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# Comments on the International Criminal Court Office of the Prosecutor's Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute

Commentary offered by the Public International  
Law & Policy Group, Debevoise & Plimpton LLP,  
Dechert LLP, and other pro bono law firm partners

**COMMENTS ON THE INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR'S  
POLICY INITIATIVE TO ADVANCE ACCOUNTABILITY  
FOR GENDER PERSECUTION UNDER THE ROME STATUTE**

**I. Introduction**

The Public International Law and Policy Group (“*PILPG*”), Debevoise & Plimpton LLP, Dechert LLP, and other pro bono law firm partners offer the following comments in response to the Office of the Prosecutor’s (the “*OTP*” or “*Office*”) call for public consultation on a new policy to advance accountability for gender persecution under the Rome Statute.

The OTP’s initiative demonstrates its continued commitment to developing a more gender-inclusive approach, draws needed attention to the serious but often overlooked crime of persecution on gender grounds, and builds on the important goals outlined in the OTP’s 2014 Policy Paper on Sexual and Gender-Based Crimes (the “*2014 Policy Paper*”). We welcome the OTP’s call for engagement with its policy on gender persecution and are pleased to be part of the discussion on the scope of the forthcoming policy.

In these comments, we will review the history of prosecuting sexual and gender-based crimes before the Court (Section II) and offer practical recommendations for the OTP’s forthcoming policy on gender-based persecution (Section III). Specifically, in considering the goals to be articulated in the forthcoming policy, we recommend the following policies and practices:

1. adopting broad and modern interpretations of “gender” and persecution “on the grounds of gender” that reflect the evolution of international jurisprudence beyond the male/female binary;
2. developing a robust victim participation scheme at every stage of a gender persecution prosecution; and
3. ensuring that intersectionality and cultural relativism are properly considered in the prosecution of gender-based persecution.

**II. Contextual Background**

**A. The Rome Statute**

The adoption of the Rome Statute represented a significant step towards ending impunity for sexual and gender-based violence. After relative inattention to such crimes by earlier *ad hoc* criminal tribunals, a concerted lobbying effort by activists aimed to create a gender-sensitive ICC.<sup>1</sup> As a result, the final text of the Statute defines gender, contains substantive provisions

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<sup>1</sup> See Rosemary Grey, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS, AND POTENTIAL (2019) [hereinafter “Grey, *Prosecuting*”].

criminalizing acts of sexual and gender-based violence, and includes procedural provisions to protect victims and witnesses of such acts.

**Definition of Gender.** The Rome Statute is the first international criminal tribunal instrument to use and define the word “gender.”<sup>2</sup> The negotiations of this definition were highly contentious,<sup>3</sup> with some states and lobbying groups opposed to the inclusion of gender at all, while others viewed the Statute as an opportunity to galvanize the gender rights movement.<sup>4</sup>

Ultimately, the drafters reached a compromise definition that reflects the competing views of the states parties. Article 7(3) provides: “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>5</sup> By adhering to a binary, biological definition—while recognizing evolving societal context—the definition accommodated both sides of the debate, offering “flexibility as well as precision.”<sup>6</sup>

Further, Article 21(3) of the Statute mandates that the applicable law and provisions of the Statute—including Article 7(3)—be interpreted and applied “consistent[ly] with internationally recognized human rights,” without discrimination on certain protected grounds, including on grounds of gender.<sup>7</sup> In its 2014 Policy Paper, the OTP stated that it would: “[e]nsure that it applies and interprets the Statute in line with internationally recognised human rights, including those relating to women’s human rights and gender equality”; and, in this vein, “consider not only acts of violence and discrimination based on sex, but also those related to socially constructed gender roles.”<sup>8</sup>

**Substantive Protections.** The Rome Statute criminalizes a broader range of sexual and gender-based crimes than any previous international criminal law instrument.<sup>9</sup> As such, the Statute provides “strong law on the books enabling gender crimes to be prosecuted as war crimes, crimes against humanity, and predicate acts of genocide.”<sup>10</sup>

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<sup>2</sup> Valerie Oosterveld, *The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Justice?* 18 HARVARD H. R. J. 55, 56 (2005) [hereinafter “Oosterveld”].

<sup>3</sup> *Id.* at 58–59.

<sup>4</sup> Gina Erica Hill, “Gender in the International Criminal Court Negotiations,” U. TORONTO, 90–94 (2001).

