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# The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?

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Valerie Oosterveld\*

In 1998, the term “gender” was used and defined for the first time in an international criminal law treaty, the Rome Statute of the International Criminal Court (“ICC”).<sup>1</sup> Will the definition help or hinder the ICC in its work? More generally, does the definition advance, or narrow, the way international law understands “gender”? The use of the term “gender” in the Rome Statute is generally viewed as positive for international criminal law, as it mirrors the increasingly common use of the term in international human rights law over the past decade. However, opinions vary widely about the definition of “gender” adopted in the Rome Statute, and include some sharp criticism. Some describe it as “stunningly narrow,”<sup>2</sup> a “failure,”<sup>3</sup> “puzzling and

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1. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, 37 I.L.M. 999 (1998) [hereinafter ROME STATUTE]. The definition is found in article 7(3).

2. Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J.L. & JURIS. 281, 283 (2002). Stephanie Farrior has similarly described the definition as “limiting.” Stephanie Farrior, *The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration, or Omission?*, 12 COLUM. J. GENDER & L. 587, 589 (2003).

3. Brook Sari Moshan, *Women, War and Words: The Gender Component in the Permanent International Criminal Court’s Definition of Crimes Against Humanity*, 22 FORDHAM INT’L L.J. 154, 178 (1998).

bizarre,”<sup>4</sup> “peculiar,”<sup>5</sup> “restraining,”<sup>6</sup> and having “limited transformative edge.”<sup>7</sup> Others claim that it wrongfully “elides the notions of ‘gender’ and ‘sex,’”<sup>8</sup> making “gender” mean the same as biological “sex” and therefore not recognizing that “gender is a constructed and contingent set of assumptions about female and male roles.”<sup>9</sup> One United Nations Special Rapporteur describes the definition as “prevent[ing] approaches that rely on the social construction of gender.”<sup>10</sup> Some commentators view the definition more positively, characterizing it as “consistent with other, more clearly stated formulations” adopted within the United Nations.<sup>11</sup>

The strongly negative reactions are not surprising. Article 7(3) of the Rome Statute provides the following definition of “gender”: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”<sup>12</sup> This oddly worded and circular provision emerged from difficult and highly contentious negotiations in which the term “gender” served as a lightning rod for conservative concerns about sexuality, unlike other terms such as “political,” “racial,” “na-

4. Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 20 n.73 (Kelly D. Askin & Dorean M. Koenig eds., 2000). Askin notes that, at a roundtable discussion, Professor Theo van Boven described the definition as “the most puzzling and bizarre language ever included in an international treaty.”

5. *Id.* at 20; see also Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 236 (2000) (describing the definition as “peculiar and circular,” albeit from a more positive point of view).

6. Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 340 (2002).

7. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 335 (2000).

8. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 394 (1999) [hereinafter Charlesworth, *Feminist Methods*]. See also Ruth B. Phillips, *Too Close to Home?: International Criminal Law, War Crimes and Family Violence*, 24 T. JEFFERSON L. REV. 229, 233 n.14 (2002).

9. Charlesworth, *Feminist Methods*, *supra* note 8, at 394.

10. *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes, and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2000/45, Violence Against Women Perpetrated and/or Condoned by the State During Times of Armed Conflict (1997–2000)*, U.N. ESCOR, Comm’n on Hum. Rts., 57th Sess., Agenda Item 12(a), ¶ 19, U.N. Doc. E/CN.4/2001/73 (2001) [hereinafter *Report of the Special Rapporteur on Violence Against Women*].

11. *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, Update to the Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. ESCOR, Comm’n on Hum. Rts., Sub-Comm’n on the Promotion and Protection of Hum. Rts., 52d Sess., Agenda Item 6, ¶ 26, U.N. DOC. E/CN.4/sub.2/2000/21(2000) [hereinafter *Report of the Special Rapporteur on Contemporary Forms of Slavery*]. See also Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65 (1999), available at [http://www.crlp.org/pub\\_art\\_icc.html](http://www.crlp.org/pub_art_icc.html) (last visited Feb. 16, 2005); Barbara Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 183, 187 (Flavia Lattanzi & William A. Schabas eds., 1999) [hereinafter *Bedont, Gender-Specific Provisions*]; Copelon, *supra* note 5, at 237; Machteld Boot, *III. Paragraph 3: Definition of Gender*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 171, 172 (Otto Triffterer ed., 1999).

12. ROME STATUTE, *supra* note 1, art. 7(3).

tional,” “ethnic,” “cultural,” “religious,” “age,” “wealth,” and “birth” included in the broad lists of prohibited grounds of persecution and discrimination.<sup>13</sup> The definition sharply reflected the use of “constructive ambiguity” by the negotiators.<sup>14</sup> The critics are concerned because the word “gender” occurs nine times in the Rome Statute, in key articles on crimes against humanity,<sup>15</sup> applicable law,<sup>16</sup> the office of the Prosecutor,<sup>17</sup> the duties and powers of the Prosecutor with respect to investigations,<sup>18</sup> and the protection of victims and witnesses as well as their participation in proceedings.<sup>19</sup> How the ICC interprets “gender” will have a direct impact on the kinds of cases of persecution that the Court may be able to prosecute, as well as on the law applied, on how the Prosecutor undertakes his/her duties, and on the protection and participation of victims and witnesses. It could also profoundly affect the legal construction of “gender” under international law.

This Article begins with an examination of the negotiation process that led to the adoption of the definition of “gender” in the Rome Statute, in which the author took an active part. Part II then surveys definitions of “gender” used by the United Nations in the areas of international human rights and refugee law. Part III examines four concerns raised by commentators regarding the Rome Statute’s definition of “gender.” The first concern is that the direct linkage in the definition of the term “gender” with the term “sex” seems to conflate the two. Some commentators fear that the ICC definition equates “gender” with biologically determined “sex,” thereby eliminating the understanding that “gender” is a social construct. The second concern is that the phrase “within the context of society” diverges from references to socially constructed roles found in United Nations documents. The U.N. definitions are more detailed and tend to interpret social construction broadly to include an examination of attitudes, values, responsibilities, opportunities, and relationships between and among women and men, while acknowledging the influence of culture, political and economic context, class, race, ethnicity, poverty level, sexual orientation, and age. The ICC’s stark reference to “context of society” therefore raises the question whether the ICC has a much more limited understanding of social construction. The third concern is that the negotiating history and the statement “the term ‘gender’ does not indicate any meaning different from the above” could be interpreted to exclude sexual orientation from falling within the definition of “gender.” Such a construction would thereby eliminate persecution conducted on the basis of sexual orientation as a crime against humanity, per-

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13. *Id.* arts. 7(1)(h), 21(3).

14. “Constructive ambiguity” is a term used in diplomacy to refer to the use of ambiguous words that give comfort to those on different sides of a debate, thereby promoting agreement.

15. ROME STATUTE, *supra* note 1, arts. 7(1)(h), 7(3).

16. *Id.* art. 21(3).

17. *Id.* art. 42(9).

18. *Id.* art. 54(1)(b).

19. *Id.* art. 68(1).

mitting discrimination on the basis of sexual orientation in the ICC's interpretation and application of law, and excluding the ICC from considering sexual orientation when addressing the needs of victims and witnesses. The final concern stems from the fact that "gender" is the only term defined in the context of the crime against humanity of persecution. Some commentators thus fear that the singling out of "gender" for definition, and the lack of clarity in that definition, will leave the ICC in a weaker position to prosecute and convict gender-based persecution as compared to other forms of persecution.

This Article concludes in Part IV by arguing that the critics are overly harsh. Admittedly, the drafters missed a key opportunity to adopt a clear and visionary approach to "gender" in the text of the Rome Statute. However, the critics have overlooked the fact that there were few better alternatives likely to emerge from the negotiations. More importantly, they have not recognized that by resorting to the use of "constructive ambiguity," the drafters did leave open opportunities for a positive and precedent-setting approach—an opportunity that should be seized upon by lawyers and the ICC itself. Those interpreting "gender" should be guided by key signals in the Rome Statute and international law indicating that "gender" is to be understood broadly as a multifaceted, complex, and socially constructed category. In addition, those interpreting "gender" should refer to international legal theory on gender-sensitivity. Given that there has been relatively little focus to date on the content of the term "gender" in international legal theory, increased theorization can also play a central role in ensuring productive and sensitive interpretations of the term by the ICC. With interpretive assistance from the Rome Statute, United Nations practice, international law, and international legal theory, the definition of "gender" included in the Rome Statute will help rather than hinder the ICC in its work, and consequently will assist in advancing the understanding of "gender" in international law.

#### I. INCLUDING "GENDER" IN THE ROME STATUTE: THE NEGOTIATION HISTORY

Unlike the final version of the 1998 Rome Statute, which refers to "gender" nine times, the 1994 draft Statute for an International Criminal Court by the International Law Commission ("ILC") did not contain the word "gender."<sup>20</sup> The final text was the result of a strong lobbying effort by nongovernmental organizations<sup>21</sup> and of recognition among many delegations that the Statute needed to be gender-sensitive if the ICC was to comprehen-

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20. See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, art. 20, at 70–73, U.N. Doc. A/49/10 (1994). See also ROME STATUTE, *supra* note 1, arts. 7(1)(b), 7(3), 21, 42(9), 54(1)(b), 68(1).

21. Especially the coalition of nongovernmental organizations known as the Women's Caucus for Gender Justice.

sively address genocide, crimes against humanity, and war crimes. Use of the term “gender” was first proposed in 1996 when several states recommended adding a reference to gender balance to the ILC’s article on the qualifications and election of judges.<sup>22</sup> In February 1997, the term “gender” was included in brackets<sup>23</sup> in the crime against humanity of persecution as a specifically prohibited ground of persecution,<sup>24</sup> echoing recent advances in international refugee law.<sup>25</sup> Five more references to “gender” were added to the draft ICC Statute in the August 1997 Preparatory Committee negotiations. Two of these references were included in a provision calling on the Prosecutor to take appropriate measures to ensure the effective investigation and prosecution of crimes, while also respecting, *inter alia*, the gender of victims and witnesses and taking into account whether the crime involved sexual or gender violence.<sup>26</sup> Similar references were added into a provision stating that the Prosecutor must take appropriate measures to protect victims and witnesses, “having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular whether the crime involves sexual or gender violence.”<sup>27</sup> Another provision stated that the “Court shall take such measures as are necessary to ensure the safety, physical and psychological well-

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22. *Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals)*, U.N. GAOR, 51st Sess., Supp. No. 22, at 11, 14, U.N. Doc. A/51/22 (1996). See also *Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. I (Proceedings of the Preparatory Committee During March-April and August 1996)*, U.N. GAOR, 51st Sess., Supp. No. 22, at 11, U.N. Doc. A/51/22 (1996).

