, the Guatemalan delegation, which was presenting the positions of the Vatican, formally proposed the deletion of the term “gender” wherever it appeared in the Statute. Several states supported the Guatemalan proposal. According to Pam Spees, some states supported the proposal “because their delegates were bona fide sexists, others were honestly confused by the term.”

The negotiations over the gender definition characterized the difficult struggle to incorporate key concepts relating to women’s issues in the ICC Statute and support for these concepts was tested time and again at the Rome Conference. The support that several states had expressed initially for the principles being pushed by the Women’s Caucus wavered in the face of the vocal opposition. Pam Spees noted that few of the state delegates participating in Rome had been in Beijing in 1995 and the majority of delegates therefore had not previously experienced the intensity of the Vatican’s negotiations on issues pertaining to gender. Spees believed that this inexperience “favored the Vatican’s efforts to undermine our credibility with regard to the broad range of issues we sought to codify in Rome.”

The context in which the negotiations took place made even key supporters of the ICC somewhat hesitant about the push to mainstream the concept of gender in the Statute. There were doubts by many throughout the five-week conference about whether the ICC Statute would be adopted at all, given the serious criticisms of the draft Statute by many major players, including the United States. In light of this uncertainty, several states and NGOs were concerned about pushing the women’s agenda too aggressively for fear of losing the support of any states for the statute as a whole, and thereby risking altogether the establishment of the Court.

Another factor that contributed to the intensity of the negotiations surrounding gender issues was the procedural commitment to consensus used at the Rome Conference. Because of the need to achieve consensus among states, negotiations could be driven to the lowest common denominator in order to accommodate the concerns of delegations that had strong reactions to particular issues. This process gave the vocal few significant leverage over the terms of the gender debate.

A final factor relevant to the negotiations, according to Spees, was the relatively small number of Women’s Caucus lobbyists physically present at the Rome Conference. While several
hundred women had been involved in lobbying governments in Beijing, at the Rome Conference there were no more than 20 to 25 women present at any given time. These advocates were outnumbered by “the ever-multiplying Vatican priests,” as well as several anti-feminist NGOs, making it difficult to shore up government support for the principles of the Women’s Caucus.

In spite of these difficulties the Women’s Caucus held firm to its positions on gender. According to Barbara Bedont and Katherine Hall Martinez, commentators on the Rome negotiations, few, if any, government delegations would have been willing to expend the political capital needed to fit for gender issues without the pressure exerted by the Women’s Caucus (1999, 69). “Indeed, even the few willing to do so would not have been successful without the pressure exerted by the Women’s Caucus members on governments in every region of the world.”

After long and difficult negotiations during the five weeks of the Rome Conference, including shuttle diplomacy by CICC representatives between the Vatican delegates and the Women’s Caucus, a compromise was achieved. All sides agreed to keep the word “gender” in the Statute but to add a definition of gender in Article 7(2) which stated: “it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” While this definition met the concerns of several delegations to exclude sexual orientation from the meaning of gender, the Women’s Caucus scored a partial victory by preserving the definition’s reference to the “context of society,” thus guaranteeing some recognition of the socially assigned differences between men and women. According to Spees, “Although this definition may be considered imperfect by some, having the term in a legal or ‘hard’ international document like the ICC statute as opposed to a policy or ‘soft’ document such as the Vienna, Cairo and Beijing Platforms, is a definite stride in the right direction toward real justice for women.”