<sup>5</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2002), Art. 7(1)(g) [hereinafter “ROME STATUTE”].

<sup>6</sup> Oosterveld at 65 (citing Cate Steains, *Gender Issues*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS* 357, 374 (Roy S. Lee ed., 1999)).

<sup>7</sup> *See* ROME STATUTE, Art. 21(3).

<sup>8</sup> OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON SEXUAL AND GENDER BASED CRIMES ¶¶ 26–27 (June 2014) [hereinafter “2014 POLICY PAPER”] (emphasis added).

<sup>9</sup> *Compare, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993), Arts. 2, 5 (criminalizing rape as a “crime against humanity” but not as a “grave breach of the Geneva Convention”); Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, 33 I.L.M. 1598 (1994), Art. 3 (categorizing acts of rape and “persecution on political, racial and religious grounds”—but not gender—as crimes against humanity); *id.* Art. 4 (characterizing rape and “enforced prostitution and any form of indecent assault” as “outrages upon personal dignity”); *see* discussion at Beth Van Schaack, *Obstacles on the Road to Gender Justice*, 17 J. GENDER, SOC. POL. & L. 363, 364, n. 1 (2009) [hereinafter “Van Schaack”].

<sup>10</sup> Van Schaack, at 3.

- Article 7(1)(g) criminalizes the acts of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>11</sup>
- Article 8 classifies the same acts as war crimes when carried out in the context of international or non-international armed conflict.<sup>12</sup>
- Sexual and gender-based violence may also be charged as the predicate acts of other crimes within the Court’s jurisdiction, such as genocide, aggression, torture, mutilation, inhumane treatment, and outrages upon personal dignity.<sup>13</sup>

The elements of sexual and gender-based crimes are detailed in the Court’s compendium, “Elements of Crimes.” Of note, the compendium explains that crimes of rape, enforced prostitution, and sexual violence do not require physical contact by the perpetrator; the mere “threat of force or coercion” is sufficient.<sup>14</sup> “Threat of force or coercion” can be committed by various means, including through “fear of violence, duress, detention, psychological oppression or abuse of power...or by taking advantage of a coercive environment, or...against a person incapable of giving genuine consent.”<sup>15</sup>

The Rome Statute is also the only international instrument to recognize the crime against humanity of gender-based persecution.<sup>16</sup> The inclusion of persecution was notable in that it “significantly broaden[ed] the positive law conception of ‘gender-based crimes.’”<sup>17</sup>

Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>18</sup> The perpetrator must have “targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such,” and such targeting must be “based on” gender or some other enumerated ground (including “other grounds that are universally recognized as impermissible under international law”).<sup>19</sup> To be charged as a crime against humanity, gender-based persecution must also be “committed as part of a widespread or

<sup>11</sup> ROME STATUTE, Art. 7(1)(g).

<sup>12</sup> *See id.* Arts. 8(2)(b)(xxii), 8(2)(e)(vi) (which mirror the language of Art. 7(1)(g)).

<sup>13</sup> *See id.* Arts. 6(b), 7(f), 7(k), 8(2)(a)(ii), 8(2)(b)(x), 8(2)(b)(xxii), 8(c)(i), 8(3)(xi), 8 *bis*.

<sup>14</sup> *See, e.g.*, INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES (2011), Arts. 7(1)(g)(1)(2), 7(1)(g)(3)(1), 7(1)(g)(6)(1), 8(2)(b)(xxii)(1)(2), 8(2)(b)(xxii)(3)(1), 8(2)(b)(xxii)(6)(1) [hereinafter “ICC ELEMENTS”].

<sup>15</sup> *See id.*

<sup>16</sup> Widney A. Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELBOURNE J. INT’L L. 1, 11 (2003). The authors suggest that although the Rome Statute is the only instrument to do this in a formal, codified manner, general principles of human rights and humanitarian law would envisage discrimination on the basis of gender as a crime against humanity should it rise to the level of persecution.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> ROME STATUTE, Art. 7(2)(g).

<sup>19</sup> ICC ELEMENTS, Art. 7(1)(h)(1)–(3).

systematic attack directed against any civilian population, with knowledge of the attack.”<sup>20</sup> Moreover, persecution must be “committed in connection” with another crime against humanity or some other crime within the Court’s jurisdiction.<sup>21</sup> In other words, it cannot be prosecuted as a standalone act.