23. In international negotiations, the use of square brackets indicates text that has not been accepted by consensus.

24. *Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 February 1997*, U.N. GAOR, Preparatory Comm. on the Establishment of an Int’l Crim. Court, 51st mtg., Annex 1, at 4, 5 n.7, U.N. Doc. A/AC.249/1997/L.5 (1997). “Gender” was bracketed as part of the debate on whether to include an illustrative (open-ended) list of prohibited grounds for persecution, or an exhaustive (closed) list. Some countries supported a short illustrative list without “gender” because additional grounds could be “read in” by the ICC’s judges on a case-by-case basis. Certain other countries argued for an exhaustive list taken from the Charters and Statutes of previous international criminal tribunals (which did not include “gender”). See Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 53–54 (1999); e-mail from Darryl Robinson, Legal Officer, Foreign Affairs Canada, to Valerie Oosterveld, Legal Officer, Foreign Affairs Canada (Feb. 18, 2004) (on file with author).

25. The United Nations High Commission for Refugees EXCOM had issued Conclusion No. 39 (XXXVI), which recognized that states, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of article 1(a)(2) of the Refugee Convention. *Conclusion No. 39 (XXXVI) on Refugee Women and International Protection*, Executive Comm. of the United Nations High Comm’n for Refugees, ¶¶ (b), (k), U.N. Doc. HRC/IP/2 (1985). In addition, the UNHCR had issued *Guidelines on the Protection of Refugee Women*, Office of the U.N. High Comm’n for Refugees, U.N. Doc. EC/SCP/67 (1991) and U.N. HIGH COMM’N FOR REFUGEES, *SEXUAL VIOLENCE AGAINST REFUGEES: GUIDELINES ON PREVENTION AND RESPONSE* (1995). Several countries had also recognized, through policy or legislation, that gender-based persecution is a valid ground for claiming refugee status. See THOMAS SPIJKERBOER, *GENDER AND REFUGEE STATUS* 3 (2000).

26. *Decisions Taken by the Preparatory Committee at Its Session Held from 4 to 15 August 1997*, U.N. GAOR, Preparatory Comm. on the Establishment of an Int’l Crim. Court, Annex 2, at 16, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997).

27. *Id.* art. 43(2).

being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence.”<sup>28</sup> This last provision gained wide acceptance and was not bracketed, while the previous provisions were bracketed because delegates debated whether the text should make separate mention of the Prosecutor’s role in protecting victims and witnesses.<sup>29</sup>

At the December 1997 negotiations, a proposal was made to include a provision stating that the ICC’s application and interpretation of general sources of law must be consistent with, among other things, norms of nondiscrimination based on gender.<sup>30</sup> Support for this idea grew, and the March 1998 draft incorporated the idea in an unbracketed article.<sup>31</sup> During the March 1998 negotiations, the Preparatory Committee also adopted a provision, ultimately bracketed, compelling the Prosecutor to appoint advisers with legal expertise on sexual and gender violence.<sup>32</sup> The issue of the qualifications of judges originally raised in 1996 was revisited,<sup>33</sup> and draft text was included in brackets stating that those selecting the ICC’s judges should consider in their selection gender balance and the need for “expertise on issues related to sexual and gender violence, violence against children and other similar matters.”<sup>34</sup> The delegates also agreed that the staff of the Court should be selected with regard to similar criteria.<sup>35</sup>

Going into the Rome Diplomatic Conference, there appeared to be partial agreement on the use of the term “gender” in the Statute, with two provisions containing the term accepted by consensus and a number of others bracketed and therefore open to debate.<sup>36</sup> Negotiations at the Diplomatic Conference

28. *Id.* art. 43(3).

29. At this time, no state questioned (at least publicly) the use of the term “gender” in these provisions.

30. *Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997*, U.N. GAOR, Preparatory Comm. on the Establishment of an Int’l Crim. Court, Annex 2, at 14 n.11, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997).

31. *Report of the Preparatory Committee on the Establishment of an International Criminal Court (Draft Statute and Draft Final Act)*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Rome, Italy, June 15–17, 1998, at art. 20(3), U.N. Doc. A/CONF.183/2/Add.1 (1998) [hereinafter *1998 Draft Statute Report of the Preparatory Committee*]. However, certain conservative states asked, in corridor discussions, why this article did not refer to non-discrimination on the basis of sex.

32. *Id.* art. 43(9).

33. *Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals)*, *supra* note 22.

34. *1998 Draft Statute Report of the Preparatory Committee*, *supra* note 31, art. 43(9). For a description of opposition to these references, see Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 357, 377–80 (Roy S. Lee ed., 1999).

35. *1998 Draft Statute Report of the Preparatory Committee*, *supra* note 31, art. 45(2). This was done through a cross reference to article 37(8).

36. *Id.* The provisions accepted by consensus were articles 20(3) on applicable law and 68(3) on measures the Court shall take with respect to victims. The bracketed provisions were the Crimes Against Humanity article, article 37(8)(e) on gender balance among judges and judicial qualifications, article 43(9) on a Prosecutor-appointed gender adviser, article 54(4)(e) on Prosecutorial investigations, and article 68(2) on measures the Prosecutor shall take with respect to victims.

began smoothly, with the adoption of a provision stating that the “Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.”<sup>37</sup> However, opposition to the use of “gender” soon arose in the negotiations relating to the qualifications of judges.<sup>38</sup> At the same time as countries questioned the references to “gender” in the provision on judicial qualifications,<sup>39</sup> conservative nongovernmental organizations distributed lobby papers calling for the deletion of both “gender balance” and the reference to judicial expertise in sexual and gender violence.<sup>40</sup>

After a long negotiation process, delegates ultimately chose to resolve the impasse by removing the term “gender” from the judicial provisions. While

37. Agreement was reached in the informal negotiations of the Working Group on Composition and Administration of the Court on June 29, 1998. Valerie Oosterveld, Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes From Informals of the Working Group on Composition and Administration of the Court, June 29, 1998 (on file with author). The provision was adopted by the Committee of the Whole and sent to the Drafting Committee on July 4, 1998. *Recommendations of the Coordinator: Part 4, Composition and Administration of the Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Rome, Italy, June 15–17, 1998, U.N. Doc. A/CONF.183/C.1/L.45 (1998).

38. In initial public discussions of the issue, the delegate from Syria stated that the paragraph providing for judges with expertise “on issues related to sexual and gender violence” was unacceptable: “he knew of no specialty called ‘gender violence.’” *Summary Record of the 14th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm. of the Whole, 14th mtg., Agenda Item 11, ¶ 46, U.N. Doc. A/CONF.183/C.1/SR.14 (1998) [hereinafter Comm. of the Whole, *Summary Record of the 14th Meeting*]. Iran argued that reference to “gender balance” could give rise to difficulties of understanding and interpretation, and that the reference to judicial expertise in sexual and gender violence might be expanded, for example to include expertise in the crime of torture. *Summary Record of the 15th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Crim. Court, Comm. of the Whole, 15th mtg., Agenda Item 11, ¶ 11, U.N. Doc. A/CONF.183/C.1/SR.15 (1998) [hereinafter Comm. of the Whole, *Summary Record of the 15th Meeting*]. Some states opposed to the use of “gender” expressed concern in corridor discussions that their judges would not be considered to have expertise in gender-based violence because such violence was traditionally dealt with outside of the criminal justice system. Countries from all regions also spoke publicly in favor of retaining the references to “gender balance” or judicial expertise in sexual and gender violence. See Comm. of the Whole, *Summary Record of the 14th Meeting, supra* (for comments from the United States, Nigeria, Colombia, New Zealand, Sweden, Afghanistan, Senegal); Comm. of the Whole, *Summary Record of the 15th Meeting, supra* (for comments from Oman, Canada, Australia, Thailand, Libya, Brunei Darussalam, Iraq, Burundi, Ghana, Costa Rica, and Finland).

39. See Steains, *supra* note 34, at 381 n.80 for a list of countries that spoke in favor. For those that called for deletion, see *id.* at 381 n.81.

40. For example, a paper prepared by the David M. Kennedy Center for International Studies stated: some groups espouse the vague concept of “gender sensitivity” as a litmus test in the judicial selection process. While consideration of the needs of women and children in the judicial selection process is appropriate, use of the undefined (and readily expansive) concept of “gender sensitivity” is problematic, and could be used by some special interest groups to undermine traditional moral, cultural and religious values.

David M. Kennedy Center for International Studies, *Impartiality in the Election of Judges*, at [http://www.worldfamilypolicycenter.org/wfpc/About\\_the\\_WFPC/papers/icc\\_report.html#AppH1](http://www.worldfamilypolicycenter.org/wfpc/About_the_WFPC/papers/icc_report.html#AppH1) (last visited Jan. 12, 2005). In an untitled paper, REAL Women of Canada argued that the word “gender” is used by special interest groups to capture the idea that men and women’s roles are socially constructed, and that the term can be used to establish or advance “rights” based on sexual conduct or sexual orientation: “On n’a jamais défini le mot ‘gender’ précisément [The word ‘gender’ was never precisely defined].” (on file with author).

many countries wished to retain the reference to “gender” in “gender balance” because it followed the precedent set by the 1995 Beijing Declaration and Platform for Action,<sup>41</sup> the delegates agreed to change the reference to “female and male.”<sup>42</sup> Negotiations on whether some judges should have expertise on issues relating to sexual and gender violence led to a similar result, with the final text simply referring to expertise “on specific issues, including, but not limited to, violence against women or children.”<sup>43</sup> Those who had supported the retention of the reference to “gender” were comforted by the fact that the list describing expertise is illustrative rather than exhaustive and that expertise on violence against women or children overlaps to some extent (though not entirely) with expertise on gender issues.

While two references to “gender” were removed to resolve the disagreement on judicial qualifications, many states felt strongly that this was not a viable solution for other references to “gender” in the Statute. Supporters felt that the remaining references to “gender” had to be retained. Debate about whether to remove the term from the provision on persecution was set aside for later discussion,<sup>44</sup> and the focus shifted to the applicable law provision, the forum in which the issue was resolved.<sup>45</sup> This provision sets out the law to be applied by the Court and concludes with a “no adverse distinction” clause, the draft of which initially read: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the prohibition of adverse distinction founded on gender” and other grounds.<sup>46</sup> While the text of this paragraph was agreed upon at the March 1998 Preparatory Committee negotiations,

41. *Beijing Declaration and Platform for Action in 1 REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, 4–15 SEPTEMBER 1995*, U.N. Doc. A/CONF.177/20/REV.1, U.N. Sales No. 96.IV.13 (1996) [hereinafter *Beijing Platform for Action*].

42. In fact, since the meaning here related to biological sex, it made sense to change it for terminological clarity, despite the Beijing Platform for Action’s language of gender balance. Charlesworth makes “a plea for greater terminological awareness,” so “gender” is not used where “sex” is the appropriate term, and vice-versa. See Hilary Charlesworth, *The Gender of International Law, Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, 93 AM. SOC’Y INT’L L. PROC. 206 (1999) [hereinafter Charlesworth, *Proceedings*].

43. ROME STATUTE, *supra* note 1, art. 36(8).

44. This was done by flagging the term with a footnote stating that “gender” “refers to male or female.” *Article 5, Crimes Within the Jurisdiction of the Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Rome, Italy, June 15–17, 1998, at 2 n.2, U.N. Doc. A/CONF.183/C.1/L.44 (1998). This was not an agreed-upon definition; it was simply a placeholder for later debate. Dissenting states were concerned that their male nationals could be charged with crimes against humanity because of traditional gender-based practices and criminalization of homosexuality. For example, Azerbaijan asked if the persecution provision could “imply that a conviction by a national court for homosexual acts might be regarded as persecution and thus fall within the jurisdiction of the Court as a crime against humanity?” *Summary Record of the 25th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 25th mtg., Agenda Item 11, ¶ 61, U.N. Doc. A/CONF.183/C.1/SR.25 (2002).