The compromise on the definition of gender cleared the way for the other significant provisions in the ICC Statute concerning the rights of women and the legal characterization of gender-based crimes. The Rome Statute addressed the historic marginalization of crimes against women, for instance, in Articles 7 and 8, by including in the definitions of war crimes and crimes against humanity a list of gender-based crimes that specifically enumerated rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization. Under the war crimes definition, these enumerated crimes are followed by the trailer, “or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.” The inclusion of that trailer indicated that the enumerated gender-based crimes themselves were grave breaches of the Geneva Conventions, a designation never before acknowledged in an international treaty.
Another important achievement of the Women’s Caucus was the adoption of Article 36(8) of the Rome Statute that, in the election of judges, required States to take into account the need for a “fair representation of female and male judges” on the Court and the need for legal expertise on violence against women. While each of these requirements was weaker than the original positions being advocated by the Women’s Caucus—which called for “equal representation” rather than fair representation among judges and “gender expertise” among court personnel rather than expertise focused more narrowly on violence against women—the language adopted in the Rome Statute gave women a strong basis for seeking positions on the new Court.

**Negotiating Election Procedures to Ensure a Fair Representation of Women Judges**

The Women’s Caucus left the Rome Conference with a strong sense of accomplishment. The Rome Statute, adopted on July 18, 1998 by a vote of 120 States in favor and 7 abstentions, represented the most extensive codification of gender issues in any international treaty in history. “Gender,” pronounced Spees in an internet summary of the Rome Conference, “is woven throughout the statute and its integration is reflected in the substance, procedure as well as structure of the Court.” Still, Spees acknowledged, difficult negotiations lay ahead. In the time needed for the treaty to gather the necessary 60 ratifications that would bring the Court into existence, states resumed meeting in PrepCom sessions to determine the elements of the crimes in the Statute, as well as the rules and procedures of the Court. In the eyes of the Women’s Caucus, a key decision in those PrepComs was what voting procedures would be adopted by the states’ parties to the treaty to ensure that a “fair representation” of women were elected as judges of the International Criminal Court.

The Women’s Caucus set out to design a position on election procedures that aimed at, not just token, but equal representation of women judges on the ICC. There was unprecedented public interest in the elections to the ICC. Selections for other international judgeships had been remote from public scrutiny and critically flawed because of it. In the nominating procedures of many states, for instance, candidates were selected by a handful of high-level officials with almost no opportunity for public consultation. The lack of transparency characteristic of many national nominations processes too often led states to put forward under-qualified candidates who were selected based solely on personal or partisan considerations. At the international level, the credibility of the election process was diminished by the unseemly practice of vote trading, where states exchanged their votes with each other for posts in various UN bodies or even unrelated international institutions.

With the credibility of the Court at stake, the CICC and its constituent groups, including the Women’s Caucus, developed a coordinated international campaign demanding that the
nomination process be designed to be transparent and to promote independent and competent professionals. The nominations procedures designated in the Rome Statute itself required that all judges be nominated at the national level by using either the same procedure as the nominations for the highest judicial offices in the state, or the same procedure as the nominations to the International Court of Justice—the highest international court. The CICC and the Women’s Caucus pressed states to abide by these nominations standards. “We were all doing this for the first time,” noted Spees. “It had never been done before.” The Women’s Caucus expressed caution, however, that the experiential criteria for nominations not be made unnecessarily high, since such a threshold would result in the exclusion of women in societies where they had not had fair opportunities to practice law or serve as judges.

While most states acknowledged publicly the need to have women on the bench, there was no clear consensus regarding the best procedure to fulfill the requirements of Article 36(8) for “fair representation of female and male judges.” Two extreme positions framed the early discussions among states: one called for a quota system to ensure an equal number of women on the bench and the other—pushed by Canada and the United Kingdom—argued for a totally unrestricted process for nominations and election of judges.

There was a difference in opinion regarding quotas even in the NGO community. Spees thought quotas in parliamentary elections had not worked well and quotas were always set at about 30%. The Women’s Caucus wanted to pursue parity as the more sensible way and they wanted to have procedures in place that did not just leave this to chance.