***Procedural Protections.*** The Statute also includes procedural protections that recognize the special challenges faced by victims and witnesses of sexual and gender-based violence.

- Article 54(1)(b) requires the Prosecutor to “take appropriate measures to ensure the effective investigation and prosecution of crimes within the Court’s jurisdiction, and in doing so, respect the interests and personal circumstances of victims and witnesses, including...gender...and take into account the nature of the crime, in particular where it involves sexual violence or gender violence.”<sup>22</sup>
- Article 68(1) similarly requires the Court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses...hav[ing] regard to all relevant factors, including...gender...in particular...where the crime involves sexual or gender violence[.]”<sup>23</sup>
- Article 68(2) permits in camera testimony or the presentation of evidence by electronic or other special measures “[i]n particular...in the case of a victim of sexual violence[.]”<sup>24</sup>
- Article 42(9) requires the Prosecutor to “appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence[.]”

The ICC Rules of Procedure and Evidence elaborate further on the available procedural protections.

- Rules 16.1(d) and 17.2(b)(iii) require the Registrar and the Victims and Witnesses Unit, respectively, to “tak[e] gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.”<sup>25</sup>
- Rule 63(4) acknowledges the challenges in proving sexual and gender-based crimes. It stipulates that “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”<sup>26</sup>

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<sup>20</sup> ROME STATUTE, Art. 7(1).

<sup>21</sup> ICC ELEMENTS, Art. 7(1)(h)(4).

<sup>22</sup> ROME STATUTE, Art. 54(1)(b).

<sup>23</sup> *Id.* Art. 68(1).

<sup>24</sup> *Id.* Art. 68(2).

<sup>25</sup> *See, e.g.*, RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT (2019), Rules 16.1(d), 17.2(b)(iii) [hereinafter “RPE”].

<sup>26</sup> *Id.* Rule 63(4).

- Rules 86 and 87 permit the use of protective measures to facilitate testimony, with a particular eye to victims of sexual or gender-based violence.<sup>27</sup> These measures include testifying via video link,<sup>28</sup> employing voice and visual alterations,<sup>29</sup> testifying under seal,<sup>30</sup> and testifying under a pseudonym.<sup>31</sup>

These substantive and procedural innovations show the importance accorded in the Statute and the Rules to prosecuting sexual and gender-based crimes, the recognition that these crimes are widespread, and an intent and willingness to incorporate new mechanisms to ensure these crimes are effectively prosecuted. The OTP’s 2014 Policy Paper reflects this intent, and the OTP’s forthcoming policy on gender persecution provides an additional opportunity to achieve these objectives.

## **B. 2014 Policy Paper on Sexual and Gender-Based Crimes**

In 2012, the OTP made clear that prosecuting sexual and gender-based violence was one of its priorities. In its 2012–2015 Strategic Plan, the OTP resolved to “enhance the integration of a gender perspective in all areas of [its] work and continue to pay particular attention to sexual and gender-based crimes[.]”<sup>32</sup> This was a commendable response to the difficulties faced by the OTP in pursuing or proving sexual and gender-based crimes in its early cases.<sup>33</sup> In 2014, the OTP further developed this goal by publishing the 2014 Policy Paper.<sup>34</sup>

The 2014 Policy Paper rightfully recognized that sexual and gender-based crimes are “amongst the gravest” under the Rome Statute and the “many challenges and obstacles” to the effective investigation and prosecution of such crimes.<sup>35</sup> The OTP thus resolved to focus its resources in the future on investigating and prosecuting sexual and gender-based crimes

<sup>27</sup> *Id.* Rules 86–87.

<sup>28</sup> *Id.* Rule 87.3(c).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Rule 87.3(a)–(b).

<sup>31</sup> *Id.* Rule 87.3(d). Pursuant to Article 68(1), such protective measures may not be “prejudicial to or inconsistent with” the accused’s right to a fair and impartial trial. ROME STATUTE, Art. 68(1).