45. ROME STATUTE, *supra* note 1, art. 21(3), formerly 20(3), during the negotiations. While the definition of “gender” was debated in this forum, debates on retaining or deleting the term still took place in negotiations on other articles. See Steains, *supra* note 34, at 386–89.

46. 1998 *Draft Statute Report of the Preparatory Committee*, *supra* note 31, art. 20(3).

several countries now argued that the term “gender” should be deleted from the list of enumerated grounds or that the clause should end at “internationally recognized human rights.”<sup>47</sup> This led to a polarized debate, with many countries expressing their support for, or opposition to, retaining the term “gender.”<sup>48</sup> The opposition argued that the term “gender” could imply rights more expansive than those currently recognized in many states, with the main concern being that the term might sanction rights based on sexual orientation.<sup>49</sup> Some also argued that “gender” could not be adequately translated into all six official U.N. languages.<sup>50</sup> Conservative nongovernmental organizations distributed lobby papers making similar (but more detailed) arguments.<sup>51</sup>

After it became clear that the debate had come to an impasse on the term “gender,” the Chair of the Working Group on Applicable Law asked if the solution used at the 1995 World Conference on Women could resolve the difference of opinion. In that case, the President of the World Conference had made a statement on the commonly understood meaning of the term “gender” and an annex containing this statement was included in the conference report.<sup>52</sup> Many delegations felt this was an acceptable solution, but those op-

47. Steains, *supra* note 34, at 372.

48. For example, on July 11 and 13, 1998, Australia, Belgium, Canada, Chile, Colombia, Costa Rica, Finland, France, Greece, Italy, Kenya, Mexico, Mozambique, Netherlands, New Zealand, Norway, Samoa, Senegal, Slovenia, South Africa, and the United States argued in favor of retaining the term “gender,” while Bahrain, Brunei, Egypt, Guatemala, Iran, Kuwait, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Turkey, United Arab Emirates, Venezuela, and Yemen called for the elimination of the term “gender.” Valerie Oosterveld, Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes From Working Group on Applicable Law, July 11, 13, 1998 (on file with author).

49. Steains, *supra* note 34, at 372. The concern that the term might also recognize women’s human rights not recognized domestically was also implicit in some statements.

50. This argument, which is commonly made at the United Nations with respect to the term “gender,” was also made in Rome. Oosterveld, *supra* note 48.

51. For example, a position paper prepared by the David M. Kennedy Center for International Studies raises several concerns:

If “gender,” as used in the ICC Draft Statute, in fact means something beyond “male” and “female,” the ICC will drastically restructure societies throughout the world. The possibilities include everything from hiring quotas to sexual orientation to abortion—hardly an appropriate agenda for a “criminal” court. The ICC was never intended, nor should it be used, to redefine and regulate all ‘socially constructed roles’ that exist throughout the globe. Remember: in the Arabic and French texts, the word gender is *never* used; instead the Arabic and French texts refer to “the two sexes.”

David M. Kennedy Center for International Studies, What’s the Argument for “Gender Justice?” (unpublished position paper, undated) (on file with author).

52. REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, 4–15 SEPTEMBER 1995, *Addendum*, Annex IV, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No. 96.IV.13 (1996) [hereinafter Beijing Conference Addendum]. This statement notes that a contact group was formed to examine the meaning of the word “gender” and concluded “(1) the word ‘gender’ had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action” and reaffirmed “that the word ‘gender’ as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage.” *Id.*

posed to the use of the term argued that the Beijing solution was too vague as it did not actually define “gender,” and such a “non-definition” would violate the requirement of certainty in criminal law.<sup>53</sup> In bilateral and corridor discussions, those opposed insisted that adoption of a suitable definition was the only way in which the term could remain.

Negotiations then shifted to drafting a definition that could be accepted by all countries, and a series of proposals were considered informally.<sup>54</sup> Countries opposed to the use of the term “gender” indicated that they would only consider a definition that referred to “men, women and children” or “the two sexes, male and female.”<sup>55</sup> Countries supporting use of the term were committed to ensuring that any definition adopted would reflect that “gender” refers to socially constructed understandings of what it means to be male or female. Positive (what “gender” means) and negative (what “gender” does not mean) approaches were considered by both sides, and the positive approach was deemed to be more acceptable. In accordance with the nature of the negotiations,<sup>56</sup> those supportive of retaining the term made proposals referring to both “male and female” and socially constructed roles, such as: “men and women and their roles in society,” “being a male or female and its [associated] implications in society,” “men and women and their functions in society,” “males and females within society,” and “males and females in the context of society.”<sup>57</sup> Those opposed to the term insisted on reference to “two sexes” and agreed on the inclusion of a reference to “society,” proposing: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, [and their roles] within society [in the context of society]. The term does not imply the existence of more than two sexes.”<sup>58</sup> Those supportive of retaining “gender” countered that the final

53. Oosterveld, *supra* note 48. Several delegates referred to the Beijing solution as a “non-definition.” *Id.*

54. On July 13, 1998, the Chair of the Working Group asked Canada and Chile to try to find a solution with a small group of opposing countries. This led to a series of informal meetings—among supportive states, among opposing states, and between the two groups, in corridors and on the side of other negotiations—outside the context of the Working Group. These are referred to in diplomatic parlance as “informal informals.” *Id.*

55. *Id.*; see also Valerie Oosterveld, Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes From Informal Informal Discussions, July 13–14, 1998 (on file with author) [hereinafter Author’s Notes From Informal Informal Discussions]; *Summary Record of the 28th Meeting*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int’l Crim. Court, Comm. of the Whole, 28th mtg., Agenda Item 11, ¶ 13, U.N. Doc. A/CONF.183/C.1/SR.28 (1998) (statement of Kuwait to the Committee of the Whole on July 28, 1998).

56. The ICC negotiations followed United Nations practice and worked by consensus. In consensus negotiations, those who oppose something are usually in the better position to make gains toward their position (by remaining intransigent), and those who support retention of something are forced to make proposals and concessions in order to keep at least some of their ideas in the document, even if they represent the majority of views. As a result, the negotiation process creates strong pressures favoring “constructive ambiguity” over complexity, and the inherent complexity of the definition of “gender” was reduced to two ideas: who was covered, and in what context? See *supra* note 14 and accompanying text.

57. Author’s Notes From Informal Informal Discussions, *supra* note 55; Steains, *supra* note 34, at 374 n.52.

58. Author’s Notes From Informal Informal Discussions, *supra* note 55. As an explanation of why they

sentence should at least reflect the Beijing approach and read: “The term does not imply any new meaning or connotation of the term different from accepted prior usage.”<sup>59</sup>

In the final round of informal negotiations, references to “in the context of their society” or “in the context of society and the traditional family unit” were proposed by those opposed to “gender” but rejected as too restrictive by those supportive of the term, while “in the context of society” was accepted by both sides as having “sufficient flexibility as well as precision.”<sup>60</sup> Those opposed to “gender” then insisted that they required something further, and the result was that the final sentence used words that had been proposed before, but written tautologically: “The term ‘gender’ does not indicate any meaning different from the above.” While an unusual solution, this sentence gave comfort to those opposed to “gender” because they saw it as reaffirming the “two sexes, male and female,” while those supportive felt that it was harmless because it reaffirmed the valuable sociological reference to “context of society.” After further debate about how to incorporate the definition into the Rome Statute, the delegates added the words “as defined in article 7(3)” after each reference to “gender” found in the Statute.

While many were surprised at the contentiousness of the debate on “gender” at the Rome Diplomatic Conference, there was precedent for this level of disagreement. The Holy See, certain Arab states, and conservative organizations had earlier made their strong views on the term “gender” known in other international fora, for example in the negotiations on the 1995 Beijing Declaration and Platform for Action. Following the adoption of that document, the Holy See stated that it understood the term “gender” “as grounded in biological sexual identity, male or female” and thus excluding “dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.”<sup>61</sup> Certain conserva-

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insisted on the reference to “two” sexes, some state representatives indicated that they feared that there might be five or more genders. This refers to the “five genders” theory of the Christian Right, who believe that the goal of certain feminist activists is to give members of the human family five genders from which to choose (male, female, homosexual, lesbian, or transgendered) instead of two (male or female). Doris E. Buss, *Finding the Homosexual in Women's Rights: The Christian Right in International Politics*, 6 INT'L FEMINIST J. POL. 257, 569 (2004). This also refers to the “herm” (hermaphrodites), “ferm” (female hermaphrodites), and “merm” (male pseudo hermaphrodites) argument used by conservative organizations in the Beijing Conference negotiations as a reason for “demanding assurance that only two sexes would be recognized.” Sally Baden & Anne Marie Goetz, *Who Needs (Sex) When You Can Have (Gender)? Conflicting Discourses on Gender at Beijing*, in FEMINIST VISIONS OF DEVELOPMENT: GENDER ANALYSIS AND POLICY 19, 30 (Cecile Jackson & Ruth Pearson eds., 1998). These arguments were made in corridor discussions and in “informal informal” negotiations.

59. Author's Notes From Informal Informal Discussions, *supra* note 55; Steains, *supra* note 34, at 374 n.53.

60. Steains, *supra* note 34, at 374.

61. Beijing Conference Addendum, *supra* note 52, at 164. The term “dubious interpretation” refers to the Holy See's opposition to sexuality that is not innate. Doris E. Buss, *The Vatican and the Beijing Conference on Women*, 7 SOC. & LEGAL STUDIES 339, 348–49 (1998). The Holy See's position was most recently articulated in the *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* (Holy See, Vatican), July 31, 2004, at 2, available at <http://www.vatican.va/>

tive Catholic and Arab states and nongovernmental organizations also expressed similar positions during the Beijing negotiations<sup>62</sup> and again in 1996 at the Habitat World Conference.<sup>63</sup>

## II. UNITED NATIONS APPROACH TO DEFINING “GENDER”

There are two approaches within the United Nations to defining “gender.” The first is a minimalist approach taken at the multilateral (state-negotiated) level. Prior to the adoption of the Rome Statute definition, states basically left the term undefined, either overtly or implicitly. “Gender” has been referred to without definition for over a decade in United Nations multilateral human rights documents, such as the outcome documents of some U.N. World Conferences<sup>64</sup> and numerous resolutions from the Commission on Human Rights, Economic and Social Council, and General Assembly.<sup>65</sup> As described above, the term “gender” was included in the 1995 Beijing Declaration and Platform for Action only after states agreed that the President of

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roman\_curia/congregations/cfaith/documents/rc\_con\_cfaith\_doc\_20040731\_collaboration\_en.html.