Most states were genuinely confused about how to carry out coherently the Statute’s requirements of criminal and international law expertise, thematic legal expertise on women and children, fair representation of gender, geographic region and legal systems. The open elections positions of the UK and Canada were largely influenced by the fact that those states already knew who they wanted to nominate for the Court. In the case of the UK, a transparent and wide ranging nominations process, uncharacteristic of its usual selection process, had resulted in the nomination of the first openly gay judge as that state’s nominee. The open elections proponents argued that they wanted women on the court, but they wanted women with the “right experience” and not just candidates to fill the available quota spots. Due to these disparate views on the subject, states were hesitant to act, and no progress was made on voting procedures until the 10th and final PrepCom meeting in July 2002, before the Court was scheduled officially to come into existence.

At the final PrepCom, the representatives of Liechtenstein and Hungary made their proposal to break the deadlock on elections procedures by putting forward a compromise between
those governments wanting “free elections,” i.e. not mandates or restrictions, and those wanting quotas. The Liechtenstein/Hungary compromise would require States to vote for a minimum number, but not an equal number, of male and female candidates for the Court. Depending on how low the minimum was placed, the Court might still be lopsidedly male.

The Women’s Caucus needed to decide whether to hold firm on a demand for a quota establishing an equal number of seats on the Court for women judges or whether to support the compromise proposal for fear of losing even that electoral support for women candidates. The leaders of the Women’s Caucus were reminded of their difficult negotiations in Rome. ICC negotiators were now eager to cut a deal and finish the PrepCom meeting in a unified and efficient manner. Spees prepared to address the Women’s Caucus leadership.
A Fair Representation: Advocating for Women’s Rights in the International Criminal Court
(Epilogue)

No agreement was reached at the July 2002 PrepCom regarding the Liechtenstein/Hungary proposal for election rules, though the impasse was primarily due to the issue of fair regional representation and not fair gender representation. Negotiations continued throughout the summer and, finally, in September 2002, at the first meeting of the Assembly of States Parties to the ICC, delegates adopted a final resolution on election procedures.

The procedure, adapted from the Liechtenstein/Hungary proposal, required states to vote for:

- a minimum of 6 male and 6 female candidates,
- a minimum of 3 candidates from each region as defined by the UN system,
- a minimum of 9 candidates from List A (criminal law background); and
- a minimum of 5 candidates from List B (international law background).

It was agreed that the minimum voting requirements would be discontinued after four rounds of voting, if all judges had not yet been elected, and that no abstentions would be allowed. (Abstentions were not allowed so that states could not use abstentions as a means of circumventing the minimum voting requirements regarding gender and regional representation.) Moreover, the Rome Statute called for states to take into account the need for legal expertise on specific issues, especially concerning violence against women and children. While there was no minimum voting requirement concerning this legal expertise, candidates were required to list whether they had experience in these areas.

The nominations period for judicial candidates was opened on September 7, 2002 and ran until November 30, 2002. Of the first 9 nominations, only 1 was a woman. The Women’s Caucus began an intense campaign to ensure that states nominated an adequate number of women judges. They organized women in many countries to write letters and make calls to their national governments about the importance of nominating qualified women judges and demanding to know what their governments were doing to seek out qualified women judges.

Barbara A. Frey, Director of the Program for Human Rights, University of Minnesota, wrote this case for the Center on Women and Public Policy as part of its 2003 Case Writing Summer Institute. The Center on Women and Public Policy and the Otto Bremer Foundation provided supporting funds. © Barbara Frey 2004.
The Women’s Caucus rallying cry was, “WE NEED WOMEN ON THE WORLD’S FIRST PERMANENT CRIMINAL COURT AND WE NEED IT NOW.” The Women’s Caucus used its e-mail, phone calls and personal visits to many countries to raise this message to the forefront. All the work to gain fair elections rules might have been for naught if states did not nominate enough women as candidates for judges. Under the rules adopted, if any fewer than 9 women were nominated to the Court, the minimum voting requirements would be reduced as follows:

<table>
<thead>
<tr>
<th>Number of Candidates</th>
<th>Minimum Voting Requirement</th>
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<td>8</td>
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The work of the Women’s Caucus paid off. By October 26, 2002, there were 4 women nominated for the Court. By the end of the nominations period, November 30, 2002, 10 out of the 44 judicial nominations were women, from Brazil, Costa Rica, Ghana, Hungary, Ireland, Latvia, Mali, Poland, South Africa, and Switzerland.