<sup>32</sup> ICC, OTP, STRATEGIC PLAN 2012–2015 ¶¶ 58–63 (11 October 2013) [hereinafter “STRATEGIC PLAN 2012–2015”]; *see also* ICC, OTP, STRATEGIC PLAN 2016–2018 (16 November 2015) ¶¶ 49–53 (resolving to “continue to integrate a gender perspective in all areas of the Office’s work and to pay particular attention to [sexual and gender-based crimes]”) [hereinafter “STRATEGIC PLAN 2016–2018”]; ICC, OTP, STRATEGIC PLAN 2019–2021, at 5 (17 July 2019) (“Strategic goal 4: to refine and reinforce [the OTP’s] approach to victims, in particular for victims of Sexual and Gender-Based Crimes”) [hereinafter “STRATEGIC PLAN 2019–2021”].

<sup>33</sup> *See, e.g.,* Grey, *Prosecuting* at 5; Lauren Wolfe, *Blind Spot: Why Do Convictions for the World’s Worst Crimes Neglect Survivors of Rape?* FOREIGN POLICY (13 March 2014), available at <https://foreignpolicy.com/2014/03/13/blind-spot/>; *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s Judgment ¶ 196 (8 June 2018); *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled “Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change” ¶ 112 (8 December 2009).

<sup>34</sup> Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 WM. & MARY J. WOMEN & L. 443, 443 (2018).

<sup>35</sup> 2014 POLICY PAPER ¶¶ 3, 45.

wherever the evidence exists, and to provide clarity and direction on gender issues in all aspects of its operations.<sup>36</sup>

**Gender Analysis.** In order to carry out its objectives, the 2014 Policy Paper urges the OTP to “integrat[e] a gender perspective and analysis into all of its work”—*i.e.*, for all crimes within the Court’s jurisdiction and at each stage of a case.<sup>37</sup> Gender analysis is defined as the examination of “the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes,” as well as the “consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.”<sup>38</sup>

At each stage of an ICC case, the 2014 Policy Paper recommends certain gender perspective and analysis practices:

- During preliminary examinations, the 2014 Policy Paper recommends consideration of the barriers to effective domestic judicial proceedings, such as gender stereotypes in the substantive law and the absence of protective measures for victims of sexual and gender-based violence.<sup>39</sup>
- In the investigation phase, the 2014 Policy Paper identifies under-reporting, stigma against victims, and lack of forensic evidence as recurrent obstacles to the prosecution of sexual and gender-based crimes.<sup>40</sup> It also suggests that those interacting with victims understand the effects of trauma and cultural issues on the investigative process.<sup>41</sup>
- During prosecutions, the 2014 Policy Paper urges highlighting of the gender-related aspects of charged crimes,<sup>42</sup> support for the psychological well-being of victims and witnesses,<sup>43</sup> and the imposition of sentences that give due consideration to the sexual and gender dimensions of convicted crimes.<sup>44</sup>

**Interpretation of Key Terms.** The 2014 Policy Paper also sets forth the OTP’s interpretation of key terms such as gender, gender-based crimes, and sexual crimes. It adopts the definition of “gender” set forth at Article 7(3) of the Rome Statute, but also explicitly “acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”<sup>45</sup> In its definition of “gender-based crimes,” the 2014 Policy Paper acknowledges that such crimes are not

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<sup>36</sup> *Id.* ¶ 6.

<sup>37</sup> *Id.* ¶¶ 2, 14, 20–21 (underline emphasis added).

<sup>38</sup> *Id.* at 4.

<sup>39</sup> *Id.* ¶ 41.

<sup>40</sup> *Id.* ¶ 50.

<sup>41</sup> *Id.* ¶¶ 56–57.

<sup>42</sup> *Id.* ¶ 74.

<sup>43</sup> *Id.* ¶ 84.

<sup>44</sup> *Id.* ¶ 99.

<sup>45</sup> *Id.* ¶¶ 15–18.

necessarily sexual in nature, and may include non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.<sup>46</sup>

Describing gender persecution as “an innovation in the Statute,” the 2014 Policy Paper urges its prosecution “to the fullest extent possible.”<sup>47</sup> The 2014 Policy Paper also notes various “indicia” of gender persecution, including “discriminatory policies, violent acts selectively targeting a particular gender, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect’s background, and prior conduct that are indicative of relevant intent and adverse gender biases[.]”<sup>48</sup>