62. Diane Otto, *Lesbians? Not in My Country: Sexual Orientation and the Beijing World Conference on Women*, 20 ALTERNATIVE L.J. 288, 89–290 (1995); Buss, *supra* note 61, at 354. Conservative NGOs characterized “gender” as a “profoundly elastic term, encapsulating a broad feminist rights strategy that includes abortion.” DORIS BUSS & DIDI HERMAN, GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS 113 (2003) (citing Austin Ruse, *Feminists at U.N.: Seek Redefinition of Universal Human Rights*, NewsMax.com, Nov. 13, 1998, at <http://www.newsmax.com/articles/?a=1998/11/13/63434>). Buss and Herman point out that these groups fear that the term “gender” challenges an essential “woman-ness” or “man-ness,” which leads to the erasure of “the two” sexes, with homosexuality as the inevitable outcome. *Id.* at 64.

63. This resulted in a footnote stating: “The statement on the commonly understood meaning of the term ‘gender,’ presented at the Fourth World Conference on Women by the President of the Conference, is reproduced in Annex V to the present report.” *Report of the United Nations Conference on Human Settlements*, U.N. Conference on Human Settlements, Istanbul, Turkey, June 3–14, 1996, Annex I, ¶ 46, U.N. Doc. A/CONF.165/14 (Aug. 7, 1996), available at <http://www.unhabitat.org/unchs/english/hagenda/ch-3d.htm> (last visited Feb. 13, 2005) [hereinafter Istanbul Declaration].

64. For example, note the *Vienna Declaration and Programme of Action*, World Conference on Human Rights, June 14–25, 1993, ¶¶ 18, 38, 42, U.N. Doc. A/CONF.157/23 (1993). Another example is the Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, in *Report of the World Summit for Social Development*, World Summit for Social Development, Copenhagen, Denmark, Mar. 6–12, 1995, Commitments 5, 6, 8, ¶¶ 7, 16, 20, 22, 27, 28, 29, 30, 36, 45, 47, 53, 56, 70, 73, 74, 77, 83, 91, U.N. Doc. A/CONF.166/9 (1995). One exception to this trend was the 2001 Durban Declaration and Programme of Action, in *Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, at 5, 75, n.1, U.N. Doc. A/CONF.189/12 (2002) [hereinafter Durban Declaration and Programme of Action], in which the Rome Statute definition of “gender” was included.

65. For examples of such statements from the General Assembly, see *Comprehensive Implementation of and Follow-Up to the Vienna Declaration and Programme of Action*, U.N. ESCOR, Comm’n on Hum. Rts., 54th Sess., 58th mtg., U.N. Doc. E/CN.4/RES/1998/78 (1998); *Elimination of Domestic Violence Against Women*, G.A. Res. 58/147, U.N. GAOR, 58th Sess., Agenda Item 110, U.N. Doc. A/RES/58/147 (2004); *Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, G.A. Res. 48/108, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/RES/48/108 (1994); *Rights of the Child*, U.N. ESCOR, Comm’n on Hum. Rts., 55th Sess., 60th mtg., U.N. Doc. E/CN.4/RES/1999/80 (1999); *Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations*, U.N. ESCOR, Substantive Sess. of 2004, Agenda Item 5, U.N. Doc. E/2004/L.35 (2004); *Women in Development*, G.A. Res. 52/195, U.N. GAOR, 52d Sess., Agenda Item 50, U.N. Doc. A/RES/52/195 (1998).

the Conference would make a statement indicating that the word “gender” as used in the Platform for Action was intended to be interpreted and understood “in [its] ordinary, generally accepted usage” and that “there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action.”<sup>66</sup> This same approach was adopted the next year in the 1996 Habitat World Conference.<sup>67</sup>

The second approach to defining “gender,” followed by the United Nations and its agencies, is quite different. These institutions have adopted a number of definitions of “gender,” some relatively detailed. While the definitions used and promoted within various parts of the U.N. differ in focus and wording, they all tend to emphasize three similar points: first, “gender” is a socially constructed concept; second, the construction of “gender” is complex and is influenced by culture, the roles women and men are expected to play, the relationships among those roles, and the value society places on those roles; and third, the content of “gender” can vary within and among cultures, and over time.

All U.N. definitions emphasize the fact that “gender” is a social construct, and therefore is a learned rather than innate category. Different definitions approach social construction in different ways. Certain U.N. definitions define “gender” by contrasting it with “sex.” Of the two main U.N. definitions that were in use at the time of the 1998 Rome Diplomatic Conference, both took this approach. One, proposed in 1995, states: “The term ‘gender’ refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed.”<sup>68</sup> The second, included in the 1996 Report of the Secretary-General on “Integrating the Human Rights of Women Throughout the United Nations System,” stated: “As sex refers to biologically determined differences between men and women that are universal, so gender refers to the social differences between men and women that are learned, changeable over time and have wide variations both within and between cultures.”<sup>69</sup> In 2002, the High Commissioner for Refugees issued influential guidelines on international protection for gender-related persecution.<sup>70</sup> These

66. Beijing Conference Addendum, *supra* note 52, Annex IV.

67. Istanbul Declaration, *supra* note 63, ¶ 46.

68. *Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into United Nations Human Rights Activities and Programmes*, U.N. ESCOR, Comm’n on Hum. Rts., 52d Sess., Agenda Items 9, 21, ¶ 13, U.N. Doc. E/CN.4/1996/105 (1995) [hereinafter 1995 *Report of the Expert Group Meeting*].

69. *Integrating the Human Rights of Women Throughout the United Nations System: Report of the Secretary-General*, U.N. ESCOR, 53d Sess., ¶ 10, U.N. Doc. E/CN.4/1997/40 (1996) [hereinafter 1996 *Report of the Secretary-General*]. Similarly, a study submitted by the Secretary-General in 2002 defined “gender” as referring to “the socially constructed roles as ascribed to women and men, as opposed to biological and physical characteristics.” *Report of the Secretary-General on Women, Peace, and Security*, U.N. SCOR, at 4, U.N. Doc. S/2002/1154 (2002).

70. *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. High Comm’r for Refu-

guidelines distinguish between “gender” and “sex,” defining the former as referring to “the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.”<sup>71</sup> Similarly, the Commission on Human Rights’ Special Rapporteur on Violence Against Women has referred to “gender” as “the socially constructed roles of women and men ascribed to them on the basis of their sex.”<sup>72</sup>

Other U.N. definitions do not emphasize that “gender” is a social construct by contrasting “gender” with “sex.” Rather, they indicate that “gender” is built upon a biological foundation. For example, the World Bank states that “[w]omen and men are different biologically but all cultures interpret and elaborate on these innate biological differences into a set of social expectations about what behaviours and activities are appropriate, and what rights, resources, and power they possess.”<sup>73</sup> Some U.N. definitions do not refer either to “sex” or biology, but instead focus on the social construction of “gender.” For example, the definition adopted by the Office of the Special Adviser on Gender Issues and Advancement of Women (“OSAGI”), which is intended to assist the United Nations system in implementing gender mainstreaming throughout the U.N. system, states that “gender” “refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes.”<sup>74</sup> Definitions adopted by the World Health Organization (“WHO”),<sup>75</sup> the U.N. Environment Programme,<sup>76</sup> the U.N. Devel-

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gees, at 1, U.N. Doc. HCR/GIP/02/01 (2002) [hereinafter UNHCR Guidelines on International Protection] (“These Guidelines are meant to provide legal interpretive guidance for governments, legal practitioners, decision-makers and the judiciary as well as UNHCR staff carrying out refugee status determination in the field.”).

71. *Id.* ¶ 3.

72. *Review of Reports, Studies and Other Documentation for the Preparatory Comm. and the World Conference, World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, Geneva, Switzerland, July 30–Aug. 10, 2001, ¶ 10, U.N. Doc. A/CONF.189/PC.3/5 (2001) [hereinafter *Review of Reports*].

73. WORLD BANK, ENGENDERING DEVELOPMENT THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE, A WORLD BANK POLICY RESEARCH REPORT 2 (2001), available at [http://www.wds.worldbank.org/servlet/WDS\\_IBank\\_Servlet?pcont=details&cid=000094946\\_01020805393496](http://www.wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&cid=000094946_01020805393496) (last visited Feb. 13, 2005).

74. OSAGI, *Gender Mainstreaming, Concepts and Definitions*, at <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited Feb. 13, 2005). This definition is also used by the U.N. Mission in the Democratic Republic of Congo (“MONUC”). MONUC, at <http://www.monuc.org/gender/equality.aspx> (last visited Feb. 13, 2005).

75. See WHO, *Gender and Reproductive Rights, Glossary*, at <http://www.who.int/reproductive-health/gender/glossary.html> (last visited Feb. 13, 2005).

76. See U.N. Environment Programme, *Project Formulation, Approval, Monitoring and Evaluation Manual*, at ch. 13.1, available at [http://www.unep.org/Project\\_Manual/13.1.asp](http://www.unep.org/Project_Manual/13.1.asp) (last visited Feb. 13, 2005).

opment Fund for Women together with the U.N. Inter-Agency Project on Human Trafficking in the Mekong Sub-Region,<sup>77</sup> the U.N. Development Programme (“UNDP”),<sup>78</sup> the International Labour Organization (“ILO”) together with the South-East Asia and the Pacific Multidisciplinary Team,<sup>79</sup> and a 2003 expert group meeting sponsored by the U.N. Division for the Advancement of Women, the Joint U.N. Programme on HIV/AIDS, the ILO, and UNDP also take this approach.<sup>80</sup> Thus, the U.N. approach does not follow any one feminist theory, with some U.N. definitions contrasting “gender” and “sex” or “gender” and biology, and other definitions approaching “gender” as any social construction of male/female distinctions (in contrast to masculine/feminine distinctions).<sup>81</sup>

Many of the U.N. definitions of “gender” acknowledge that the construction of the term is strongly influenced by culture, which affects the roles women and men are expected to play, the relationship among those roles, and the value society places on those roles. For example, one definition states that “[h]istorically, different cultures construct gender in different ways so that women’s roles, the value that their society places on those roles, and the relationship with men’s roles may vary considerably over time and from one setting to another.”<sup>82</sup> Another definition recognizes that the understanding of “gender” has “wide variations both within and between cultures.”<sup>83</sup> Since culture and society are so closely intertwined in the construction of the term, the OSAGI definition notes that the concept of “gender” is part of “the broader socio-cultural context.”<sup>84</sup> Other definitions similarly link society, culture, and sometimes political or economic context.<sup>85</sup> Some definitions

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77. See U.N. Development Fund for Women and the United Nations Inter-Agency Project on Human Trafficking in the Mekong Sub-Region, *Trafficking in Persons: A Gender and Rights Perspective, Briefing Kit*, Sheet 4, at <http://www.unifem-eseasia.org/resources/others/traffikit.pdf> (last visited Feb. 13, 2005).

78. See UNDP, *Guide to Developing a UNDP Country Gender Briefing Kit*, at [http://www.undp.org/gender/docs/UNDP\\_Gender\\_Briefing\\_Kit.pdf](http://www.undp.org/gender/docs/UNDP_Gender_Briefing_Kit.pdf) (last visited Feb. 13, 2005). The UNDP has also defined “gender” as referring to the “comparative or differential roles, responsibilities and opportunities for women and men in a given society.” UNDP, *Gender Mainstreaming Manual and Information Pack*, at [http://www.undp.org/gender/docs/GM\\_INFOPACK/GMGlossary1.doc](http://www.undp.org/gender/docs/GM_INFOPACK/GMGlossary1.doc) (last visited Feb. 13, 2005).