In large part, because of the minimum voting requirements in the procedure, 6 out of 7 judges elected on the first ballot at the February 3, 2003 Assembly of States Parties were women, including Judge Navi Pillay. In March 2003, 18 individuals were sworn in as the first judges of the International Criminal Court—7 were women—the highest percentage of women on any international or regional court.


A Fair Representation: Advocating for Women’s Rights in the International Criminal Court
(Teaching Note)

This case tracks the efforts over the past decade of women’s human rights advocates to promote broader international legal protections against serious gender-based crimes. The case focuses on the Women’s Caucus for Gender Justice, a transnational advocacy network that successfully lobbied the drafters of the statute creating the International Criminal Court to recognize rape, sexual slavery, forced pregnancy, and other gender-based violence as specific crimes within the Court’s jurisdiction. The Women’s Caucus also worked to promote equal representation of women as judges on the Court.

The following are some of the teaching objectives for the case:
1. to invite students to engage in strategic thinking about effective international legal and social activism by looking at the strategy and tactics of the international women’s movement;
2. to teach students the historical underpinnings of crimes of violence against women, including rape in wartime, and the lack of laws criminalizing that violence;
3. to walk students through some of the advances made in the past decade to advance the rights of women in international law;
4. to encourage students to consider the role of special interests in the development of international norms; and
5. to engage students in considering whether and how rules should be established to ensure the fair representation of women or other minority groups in political and judicial bodies.

I would suggest the following questions for teachers using the case:
1. Why were crimes against women not recognized as war crimes until the ad hoc tribunals on Rwanda and Former Yugoslavia in the 1990s?
2. What were the social and political factors underlying the rise in the women’s human rights movement in the 1990s?

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3. What significant gains did women achieve at the Vienna conference in 1993 and the Beijing conference in 1995? Were the instruments adopted at those conferences legally binding?

4. Who were the key actors in the Women’s Caucus for Gender Justice? What do you think were the strengths and weaknesses of the Women’s Caucus? How did the Women’s Caucus relate to other human rights organizations?

5. Why did the Women’s Caucus choose the ICC negotiations as the focus of their activities? Why were they interested in creating “hard law” regarding gender and gender-based crimes?

6. Why was the Women’s Caucus so adamant about the use of the term “gender” instead of the term “sex” in the ICC? Who were their opponents in the debate on “gender” and what were their arguments? How did the human rights community react to the debate on “gender”?

7. Why was the Women’s Caucus so convinced of the need for women judges on the ICC? How would the international community react if the ICC had no women judges?

8. How would you interpret the requirement that the Court have “a fair representation of female and male judges?” What were the political and social obstacles to getting a fair representation?

9. Was a quota procedure for electing judges needed to ensure a fair representation of female and male judges or should the Women’s Caucus just focused on the national level to promote female nominees?

10. What is the position of the United States Government on the International Criminal Court?

Consider the arguments for quotas:

- States will have an incentive to nominate female candidates because it will increase their likelihood of having a person from their country on the Court;
- If no quota procedure exists, based on past experience, states will not nominate women because their national procedures for selecting judges favor men;
- Women have suffered past discrimination in being selected to international diplomatic and judicial appointments that justifies the use of positive discrimination in this case;
- Recent history has shown that women judges have played a critical role in addressing crimes against women—this emphasis on criminal accountability should be a priority of the Court.

Here are some arguments against quotas:

- The integrity of the Court is paramount; the quality of judges may suffer by having quotas for women because there were not as many women with the requisite credentials as men;
- A quota procedure is discriminatory;
- Male judges could be sensitive to crimes against women.