### C. ICC Practice in Recent Years (2014-Present)

***Sexual and Gender-Based Crimes.*** After publication of the 2014 Policy Paper, and the OTP’s increased focus on sexual and gender-based crimes, the Court witnessed a sharp uptick in the investigation and charging of sexual and gender-based crimes. In the four years after the Policy’s enactment, sexual and gender-based crimes grew to 50% of the crimes charged at the ICC.<sup>49</sup> And every investigation since 2014 (with the exception of the investigation into the situation in Palestine) includes allegations of such crimes.<sup>50</sup>

Progress has also been made in the prosecutorial phase. *Ntaganda* was the first case in the Court’s history in which all sexual and gender-based charges were confirmed by the Pre-Trial Chamber, and in 2021, *Ntaganda*’s conviction for rape and sexual slavery, as both war crimes and crimes against humanity, was confirmed.<sup>51</sup> *Ongwen* was the first case where forced pregnancy was charged by an international court as a standalone crime, and the first time that forced marriage was prosecuted before the ICC.<sup>52</sup> It was also the first ICC trial to use the prior-recorded testimony of victims, in recognition of the social stigmas and mental health concerns of giving such testimony.<sup>53</sup> *Ongwen* was convicted for sexual and gender-based crimes and sentenced to 25 years imprisonment, but those decisions remain on appeal.<sup>54</sup> Finally, in *Yékatom*

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<sup>46</sup> *Id.* ¶ 16.

<sup>47</sup> *Id.* ¶ 67.

<sup>48</sup> *Id.*

<sup>49</sup> Grey, *Prosecuting* at 253, Fig. 5.1.

<sup>50</sup> *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda’s Legacy*, 9 INT’L FEDERATION FOR HUMAN RIGHTS & WOMEN’S INITIATIVES FOR GENDER JUSTICE (June 2021), available at <https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf>.

<sup>51</sup> *Compare Prosecutor v. Ntaganda*, ICC-01/04-02/06-203-AnxA, Prosecution’s Submission of the Document Containing the Charges Annex A, at 56–60 (10 January 2014) with *Prosecutor v. Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, at 63 (9 June 2014); *Prosecutor v. Ntaganda*, ICC-01-04-02/06, Judgment, at 536 (8 July 2019); *Prosecutor v. Ntaganda*, ICC-01-04-02/06-2442, Sentencing Judgment, at 117 (7 November 2019); *Prosecutor v. Ntaganda*, ICC-01-04-02/06-2667, Judgment on the Appeal of Mr. Bosco Ntaganda Against the Decision of Trial Chamber VI of 7 November 2019 Entitled “Sentencing Judgment” ¶ 284 (30 March 2021).

<sup>52</sup> Nisha Varia, *LRA’s Ongwen: A Critical First ICC Conviction*, HUMAN RIGHTS WATCH (13 March 2021), available at <https://www.hrw.org/news/2021/03/13/lras-ongwen-critical-first-icc-conviction#>.

<sup>53</sup> Grey, *Prosecuting* at 175.

<sup>54</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (4 February 2021); *Prosecutor v. Ongwen*, ICC-02/04-01/15-1819-Red, Sentence (6 May 2021); see ICC: Ongwen Case, available at <https://www.icc-cpi.int/Pages/cases.aspx?k=MngPhaseOfCaseEN:Appeal> (last accessed 4 March 2022) (noting appellate hearing in *Ongwen* case on 14–18 February 2022).



& *Ngaïssona*, the Pre-Trial Chamber confirmed charges against Ngaïssona of rape as a war crime and crime against humanity. The OTP has made additional efforts to charge sexual and gender-based crimes, including gender-based persecution, but the Pre-Trial Chamber has denied those requests.<sup>55</sup>

These prosecutorial successes—which follow from the OTP’s efforts since issuing its 2014 Policy Paper—highlight that it is not only possible, but essential, to pursue sexual and gender-based crimes. Despite the challenges faced over the years, sexual and gender-based crimes are widespread and often impact victims that are already marginalized in their societies. In a search for “justice,” the OTP has an important role to play in giving these victims a voice.