79. See ILO and South-East Asia and the Pacific Multidisciplinary Advisory Team (“SEAPAT”), *Online Gender Learning Information Module*, Unit 1, at <http://www.ilo.org/public/english/region/asro/mdtmanila/training/homepage/mainmenu.htm> (last visited Feb. 13, 2005).

80. U.N. Division for the Advancement of Women, *The Role of Men and Boys in Achieving Gender Equality, Report of the Expert Group Meeting*, at 14, n.2, U.N. Doc. EGM/MEN-BOYS-GE/2003/REPORT (2004), available at <http://www.un.org/womenwatch/daw/egm/men-boys2003/reports/Finalreport.pdf> [hereinafter *2003 Expert Group Meeting*].

81. Baden & Goetz, *supra* note 58, at 29 (citing Laura Nicholson, *Interpreting Gender*, 29 SIGNS 79 (1994)).

82. 1995 *Report of the Expert Group Meeting*, *supra* note 68, ¶ 13. This definition defines “gender” from the point of view of women, but most U.N. definitions define “gender” as it applies to both men and women (sometimes also explicitly mentioning girls and boys). “Gender” should always be defined as applying to both women and men, in order not to conflate “gender” with “women” and therefore substantially narrow the definition of “gender.”

83. 1996 *Report of the Secretary-General*, *supra* note 69, ¶ 10.

84. OSAGI, *supra* note 74.

85. 2003 *Expert Group Meeting*, *supra* note 80, at 14 n.4 (referring to gender norms as “[s]ocial and cultural expectations”); U.N. Environment Programme, *supra* note 76 (noting that “gender” roles “change

understand “gender” to be even more intersectional, and must be understood as interacting with class, race, ethnicity, poverty level, sexual orientation, and age.<sup>86</sup> Inherent in these U.N. definitions is the understanding that those who fall outside the accepted construction of “gender” may suffer varying degrees of ostracism or other penalties in the societies in which they live.

Another important feature of many U.N. definitions is the recognition that “gender” is a category that changes over time.<sup>87</sup> Gender is not innate.<sup>88</sup> While some definitions note that at any given moment in time, gender norms are often thought to be unchanging and representing tradition or natural difference between women and men,<sup>89</sup> the World Bank definition states that gender asymmetries “can at times change quite rapidly in response to policy and changing socioeconomic conditions.”<sup>90</sup>

At the multilateral level,<sup>91</sup> states have generally avoided defining “gender.” This is because there is no consensus about the precise content of the term, and there are widely differing, strongly held views on what the term should and should not mean. Therefore, the term is usually left undefined, either by not including any explanation or by stating that the term is to be interpreted or understood in its ordinary, generally accepted usage. Two deviations from this approach are the Rome Statute’s definition, and the replication of that definition in the outcome document of the 2001 World Conference Against Racism.

from one place and culture and across time”); *Review of Reports*, *supra* note 72, ¶ 10 (stating that “gender” depends on socio-economic, political, and cultural context); UNHCR Guidelines on International Protection, *supra* note 70, ¶ 3 (referring to “socially or culturally constructed and defined identities, status, roles and responsibilities”); ILO and SEAPAT, *supra* note 79 (noting that social differences between men and women vary widely within and across cultures and treating “gender” as a “socio-economic variable for analysing roles, responsibilities, constraints, opportunities, and needs of men and women”); WHO, *supra* note 75 (referring to “economic, social and cultural attributes and opportunities associated with being male and female in a particular point in time”).

86. *Review of Reports*, *supra* note 72, ¶ 10; OSAGI, *supra* note 74. The World Bank definition approaches the multi-dimensional nature of “gender” in a slightly different manner: “Like race, ethnicity and class, gender is a social category that largely establishes one’s life chances, shaping one’s participation in society and in the economy. Some societies do not experience racial or ethnic divides, but all societies experience gender asymmetries—differences and disparities—to varying degrees,” WORLD BANK, *supra* note 73, at 24.

87. 1995 *Report of the Expert Group Meeting*, *supra* note 68, ¶ 13; 1996 *Report of the Secretary-General*, *supra* note 69, ¶ 10; 2003 *Expert Group Meeting*, *supra* note 80, at 14, n.4; UNDP, *supra* note 78, at 17; U.N. Environment Programme, *supra* note 76; ILO and SEAPAT, *supra* note 79; OSAGI, *supra* note 74; WHO, *supra* note 75; WORLD BANK, *supra* note 73, at 24.

88. UNHCR Guidelines on International Protection, *supra* note 70, ¶ 3 (stating that “[g]ender is not static or innate but acquires socially and culturally constructed meaning over time”).

89. 2003 *Expert Group Meeting*, *supra* note 80, at 14 n.4.

90. WORLD BANK, *supra* note 73, at 24.

91. The examples above have focused on the United Nations. Other multilateral institutions have also adopted definitions of “gender,” such as the Organization for Economic Cooperation and Development: “The term *gender* refers to the economic, social, political, and cultural attributes and opportunities associated with being male and female . . . . The nature of gender definitions (what it means to be male or female) and patterns of inequality vary among cultures and change over time.” ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, DEVELOPMENT ASSISTANCE COMM., DAC GUIDELINES FOR GENDER EQUALITY AND WOMEN’S EMPOWERMENT IN DEVELOPMENT CO-OPERATION 12–13 (1999), available at <http://www.oecd.org/dataoecd/56/46/28313843.pdf> (last visited Feb. 13, 2005).

By contrast, the United Nations has taken the opposite approach of defining “gender,” sometimes in substantial detail. While the definitions differ, they generally stress the socially constructed nature of “gender” (sometimes contrasting it with the biologically determined nature of “sex”), they note the complexity of this construction and the influence of culture, politics, economics, race, and other variables, and they identify the time and context of “gender.”

### III. CRITICISM OF THE ROME STATUTE’S DEFINITION OF “GENDER”

The definition of “gender” included in the Rome Statute has garnered strong criticism. While the criticism varies, there appear to be four main grounds for concern relating to the perceived conflation of “gender” and “sex,” the limitations of the reference to “context of society,” the potential exclusion of sexual orientation from the definition of “gender,” and the sidelining of gender issues through the inclusion of a definition.

The Rome Statute’s definition begins with the statement: “For the purposes of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female.” Hilary Charlesworth views this sentence as deliberately confusing and as eliding “sex” and “gender.”<sup>92</sup> She feels that the statement fails to communicate that gender is a socially constructed set of assumptions regarding the roles of males and females.<sup>93</sup> More pointedly, Charlesworth and Christine Chinkin argue that the phrase presents “gender” as an issue of biology rather than social construction, and thus the definition has limited transformative edge.<sup>94</sup> The definition does not draw attention to aspects of social relations that are culturally contingent and without a foundation in biological necessity, as use of the term “gender” should do.<sup>95</sup> Brenda Cossman refers to the definition as a “stunningly narrow conception of gender.”<sup>96</sup> She reads the definition as being explicitly limited to the two biological sexes and states that it is not even clear that the definition is intended to include the more typical understanding of gender as socially constructed roles and values.<sup>97</sup> Ruth Philips believes that the Rome Statute’s definition practically does not distinguish between gender and sex, leaving little room for cultural construction of sex roles.<sup>98</sup>

Does the reference to the “two sexes, male and female” collapse “gender” back into “sex”? The answer to this question is important because it will

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92. Charlesworth, *Feminist Methods*, *supra* note 8, at 394; Charlesworth, *Proceedings*, *supra* note 42, at 207.

93. Charlesworth, *Feminist Methods*, *supra* note 8, at 394.

94. CHARLESWORTH & CHINKIN, *supra* note 7, at 335. Charlesworth has also said that the result of such elision between “sex” and “gender” is a diminishing of the radical potential of both sexing and gendering international law. Charlesworth, *Proceedings*, *supra* note 42, at 207.

95. CHARLESWORTH & CHINKIN, *supra* note 7, at 3.

96. Cossman, *supra* note 2, at 283.

97. *Id.* at 284.

98. Philips, *supra* note 8, at 234 n.14.

determine what factors the ICC will consider in examining the crimes and the needs of victims and witnesses. For example, if “gender” is no more than “sex,” then the ICC would not be able to carry out the kind of analysis of men’s and women’s roles that proved to be critical in the disposition of the *Krstic* case in the International Criminal Tribunal for the Former Yugoslavia.<sup>99</sup> Similarly, the ICC would simply consider whether a victim or witness was male or female, rather than also considering the social construction attached to “male” or “female” in a given society, which could result in insensitive decisions about the protection or participation of the victim or witness. Those opposed to the definition of “gender” pressed hard for a definition that made “gender” mean the same thing as “sex,” because they feared that if it did not, the baseline for interpreting the social construction of “gender” would expand from male and female to either include five “genders” (adding gay, lesbian, and transgendered) and/or include hermaphrodites, female hermaphrodites, and male pseudo hermaphrodites.<sup>100</sup> They were convinced that if “male and female,” the number “two,” and the word “sex” were used, biology would be the foremost factor in the definition.

However, the references to “two sexes” and “male and female” cannot strip meaning from “gender” and render it equivalent to “sex,” because they are linked to the phrase “within the context of society.” A far more straightforward interpretation of the “two sexes, male and female” is that it serves as a signal to the ICC that the social construction of “gender” is to be interpreted from a biological male/female foundation, just as a number of United Nations definitions of “gender” take “sex” as their starting point. A biological *foundation* is quite different from biological *determinism*, unless taken to an extreme.

The ICC should not take, and should not be assumed to take, a biologically determinist position in defining “gender,” for two reasons. First, while the negotiating history does include a bloc that wished to ensure biological determinism, that history also includes a larger bloc that wished to ensure the opposite. The ICC will take that into account when considering the intent of the drafters.<sup>101</sup> Second, given that there is no consensus among com-

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99. In that case, the Tribunal examined the patriarchal nature of the Bosnian Muslim society in Srebrenica, and found that the Bosnian Serb forces were aware that destruction of a sizable number of men would “inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica” because these men would be officially listed as missing and their spouses would be unable to remarry (having fidelity to a missing husband) and consequently, would not have new children, Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Trial Chamber, ¶ 93 nn.193 & 196, ¶ 595 (Aug. 2, 2001). “The physical destruction of the men therefore had severe procreative implications for the community.” Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, Appeals Chamber, ¶ 30 (Apr. 19, 2004). While *Krstic* was a case considering the crime of genocide, if “gender” was no more than “sex” under the ICC’s crimes against humanity, then similar factual circumstances might result in the ICC overlooking that the surviving women were victims of persecution as much as the dead men were, because a socio-cultural analysis is key to exposing this fact.

