Minna Schrag presented in the high profile cases that are expected to be before the court. It would have been far more effective, although more expensive, to provide for five judges in each trial chamber, and require agreement of at least four of the five judges for conviction.

In defining criminal responsibility, the Rome conference failed to provide criminal responsibility for inciting others to commit crimes against humanity and war crimes, in effect shielding disseminators of violence-inspiring propaganda from prosecution. Since those responsible for such incitement may truly be among the most culpable, for example for persuading neighbors to commit terrible crimes against one another, this omission is a significant limitation on the court's ability to address the most significant crimes.

Despite these, and other, failings, the ICC Statute is a remarkable accomplishment.

34. Consistent with the terms of the Genocide Convention, direct and public incitement to genocide is punishable by the ICC. Article 25(3)(e).

35. The Statutes of the Yugoslav and Rwanda Tribunals do provide for criminal responsibility for instigating others to commit the underlying crimes. See Yugoslav Tribunal Article 7(1). In the Nahimana case, the Rwanda Tribunal has charged persons responsible for radio broadcasting of exhortations to kill Tutsis with instigation to commit crimes against humanity. Prosecutor v. Nahimana, ICTR No. 96-11-T. For the ICC, any general incitement provision would have to be precisely framed to avoid infringing on rights to freedom of expression.

The Making of a Gender-Sensitive International Criminal Court

VALERIE OOSTERVELD*

The International Criminal Court (ICC) Statute incorporates significant advances in the prosecution of crimes of sexual violence, and crimes against women in armed conflict more generally. It was not easy to ensure that the Statute reflected the evolution of international humanitarian law with respect to women, but it was extremely important. Crimes committed against women in war are traditionally underprosecuted. The International Criminal Tribunals for the Former Yugoslavia and Rwanda are slowly reversing the historical invisibility, and their decisions provided the basis for ensuring that past mistakes were not repeated in the ICC Statute.

In 1994, the International Law Commission presented a final draft ICC Statute to the United Nations General Assembly. This draft was subsequently used as the basis for discussions and negotiations at the 1995 ad hoc committee meetings, and at the 1996, 1997 and 1998 Preparatory Committee (PrepCom) meetings. By the February 1997 PrepCom, nongovernmental organizations (NGOs) had become concerned that the draft Statute did

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A Gender-Sensitive Court

not adequately represent the evolution of international humanitarian law with respect to crimes of sexual violence, and that it was not gender-sensitive.

This group of NGOs began jointly lobbying as the "Women's Caucus for Gender Justice in the ICC". Sympathetic governments responded by introducing gender-sensitive articles into the draft Statute regarding the definition of crimes, protection of victims and witnesses and selection of judges and staff. This cooperative partnership between NGOs and like-minded States was successful, and by the time the draft Statute was sent to Rome, it contained important provisions relating to gender-sensitive justice, many without brackets, and received relatively few objections from unsympathetic States.

At the Diplomatic Conference in Rome, however, the majority of these provisions came under intense and sustained attack by an alliance of fundamentalist religious and conservative organizations, and those States that traditionally oppose the advancement of women's human rights. Originally, this alliance focused entirely on the definition of crimes, advocating that the crime of "forced pregnancy" be struck from the list of crimes. In response, the representatives of Bosnia and Herzegovina called for the retention of the crime in the Statute, arguing that it represented a distinct legal harm and, as such, it deserved to be named as a crime separate from rape and confinement. These arguments were supported by a number of States, and negotiations on how to resolve this issue lasted for the duration of the conference. Consensus was reached during the final week that the crime would be included in the Statute, defined as "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law".

Those who had opposed the inclusion of the crime of "forced pregnancy" broadened their scope during the first weeks of the conference to also oppose the inclusion of any reference to the word "gender" within the Statute. The word "gender" appeared throughout the draft Statute; many of these references had been previously agreed upon during the PrepComs. For example, at the March-April 1998 PrepCom, States had adopted an unbracketed provision directing the Court to apply and interpret all applicable law consistent with internationally-recognized human rights, which includes a prohibition on adverse distinction founded on gender. Elsewhere in the draft Statute, the Prosecutor was empowered to appoint advisers with legal expertise on sexual and gender violence. In another draft provision, victims and witnesses were to be provided with protection tailored to their gender, among other factors. The objection to the use of the word "gender" meant that some issues previously discussed and resolved at the 1995 Fourth World Conference on Women in Beijing – such as the acceptance of the use of the term "gender" throughout the United Nations system – had to be revisited and renegotiated. After intense negotiations, the term "gender" was retained in the Statute with the following defi-

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2. Informal "Discussion Paper, Delegation of Bosnia and Herzegovina", issued during the Rome conference, on file with the author.
3. Article 7(2)(f).
5. See Article 36(7) of UN Doc. A/AC.249/1998/CRP.10 (1 April 1998). This article was sent to Rome in brackets, as "[m]any delegations preferred this to be in the Rules of Procedure and Evidence".
6. See Article 61(2), UN Doc. A/AC.249/1998/CRP.12 (1 April 1998), on the Prosecutor's duty to take appropriate measures to protect witnesses, taking into account all relevant factors, including gender. This provision was bracketed. See also Article 61(3), which was unbracketed, stating that the Court shall take measures to ensure the safety, well-being, dignity and privacy of witnesses, including victims and witnesses of sexual and gender violence.