***Gender persecution.*** The importance of fully prosecuting sexual and gender-based crimes applies equally to gender-based persecution. The OTP’s forthcoming gender persecution policy underlines its commitment to highlighting the prevalence of this crime. In 2019, the *Al Hassan* case saw the first instance of a gender persecution charge going to trial.<sup>56</sup> The more recent *Abd-Al-Rahman* case is also notable in that it charges gender persecution for alleged crimes committed against male victims.<sup>57</sup>

In addition, the preliminary investigations (or inquiries into potential preliminary investigations) in Afghanistan, Colombia, and Iraq all feature allegations of gender-based persecution, but were delayed or closed for complementarity or admissibility reasons.<sup>58</sup> In

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<sup>55</sup> *Prosecutor v. Alfred Yékatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-517, Decision on the Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges 19 (14 May 2020); *Prosecutor v. Alfred Yékatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-518-Red, Public Redacted Version of “Prosecution Motion to Amend the Charges against Alfred YÉKATOM,” ¶¶ 3–4 (22 May 2020); *Prosecutor v. Alfred Yékatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-560, Consolidated Decision on Filings ICC-01/14-01/18-524-Corr and ICC-01/14-01/18-545 (Prosecutor’s requests for leave to appeal the decisions pursuant to article 61(9) of the Rome Statute dated 14 May 2020 and 1 June 2020), ¶ 19 (19 June 2020). It is worth noting that in both instances the delay in bringing these charges resulted from steps taken by the OTP to protect the victim’s security and mental health. See *Yékatom & Ngaïssona*, Decision on Request to Amend Charges ¶ 14; *Yékatom & Ngaïssona*, Motion to Amend Charges Against Yékatom ¶¶ 23, 28. Rosemary Grey et al., *The ICC’s Troubled Track Record on Sexual and Gender-Based Crimes Continues: The Yékatom & Ngaïssona Case*, OPINIO JURIS (7 March 2020), available at <http://opiniojuris.org/2020/07/03/the-iccs-troubled-track-record-on-sexual-and-gender-based-crimes-continues-the-Yékatom-ngaïssona-case-part-1/> [hereinafter “Grey, *Track Record*”].

<sup>56</sup> *Prosecutor v. Al Hassan*, ICC Case Information Sheet, <https://www.icc-cpi.int/mali/al-hassan>; Grey, *Prosecuting* at 245.

<sup>57</sup> See *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-325-Conf-Anx1-Corr2, Second Corrected Version of the Document Containing the Charges ¶ 93 (29 March 2021).

<sup>58</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17-7-Red, Request for Authorization of an Investigation Pursuant to Article 15 ¶¶ 115–121 (20 November 2017); Fatou Bensouda, Keynote Remarks at SAIFAC Conference, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court 2*, 5 (2019) [hereinafter “Bensouda”]; Press Release, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS (8 April 2015), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1>; see CUNY Law School, MADRE, and Organization of Women’s Freedom in Iraq, *Communication to the ICC Prosecutor Pursuant to Article 15 of the Rome Statute Requesting a Preliminary Examination into the Situation of: Gender-Based Persecution and Torture as Crimes Against Humanity and War Crimes Committed by the Islamic State of Iraq and the Levant (ISIL) in Iraq* (8 November 2017); Press Release, ICC Judges Reject Opening of an Investigation Regarding the Afghanistan

particular, the Afghanistan investigation was the first to name gender-based persecution as a charged crime.<sup>59</sup> Though the Pre-Trial Chamber declined to authorize the investigation in 2019, the OTP has recently taken steps to reopen the case.<sup>60</sup>

The Nigeria investigation remains open and includes potential charges of gender-based persecution of both male and female victims,<sup>61</sup> as does the investigation into Myanmar.<sup>62</sup> The Court is also investigating alleged crimes against humanity in its *Venezuela I* investigation,<sup>63</sup> and independent fact-finding by the United Nations uncovered reports of sexual and gender-based violence that may amount to gender-based persecution.<sup>64</sup>

***Gender-Sensitive Policies and Procedures.*** In recent years, the OTP has also developed additional gender-sensitive policies and procedures with respect to investigations and preliminary examinations to address past obstacles to bringing sexual and gender-based charges. For instance, the Office has adopted policies of timely charging sexual and gender-based crimes wherever evidence exists, from an investigation’s inception;<sup>65</sup> charging multiple alternative modes of liability;<sup>66</sup> paying particular attention to crimes that have been traditionally under-prosecuted;<sup>67</sup> developing “narrower” cases, including cases against mid-level perpetrators, where appropriate;<sup>68</sup> and conducting an evidentiary review, including a “gender crimes checklist,” prior to the confirmation of charges.<sup>69</sup> These policies have been further supported by the appointment of special advisors to the Prosecutor on issues of sexual and gender-based violence, as envisioned in Article 42(9) of the Statute.