100. See *supra* note 58 and accompanying text.

101. Under the Rome Statute, the ICC is required to apply applicable treaties and the principles and rules of international law, including those on treaty interpretation. ROME STATUTE, *supra* note 1, art. 21.

mentators on the plain meaning of the “two sexes, male and female,” the ICC is likely to also study “applicable treaties and the principles and rules of international law”<sup>102</sup> in formulating its understanding of gender. These treaties and laws include the principle of gender mainstreaming<sup>103</sup> and the various definitions of “gender,” including those outlined above, which are a part of international law. Many U.N. definitions take “sex” or biology as the starting point from which to contrast “gender,” and upon which the socially constructed understandings of “male” and “female” are built.<sup>104</sup>

Within feminist theory, including feminist theory of international law, there are evolving and differing views on the nature of “sex” and “gender.” These differing views explain certain aspects of the criticism of the Rome Statute definition, especially of the phrase “two sexes, male and female.” Judith Butler argues that the “construct called ‘sex’ is as culturally constructed as gender.”<sup>105</sup> If this is so, then “sex” is not a place from which to contrast “gender” or a platform upon which the social construction of “gender” can be built. The U.N.-style approach outlined above does not take the social construction of “sex” into account. This, according to Cossman, means that the definition of “gender” at the international level loses its “subversive” possibilities and instead becomes narrowly conceived.<sup>106</sup> Is it possible that the Rome Statute definition of “gender” encompasses Cossman’s approach, such that a reading of “sex” is also socially constructed? The possibility of interpreting the Statute with “sex” understood as a socially constructed concept cannot be ruled out, given that the “two sexes” of the Rome Statute definition are themselves potentially subject to “the context of society.” However, the definition seems to fall heavily on the side of the “sex”-as-a-starting-point approach taken by the U.N., given a plain reading of the definition, the negotiation history, and the precedent provided by various U.N. definitions.

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Following this approach, the ICC may examine the preparatory work of the Rome Statute and the circumstances of its conclusion, if an interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose” still leaves the meaning “ambiguous or obscure.” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 31, 32, Hein’s No. KAV 2424, 1155 U.N.T.S. 331. It is highly likely that the ICC will need to consider the preparatory work in order to fully understand and interpret the definition of “gender.”

102. ROME STATUTE, *supra* note 1, art. 21(1)(b).

103. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, in this Volume.

104. See 1995 *Expert Group Meeting*, *supra* note 68, ¶ 13; 1996 *Report of the Secretary-General*, *supra* note 69, ¶ 10; *Review of Reports*, *supra* note 72, ¶ 10; UNHCR Guidelines on International Protection, *supra* note 70, art. I, ¶ 3; WORLD BANK, *supra* note 73, at 24.

105. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 7 (1990).

106. See Cossman, *supra* note 2, at 284. By subversive possibilities, she means its ability to trouble and challenge the inevitability of the relationship between gender and sex, and the interpretations that flow from a delinking of these constructs that might “disrupt and fragment the dominant cultural narrative.” See *id.* at 282–83. Charlesworth and Chinkin raise a related point: “If we attend to the constitutive role of the law and society in forming the ‘naturally’ sexed person, the concepts of ‘sex’ and ‘biological difference’ can be seen to have constructed, contingent and political elements,” with the major difference between “sex” and “gender” being “their focus on different elements of dichotomies such as body/mind and nature/culture.” CHARLESWORTH & CHINKIN, *supra* note 7, at 3–4.

Cossman's concerns are therefore validated. Even so, this fact is unlikely to have any practical effect on the ICC's work as the word "sex" will always be considered by the Court in the context of the "gender" definition and not on its own, since it is not used elsewhere in the Statute.

The second criticism of the definition raised by some authors is that the phrase "within the context of society" limits what the ICC can understand gender to mean, and therefore may limit the ICC's consideration of the full range of factors affecting the social construction of gender. If this were true, then the ICC might not be able to examine certain factors related to how a society constructs "gender," such as a strong cultural emphasis on marriage and female virginity at marriage, or societal vilification of gay men. If the ICC cannot examine these factors, then it will not be able to understand and evaluate adequately the effects of rape on a female victim who is deemed unmarriageable by her society, or on a man (whatever his sexual orientation) raped by another man in a homophobic society. Cossman argues that the phrase "in the context of society" is unclear and may be narrower than the typical view that "gender" involves socially constructed roles.<sup>107</sup> The Special Rapporteur on Violence Against Women characterizes the definition as preventing approaches that rely on the social construction of gender.<sup>108</sup> Not all commentators agree, however. Barbara Bedont, Katherine Hall Martinez, Rhonda Copelon, and Machteld Boot read the phrase "context of society" as incorporating a sociological or social construction of gender.<sup>109</sup> The Special Rapporteur on Contemporary Forms of Slavery interpreted the definition to be "consistent with other, more clearly stated formulations" adopted within the United Nations,<sup>110</sup> which would include the socially and culturally sensitive definitions outlined above.

There is no denying the fact that the phrase "within the context of society" is not as clear as language found in, for example, U.N. definitions of "gender," including "socially constructed,"<sup>111</sup> "constructed by all societies,"<sup>112</sup> "socially defined,"<sup>113</sup> and "social differences."<sup>114</sup> Even so, the phrase "context of society" is not very different from the language found in the U.N. definitions. The phrase "within the context of society" was chosen to give ICC judges the flexibility to determine the meaning of the phrase on a case-by-case basis,<sup>115</sup> which the U.N. definitions also encourage. In so doing, and in

107. Cossman, *supra* note 2, at 284.

108. *Report of the Special Rapporteur on Violence Against Women*, *supra* note 10, ¶ 19.

109. Copelon, *supra* note 5, at 236–37; Bedont & Hall Martinez, *supra* note 11, at 3; Boot, *supra* note 11, at 172.

110. Report of the Special Rapporteur on Contemporary Forms of Slavery, *supra* note 11, ¶ 26.

111. 1995 *Report of the Expert Group Meeting*, *supra* note 68, ¶ 10; *Review of Reports*, *supra* note 72, ¶ 10; OSAGI, *supra* note 74; UNDP, *supra* note 78, at 17; WORLD BANK, *supra* note 73, at 24.

112. 1995 *Report of the Expert Group Meeting*, *supra* note 68, ¶ 13.

113. U.N. Environment Programme, *supra* note 76.

114. ILO and SEAPAT, *supra* note 79.

115. Steains, *supra* note 34, at 374.

accordance with article 21, the ICC will need to create a set of signifiers of context such as those found in the U.N. definitions outlined above: roles (including the relationship between and among men's and women's roles), attitudes, values, attributes, expectations, status, opportunities, socialization processes, responsibilities assigned, rights, resources, and power, as determined and/or expected within a society or culture at any given time and place, and as affected by race, class, sexual orientation, poverty level, ethnic group, age, and other factors. The end result is that "context of society" necessarily implicates the same factors as "socially constructed," and therefore allows the ICC to consider a wide range of crucial factors involved in understanding "gender" within a society.

In addition, while judges are to consider the "context of society," this does not mean that they must *defer* to the context, a fear that seems to underlie some of the commentators' concerns. When the ICC judges and Prosecutor are considering the crime against humanity of gender-based persecution, the ICC's Elements of Crimes document requires that the definition of "gender" be evaluated in light of the acts and perception of the accused. The accused may try to rely on state- or society-supported misogynist or homophobic reasoning to excuse his actions. For example, an accused may try to excuse his crimes as being dictated by the kind of propaganda campaign that the International Criminal Tribunal for Rwanda described as taking place prior to and during the 1994 genocide, in which Tutsi women were presented as sexual objects.<sup>116</sup> However, this defense would not be successful because the reference to "within the context of society" does not require the ICC's Prosecutor and judges to situate themselves within, and potentially accept, a misogynist or homophobic framework in order to determine whether "gender" was the basis for persecution.<sup>117</sup> Similarly, if a society defines "gender" narrowly, this cannot negatively alter how the ICC provides victim and witness protection or participation, or how the Prosecutor undertakes his or her duties with respect to a certain situation. The Prosecutor, Registrar, and judges must not only examine the context of the society in which the crime took place (and how the perpetrator viewed that context), but must also interpret

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Eventually, the language "within the context of society" was settled upon, with delegations on both sides of the issue satisfied that there was sufficient flexibility as well as precision inherent in the sentence. This effectively leaves the term open for the future Court to interpret and apply to the circumstances before it, as appropriate . . . . 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.

*Id.*

116. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 732 (Sept. 2, 1998).

117. *Report of the Preparatory Commission for the International Criminal Court: Addendum, Part II, Finalized Draft Text of the Elements of Crimes*, Preparatory Comm'n for the Int'l Crim. Court, art. 7(1)(h), U.N. Doc. PCNICC/2000/1/Add.2 (2000). In fact, the reliance on such propaganda can serve as proof that the "perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such," *id.* at 15, and that the "perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population," *id.*

and apply the definition of “gender” in light of international law.<sup>118</sup> The “society” considered in the Rome Statute’s definition is not only domestic, but also international.<sup>119</sup> A helpful corollary is found in international refugee law, which considers both the domestic and international social construction of “gender.”<sup>120</sup>

The third criticism leveled at the Rome Statute’s definition of “gender” is that it appears to preclude the ICC from interpreting sexual orientation as included within “gender.” (This is actually a subset of the second concern; namely, that the ICC will not be able to consider one important aspect in the social construction of “gender”: the social understanding of sexual identity.) Charlesworth and Philips both take the view that the definition deliberately reflects the concern of Arab states and the Holy See that any reference to “gender” might be understood to include sexual orientation.<sup>121</sup> While they do not explicitly conclude that sexual orientation is therefore excluded from the definition of “gender” (although Philips calls the approach “regressive”<sup>122</sup>), Rana Lehr-Lehnardt does, stating that “gender means male and female, not homosexual” and that “homosexual provisions are excluded.”<sup>123</sup> Stephanie Farrior also assumes that “[d]ebates in Rome resulted in the [Rome Statute] adopting a limiting definition to ensure that persecution on the basis of sexual orientation would not be covered.”<sup>124</sup> Cossman correctly notes that conservative states locked onto the concept of “gender” as potentially subversive because it includes consideration of sexual identity.<sup>125</sup> She concludes that, as a result of conservative pressure, the ICC’s definition excludes protections for “gender outlaws.”<sup>126</sup> Like Charlesworth, Cossman fears that the ICC negotiators missed an opportunity to remap the margins or

118. ROME STATUTE, *supra* note 1, art. 21(3).

119. International refugee law provides some assistance in this regard. While refugee law is state-based, it is not aimed at holding states responsible: its function is remedial. James Hathaway, *New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection*, 8 J. REFUGEE STUD. 288, 293 (1995). Refugee status is determined based on the story told by the claimant, and is often based on a fear created by an individual or and individual’s actions toward the claimant. When this is the case, refugee law accepts that the claimant may or may not define “gender” for him/herself in a particular way, but that the aggressor does define “gender”—and has acted upon that definition—in a manner that causes a well-founded fear of persecution in the claimant. Of course, the claimant may consciously choose to act outside of the constraints imposed by her culture’s definition of gender; in this case, “whatever cultural consensus exists, refugee law protects an individual who wishes to dissociate herself from that consensus, asserting that her choice is in line with international standards.” Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 145 (2002).