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Situation (2019), available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1448>; ICC, Preliminary Examination Colombia, [icc-cpi.int/Colombia](https://www.icc-cpi.int/Colombia). Publicly available information on remaining open preliminary investigations in Guinea, Ukraine, Bolivia and Venezuela does not suggest that gender-based persecution is an issue in those cases. See generally ICC, Preliminary Examinations, available at <https://www.icc-cpi.int/pages/pe.aspx>.

<sup>59</sup> Rosemary Grey, et al. *Gender-Based Persecution as a Crime Against Humanity: The Road Ahead*, 17(5) J. INT’L CRIM. JUST. 957, 979 (2019) [hereinafter “Grey, *Road Ahead*”].

<sup>60</sup> Press Release, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, Following the Application for an Expedited Order under Article 18(2) Seeking Authorization to Resume Investigations in the Situation in Afghanistan (27 September 2021), available at <https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>.

<sup>61</sup> See Bensouda at 2, 5.

<sup>62</sup> *Id.* at 2 (noting that “sexual and gender-based violence pervade the contexts in which the Court operates,” including in Nigeria and Myanmar); *id.* at 5 (“In Nigeria, we have been analyzing whether there is a reasonable basis to believe that Boko Haram committed the crime of persecution on the basis of gender grounds against women and girls, men and boys”).

<sup>63</sup> ICC, *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18, available at <https://www.icc-cpi.int/venezuela>.

<sup>64</sup> Detailed Findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, UN Doc. A/HRC/45/CRP.11, 371, 374, 377–378 (15 September 2020).

<sup>65</sup> STRATEGIC PLAN 2012–2015 ¶¶ 4(a), 23, 90; STRATEGIC PLAN 2016–2018 ¶¶ 35–36; see Grey, *Prosecuting at* 262 (citing F. Bensouda, *Gender Justice and the ICC*, 16 (4) INT’L FEMINIST J. POL. 538, 540 (2014)).

<sup>66</sup> ICC, PRE-TRIAL PRACTICE MANUAL, at 18 (2015).

<sup>67</sup> ICC, OTP, POLICY PAPER ON CASE SELECTION AND PRIORITIZATION ¶ 46 (2016).

<sup>68</sup> STRATEGIC PLAN 2019–2021 ¶24.

<sup>69</sup> Grey, *Prosecuting at* 263, n. 64.

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As outlined above, in the 20 years since the passage of the Rome Statute, the OTP has taken significant steps to translate the promise of the Statute into reality, including with the 2014 Policy Paper. As the Office has recognized, a deeper and more focused approach on gender persecution is now called for. The Prosecutor’s forthcoming policy initiative on gender persecution constitutes an important and most welcome step in the effort to meet that call.

In particular, a review of the cases in which gender-based persecution has been investigated and prosecuted reveals several key issues that are ripe for consideration in drafting the forthcoming policy: (1) the inherent complexities of establishing intent to persecute on gender-based grounds specifically; (2) the challenges inherent in evidencing sexual and gender-based crimes generally; and (3) intersectionality and the difficulties of demonstrating the unique role and presence of gender-based persecution in atrocity situations.<sup>70</sup> In the sections that follow, we make several recommendations that aim to address these recognized challenges in prosecuting gender persecution.

### **III. Recommendations**

In this section, we recommend the following for inclusion in the OTP’s forthcoming policy on gender persecution: (A) a broader and modern understanding of “gender” and gender-based persecution under the Rome Statute that reflects the evolution of internationally recognized human rights; (B) a robust victim participation scheme for every stage of gender-based persecution prosecutions; and (C) consideration of intersectionality and cultural relativism within the gender persecution framework.

#### **A. Broadening and Clarifying “Gender” and Gender-Based Persecution Under the Rome Statute**

The forthcoming policy initiative on gender persecution is an opportunity for the OTP to adopt a broader and modern definition of gender—one that moves beyond the male/female binary and is grounded in the current societal context and evolving international human rights law and practice. It is also an opportunity for the OTP to reimagine gender persecution through the eyes of the perpetrator—and not by virtue of the victims’ characteristics—in order to protect marginalized and vulnerable persons falling outside binary gender categories but who are nevertheless targeted on gender grounds.