120. UNHCR Guidelines on International Protection, *supra* note 70, ¶ 3; *see also supra* note 25 and accompanying text.

121. Charlesworth, *Proceedings*, *supra* note 42, at 207; Philips, *supra* note 8, at 233 n.14.

122. Philips, *supra* note 8, at 233 n.14.

123. Lehr-Lehnardt, *supra* note 6, at 340, 351.

124. Farrior, *supra* note 2, at 598.

125. Cossman, *supra* note 2, at 284.

126. *Id.* at 289; *see also* Brenda Cossman, *The Gender of International Law, Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, 93 AM. SOC’Y INT’L L. PROC. 206, 208 (1999).

boundaries of international law,<sup>127</sup> rethink “gender,” and engage with both the limits and possibilities of agency, including sexual agency.<sup>128</sup>

The views assuming that sexual orientation is excluded from the definition of “gender” are arguably incorrect. First, as Copelon notes, the “words do not support an exclusion of sexual orientation.”<sup>129</sup> Indeed, as Cate Steains correctly recalls, there was no consensus as to whether the definition of “gender” should include sexual orientation.<sup>130</sup> This lack of consensus “effectively leaves the term open for the Court to interpret and apply to the circumstances before it, as appropriate.”<sup>131</sup> Some seem to read the final sentence of the Rome Statute definition as implicitly precluding “gender” from encompassing sexual orientation.<sup>132</sup> But the text does not say this and, as Bedont, Hall Martinez, and Copelon have stated, many view this last sentence as tautological and superfluous<sup>133</sup> because it simply refers the reader back to the first sentence. This analysis is defensible under general principles of treaty interpretation, according to which the ICC would examine the ordinary meaning of the words of the second sentence,<sup>134</sup> which say that the first sentence does not have any meaning other than what it means.<sup>135</sup>

127. Cossman, *supra* note 2, at 291.

128. *Id.* at 293–94.

129. Copelon, *supra* note 5, at 237.

130. E-mail from Cate Steains, Permanent Mission of Australia to the United Nations in New York, to Valerie Oosterveld, Legal Officer, Foreign Affairs Canada (Jan. 22, 2004) (on file with author). This would include no consensus on whether the ICC can consider the crime against humanity of persecution based on sexual orientation, whether the ICC is prohibited from discriminating on the basis of sexual orientation in the application and interpretation of law, whether the Prosecutor should, in hiring an adviser, consider whether that person has expertise in issues related to sexual orientation, and whether ICC officials would need to consider sexual orientation when addressing the needs of victims and witnesses.

131. Steains, *supra* note 34.

132. This misperception stems in part from an unfortunate editorial change to Steains’ chapter in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS*. *Id.* Language was inserted by the editor without her permission that stated that the second sentence in the definition of “gender” was “ultimately included to forestall any implication that the issue of sexual orientation could be raised in connection with article 7(3).” E-mail from Cate Steains, *supra* note 130. This sentence had originally read: “The second sentence was included upon the insistence of the ‘anti-gender’ delegations, despite arguments by the ‘pro-gender’ delegations that it was superfluous.” *Id.*

133. Bedont & Hall Martinez, *supra* note 11, at 203; Copelon, *supra* note 5, at 237.

134. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 188 (2000).

135. While the ICC might stop at consideration of the ordinary meaning of the words, it might not consider that clear enough and would go on to consider the context, which would include the preambular reminder of the “unimaginable atrocities” that occurred over the past century and affirmations that the ICC will address most serious crimes of concern to the international community. *Id.* at 188–91. *See also* ROME STATUTE, *supra* note 1, pmb. ¶¶ 4, 9. The “unimaginable atrocities” would include the extermination of homosexuals during World War II. The ICC would also likely consider the preparatory work on the Rome Statute, in which those supportive of an inclusive definition of “gender” asked that the term “not imply any new meaning or connotation of the term different from accepted prior usage.” Author’s Notes From Informal Informal Discussions, *supra* note 55. This was in response to a proposal by those opposed to the term “gender” that the definition state that “[t]he term does not imply the existence of more than two sexes.” *Id.* As a completely different text was adopted, the sentence does not imply either.

Second, Copelon convincingly argues that it is “dubious to argue that any ambiguity should be resolved in favor of discrimination.”<sup>136</sup> The right to nondiscrimination on the basis of sexual orientation has been recognized by various United Nations treaty committees.<sup>137</sup> Third, conceptions of “gender” and sexual orientation are inextricably linked. Violence against women or men based on cultural definitions of “appropriate maleness” or “femaleness” is intimately intertwined with violence against individuals based on sexual orientation.<sup>138</sup> The concept of “gender,” especially in the context of gender-based persecution, must be broad enough to capture any group challenging traditionally defined gender roles—not only groups defined by sexual orientation, but also individuals who violate norms of gender conformity through their dress and other social, non-sexual forms of expression, such as transgendered individuals.<sup>139</sup> Women and those who attempt to transcend societal gender role expectations often fight against similar opponents for similar underlying reasons.<sup>140</sup> Under international refugee law, the U.N. High Commissioner for Refugees has recognized that gender-based persecution includes discrimination against homosexuals.<sup>141</sup>

While there are strong arguments against an assumed exclusion of sexual orientation from the definition of “gender” in the Rome Statute, some might argue that it does not matter whether “gender” includes sexual orientation

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136. Copelon, *supra* note 5, at 237.

137. The Human Rights Committee, like several other U.N. Committees, has issued a number of concluding observations on the prohibition of discrimination on the basis of sexual orientation. *Report of the Human Rights Committee*, U.N. GAOR, 51st Sess., Supp. No. 40, ¶ 59, U.N. Doc. A/51/40 (1996); *Report of the Human Rights Committee, Vol. I*, U.N. GAOR, 52d Sess., Supp. No. 40, ¶ 279, U.N. Doc. A/52/40 (1997); *Report of the Human Rights Committee, Vol. I*, U.N. GAOR, 54th Sess., Supp. No. 40, ¶ 190, 216, 256, 356, 375, U.N. Doc. A/54/40 (1999); *Report of the Human Rights Committee, Vol. I*, U.N. GAOR, 55th Sess., Supp. No. 40, ¶ 247, 248, 309, U.N. Doc. A/55/40 (2000); *Report of the Human Rights Committee, Vol. I*, U.N. GAOR, 56th Sess., Supp. No. 40, ¶ 72(11), U.N. Doc. A/56/40 (2001). The Human Rights Committee ruled that the references to “sex” in the Covenant’s non-discrimination clauses (articles 2(1) and 26) are to be read as including sexual orientation. *Report of the Human Rights Committee, Vol. II*, U.N. GAOR, 49th Sess., Supp. No. 40, at 235, U.N. Doc. A/49/40 (1994). In addition, the Committee on Economic, Social, and Cultural Rights has issued a General Comment that states that the Covenant proscribes discrimination on the grounds of sexual orientation. *Report on the Twenty-Eighth and Twenty-Ninth Sessions*, Comm. on Econ., Soc., and Cultural Rights, U.N. ESCOR, Supp. No. 2, at 125, U.N. Doc. E/2003/22 (2003). Many of these views and decisions are based on an interpretation of “sex” as including sexual orientation, since the term “gender” is not used in the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights due to their age. However, read alongside contemporaneous interpretations by the U.N. of “gender,” these decisions and statements provide support for the view that nondiscrimination on the basis of “gender” includes non-discrimination on the basis of sexual identity.

138. See James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 990–91 (1997) (stating that violence against sexual minorities reflects common gendered assumptions and mechanisms that foster the violence).

139. *Cf. id.* at 1006–07 (arguing that oppression based on sexual orientation or identity involves oppression not only against gays and lesbians because of their sexual orientation, but also oppression against those whose conduct challenges traditional gender norms).

140. *Id.* at 1007.

141. UNHCR Guidelines on International Protection, *supra* note 70, ¶ 3; see also Wilets, *supra* note 138, at 1046 n.237.

because sexual orientation can be addressed through other avenues. For example, sexual orientation could be included under “other status” in the article on the application and interpretation of applicable law,<sup>142</sup> as was done by certain states following the adoption of the Beijing Declaration and Platform for Action.<sup>143</sup> Sexual orientation could possibly be considered in the crime against humanity of persecution, through the phrase “or any other grounds that are universally recognized as impermissible under international law.”<sup>144</sup> In addition, the Prosecutor could hire an adviser with expertise on sexual orientation issues, and the Court and the Prosecutor could consider the sexual orientation of victims and witnesses in making decisions on investigations, prosecutions, and protection, because the considerations in the relevant articles are open-ended and not exhaustive.<sup>145</sup> These arguments may provide alternative or additional ways of including sexual orientation in the Rome Statute, but the fact remains that a consideration of the construction of “gender” would not be complete without an evaluation of whether the collective norms in a society understand “femaleness” and “maleness” only to include heterosexuality, or to include different sexual identities.<sup>146</sup> In some cases the expectations of heterosexuality are so prevalent that they are fundamental to the interpretation of other aspects of “gender.” For example, perpetrators may choose to persecute groups of women using rape because they expect that the women will then be considered “defiled” and therefore unmarriageable by the men in their society.

Buried within the concern about potential exclusion of sexual orientation from the definition of “gender” is the separate concern that the ICC will conflate “sex,” “gender,” and “sexual orientation.”<sup>147</sup> This could work in two ways: “gender” could be conflated with “sexual orientation” such that an analy-

142. ROME STATUTE, *supra* note 1, art. 21(3).

143. Otto, *supra* note 62, at 290. See also *Beijing Platform for Action*, *supra* note 41, at 164–65 (showing that Israel submitted a statement to the Conference stating that it interprets the words “other status” as including sexual orientation).

144. ROME STATUTE, *supra* note 1, art. 7(1)(h). However, note the high threshold of “universally recognized.”

145. The Rome Statute empowers the Prosecutor to appoint advisers with legal expertise on specific issues in article 42(9) and mandates that the Prosecutor will take the nature of the crime into account in order to ensure effective investigation and prosecution of crimes in article 54(1)(b), while article 68(1) states that the Court will take appropriate steps to protect the wellbeing of victims and witnesses by taking into account all relevant factors. *Id.* arts. 42(9), 54(1)(b), 68(1).

146. Some might argue that the ICC has demonstrated that it understands “femaleness” and “maleness” as only including heterosexuality, insofar as it has chosen to list separately “sexual orientation” and “gender” as grounds upon which counsel cannot discriminate against others. *Proposal for a Draft Code of Professional Conduct for Counsel before the International Criminal Court*, Presidency of the Int’l Crim. Court, art. 9(1), U.N. Doc. ICC-ASP/3/11/Rev.1 (2004). The opposite argument might also be made that the ICC views sexual orientation as linked to and part of the term “gender,” but felt the need to ensure clear guidance in the Code and so named them separately. Given that the ICC’s Registry drafted the Code at a time when the ICC was still in its establishment phase, it is doubtful that the draft Code represents a specific policy on whether sexual orientation forms part of the definition of “gender” or not.

147. For an analysis of the conflation of these three concepts in domestic law, see Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

sis of “gender” begins and ends with an analysis of sexual orientation. This would limit the Court’s understanding of “gender” to only one facet of many that could be considered. This could lead the ICC to overlook cases of gender-based persecution that do not (overtly) involve elements of sexual orientation, such as targeting all male children for extermination because they could eventually become soldiers. This is not a likely scenario given the need for the ICC to evaluate the “context of society” and all of its attendant indicators outlined above. The second way this triple conflation could work is that “sexual orientation” could be collapsed into either “sex” or “gender,” with the end result that the ICC equates “sexual orientation” with heterosexuality.<sup>148</sup> In other words, commentators are concerned that the ICC will fall into a trap of heteronormativity. While this concern stems from the negotiation history, in which conservative states pressed for the reference to “two sexes” in an unsuccessful attempt to collapse “gender” back into biology, it also stems from feminist critiques arguing that “sex” is a socially constructed concept and questioning the link between the assumption that there are only two sexes and therefore two areas of evaluating “gender”—masculinity and femininity—and, implicitly, sexual identity.<sup>149</sup> This triple conflation could cause problems if the ICC assumed in any given context that biological sex and/or gender dictated a person’s sexuality, thereby overlooking potential grounds for persecution. The ICC therefore must be alert to avoid conflating “sex” and/or “gender” with “sexual orientation,” even though there are no textual clues (as there are in the differentiation of “sex” and “gender”) within the Rome Statute definition of “gender.”

Finally, some commentators fear that the fact that “gender” is defined in the Rome Statute when other equally crucial terms are not suggests that gender issues will remain sidelined within international criminal justice. According to Jocelyn Campanaro, the very fact that “gender” is defined and other key terms are not reflects a devaluation of gendered harms.<sup>150</sup> She is concerned that gender-based crimes will not receive equal attention as a result,<sup>151</sup> probably because the definition is too narrow or because the ICC will be less inclined to prosecute or convict on the basis of an opaque definition. Similarly, Brook Sari Moshan feels that the Rome Statute inappropriately qualifies

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148. This seems to be Cossman’s concern. She states that although a rigid definition of “gender” may allow the problems of women to become visible in international law, it may cause “multiple other subjectivities constructed in and through gender to remain beyond the margins,” Cossman, *supra* note 2, at 289. She also states that homosexuals are among those that such a definition may leave beyond the margins. *Id.*

149. For example, some feminist scholars have described “sex” as containing “constructed, contingent and political elements.” CHARLESWORTH & CHINKIN, *supra* note 7, at 4 (citing Margaret Davies, *Taking the Inside Out: Sex and Gender in the Legal Subject*, in *SEXING THE SUBJECT OF LAW*, 25 (Ngaire Naffine & Rosemary J. Owens eds., 1997)).

150. See Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2591 (2001).

151. *See id.*

the term “gender” and considers the definition a “failure.”<sup>152</sup> She believes that the definition will complicate the prosecution of gender-based crimes as it is unworkable and impractical.<sup>153</sup> She fears that the definition of “gender” implies that gender-based persecution is different from other forms of persecution and therefore will be perceived by the ICC’s judges as “somehow less grave.”<sup>154</sup>

Campanaro and Moshan’s concerns are understandable, given many failures in the past to prosecute fully, or prosecute at all, gender-based crimes.<sup>155</sup> However, much comfort can be found in the arguments above on the nature of the definition of “gender” and in the administrative structure of the ICC set out in the Statute. Under this structure, the Prosecutor must appoint advisers with legal expertise on sexual and gender violence<sup>156</sup> and must take appropriate measures to ensure the effective investigation and prosecution of crimes, taking into account whether the crimes involve gender violence.<sup>157</sup> These steps were specifically included to ensure that gender-based crimes are not sidelined or ignored.<sup>158</sup> The Prosecutor has, in fact, highlighted gender-based crimes in his statements relating to the investigation underway in the Democratic Republic of Congo.<sup>159</sup>

#### IV. CONCLUSION

It is unfortunate that “gender” was singled out in the Rome Statute negotiations and ultimately accorded a “peculiar and circular” definition.<sup>160</sup> A large number of delegations wished to leave the term undefined, just as the terms “political,” “racial,” “national,” “ethnic,” “cultural,” and “religious” were left undefined in the crime against humanity of persecution, and as “age,” “race,” “colour,” “language,” “religion or belief,” “political or other opinion,” “national, ethnic, or social origin,” “wealth,” “birth,” and “other status” remain undefined in article 21(3) on the application of the law without adverse distinction. Once it became clear that the only solution was to adopt a definition, both sides in the “gender” debate would have preferred a definition that more clearly articulated their positions. As is often the case in international negotiations, states sought refuge in constructive ambiguity,<sup>161</sup>

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152. Moshan, *supra* note 3, at 178.

153. *See id.* at 178, 182.

154. *Id.* at 183.

155. For examples of failures to prosecute fully gender-based crimes, see JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 205, 222, 227 (2001).

156. *ROME STATUTE*, *supra* note 1, art. 42(9).

157. *Id.* art. 54(1)(b).

158. Steains, *supra* note 34, at 385, 390.

159. Press Release, The Int’l Crim. Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004), available at <http://www.icc-cpi.int/press/pressreleases/26.html> (“The reports allege a pattern of rape, torture, forced displacement and the illegal use of child soldiers.”).

160. Copelon, *supra* note 5, at 236.

161. AUST, *supra* note 134, at 184. Aust describes the pressures that lead to the use of constructive

leaving much of the decision-making on the content of the definition to the ICC's judges (and, where provided for in the Statute, the Prosecutor and Registrar).

Since the interpretation of "gender" is left with the ICC itself, there are very real concerns by many commentators that the ICC will choose a narrow and regressive reading of the "gender" definition. This could have ramifications not only for how the ICC addresses certain crimes, applicable law and victims and witnesses, but also on the theorization of "gender" in international law more generally. While there is no guarantee that the ICC will go down such a negative path, there are many clear and positive guideposts pointing the ICC in a more progressive direction. If the ICC follows the more progressive path, many of the current concerns will appear overstated. A plain reading of the Rome Statute's text and an interpretation based on U.N. definitions of "gender" support a differentiation between "sex" and "gender," rather than a conflation of the two terms. The ICC will likely understand "context of society" as equal to "socially constructed" and draw its list of indicators of "context of society" from existing U.N. definitions of "gender" which are broad, multifaceted, and cross-cutting. While the ICC must *consider* the "context of society," it cannot *defer* to a misogynist or homophobic context. Additionally, the negotiation history and a plain reading of the Rome Statute's definition of "gender" demonstrate that "sexual orientation" is not explicitly excluded from "gender." In addition, international law is increasingly recognizing "sexual orientation" as a prohibited ground of discrimination. Finally, the administrative structure provided for in the Rome Statute directs the Prosecutor to adopt a strong focus on gender-based crimes, resulting in a thorough review of such crimes by the ICC's judges. Therefore, while one cannot predict with certainty that the ICC will avoid the pitfalls identified by Cossman, Charlesworth, the Special Rapporteur on Violence Against Women, and others, there are strong indicators that the ICC will take a path that benefits gender justice at the ICC, and international law more generally.<sup>162</sup>

The criticisms of the Rome Statute's definition of "gender" highlight the fact that the term is undertheorized in international law. The fact that the Rome Statute leaves the ICC to give content to the term "gender" creates an important opportunity for international lawyers to focus more squarely on the meaning of the term. Increased theorization (at a general level and in the

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ambiguity. "For multilateral treaties, the greater the number of negotiating states, the greater is the need for imaginative and subtle drafting to satisfy competing interests. The process inevitably produces much wording which is unclear or ambiguous." *Id.*

162. On the other hand, not all states have the same reasons to follow these international guideposts when interpreting the crime against humanity of gender-based persecution in the domestic context. States might decide to enforce their own restrictive views of "gender," for example by excluding persecution on the basis of sexual orientation. The ICC can overcome this by deeming such action to represent "unwillingness" under what is commonly referred to as the doctrine of complementarity found in article 17 of the Rome Statute.

context of the Rome Statute) can play a critical role in ensuring broad and productive interpretations of the term by the ICC. Increased theorization may mean transporting theories on the definition of “gender” from other contexts (the domestic legal context and others) and examining their applicability to international law generally, as well as to specific areas of international law such as international human rights, humanitarian, criminal, and refugee law.<sup>163</sup> It may also mean creating a new set of understandings, and would very likely include a great deal of fluidity. A focus on theorizing “gender” will likely lead to a number of international legal approaches, just as there are a number of ever-evolving feminist approaches in other areas.

The definition of “gender” in the Rome Statute should not automatically be replicated in other international law documents. This is easier said than done in the context of international consensus negotiations, in which an unequal power structure privileges those countries rejecting proposals (even when they are a small minority), and in which debates on “gender” are sometimes unfortunately characterized as “distractions” from the “main issues.”<sup>164</sup> Add in the pressures of domestic, religious, and other politics and negotiators may view the Rome Statute definition as a “quick fix” to resolve a crisis. This is what happened in the Durban Declaration and Programme of Action of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.<sup>165</sup> While the Rome Statute’s definition is broad and flexible enough to ensure a positive and sensitive interpretation by the ICC’s Prosecutor, Registrar, and judges, its text is also spare and circular. Future documents can and should strive for a better-drafted and clearer approach, even if the text is essentially left similarly open to construction (this provides the opportunity for increased theorization of the term “gender”). To achieve this, states supportive of a sensitive and forward-looking use of the term “gender” must plan ahead, work together during negotiations, and act as a cohesive bloc. Again, this is easier prescribed than followed, as there would first need to be consensus among a group of states as to some of the basic content of “gender,” even when there is no agreement within the feminist community on the same point. However, such coordination is essential to ensure that states do not approach defining “gender” progressively in an ad-hoc manner—as if opposition to the term always comes as a surprise—but rather approach such a definition as a strategic goal.

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163. See CHARLESWORTH & CHINKIN, *supra* note 7.

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

165. Durban Declaration and Programme of Action, *supra* note 64. A note appended to the document states: “For the purpose of this Declaration and Programme of Action, it was 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.” *Id.* at 75. The term “gender” is mentioned in eighteen paragraphs in the Durban Declaration and Programme of Action.

The Rome Statute definition does not transform international law from understanding “gender” in one way to understanding it a different way.<sup>166</sup> In this sense, the definition in the Rome Statute represents a missed opportunity to remap the boundaries of international law.<sup>167</sup> Practically speaking, it probably was never possible to make a dramatic shift, given the dynamics of the negotiation. The result, however, is broad enough to allow the ICC to interpret the definition to reflect the approaches taken within the United Nations, including nondiscrimination on the basis of sexual orientation, and avoid regression in the law. It is also enough of an empty vessel that increased attention to the theories of “gender” by international lawyers could also have a significant and positive impact on the content of “gender” within international law.

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166. For this reason, the Rome Statute definition of “gender” is thus not transformative. Cossman, *supra* note 2, at 283; CHARLESWORTH & CHINKIN, *supra* note 7, at 335.

167. CHARLESWORTH & CHINKIN, *supra* note 7, at 335.

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