***Broadening the Definition of “Gender”***. As noted above, Article 7(3) of the Rome Statute provides: “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>71</sup>

Although the definition ostensibly begins with the so-called “binary” definition of gender, and ends with a limiting sentence, it also includes the words “within the context of

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<sup>70</sup> *Id.* at 266, Fig. 5.4 & 279–282.

<sup>71</sup> ROME STATUTE, Art. 7(3).

society.” The inclusion of this latter element indicates that the drafters did not envisage adhering to a strict binary. Moreover, Article 21(3), which requires that interpretation of the Statute “be consistent with internationally recognized human rights,” makes clear that the terms in the Rome Statute—including “gender”—are to be interpreted in light of evolving standards in human rights law.

There is wide academic support for a broad interpretation of Article 7(3) as well. One author argues that “within the context of society” coheres with a “socially constructed” understanding of gender and allows the Court to consider a wide range of factors beyond the biological binary.<sup>72</sup> Others point to the Rome Statute’s drafting history in support of a broad and fluid understanding of “gender.”<sup>73</sup> As such, scholars have argued, for instance, that gender-based persecution encompasses the persecution of transgender persons, as well as the persecution of male and female advocates for women’s education.<sup>74</sup>

Thus, we recommend that the OTP’s new policy initiative on gender persecution adopt a broader and modern understanding of “gender”—as both a biological *and* socially constructed concept—in reliance on Article 21(3) and “within the context of society” in Article 7(3). A broader approach to the definition of gender is consistent with positions taken by the OTP in the past. For example, the 2014 Policy Paper reflects an understanding that “gender-based crimes” encompass attacks on the basis of “sex and/or socially constructed gender roles.”<sup>75</sup> Building from the 2014 Policy Paper, the OTP’s former Special Advisor on Gender urged against the “presumption that the OTP views the construct of gender as limited to binary.”<sup>76</sup>

A broader approach to “gender” coheres not only with the OTP’s past practice, but also with the practice of other international and regional human rights bodies. These bodies, collectively, establish the “internationally recognized human rights” referred to under Article 21(3). For example:

- Several United Nations and other intergovernmental bodies have adopted broad and “socially constructed” definitions of “gender” in their practice.<sup>77</sup> Often, these

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<sup>72</sup> Oosterveld at 75.

<sup>73</sup> Grey, *Road Ahead* at 963.

<sup>74</sup> *See id.*

<sup>75</sup> 2014 POLICY PAPER ¶ 16.

<sup>76</sup> *See* Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 N.W. J. H. R. 1, 15 (2021) [hereinafter “Davis, *Dusting*”] (citing Conversation with Patricia Visser-Sellers, Special Advisor for Gender for the Office of the Prosecutor of the International Criminal Court (12 March 2018)).

<sup>77</sup> *See, e.g.*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice* (2018), at 7 (“Gender refers to the socially constructed identities, attributes and roles of persons in relation to their sex and the social and cultural meanings attached to biological differences based on sex. The meaning of such socially constructed identities, attributes and roles varies across societies, communities, and groups and over time.”); OFFICE OF THE SPECIAL ADVISOR ON GENDER ISSUES AND ADVANCEMENT OF WOMEN, *Gender Mainstreaming: Strategy for Promoting Gender Equality* (2001), available at <https://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf>, at 1 (“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 the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization

definitions explicitly acknowledge that the socially constructed concept of gender varies across time and context.<sup>78</sup> These human rights bodies also tend to include sexual orientation, gender identity, and gender expression as protected characteristics against discrimination or persecution.<sup>79</sup>

- International and regional courts also understand “gender” as a social construct. The Inter-American Court of Human Rights, for instance, differentiates “gender” from “sex” and includes “socially constructed identities” in its conception of gender.<sup>80</sup> In 2017, it clarified that gender identity and gender expression are protected characteristics, and, in doing so, observed that “human rights treaties are living instruments the interpretation of which must evolve with time and with the conditions of contemporary life.”<sup>81</sup> The UN Human Rights Committee and European Court of Human Rights have similarly prohibited discrimination on grounds of sexual orientation and gender identity.<sup>82</sup>
- The drafting process for the International Law Commission’s (“*ILC*”) draft articles on Crimes Against Humanity (2019) is also illustrative. When conceiving of a definition for gender, many member states invoked the OTP’s 2014 Policy Paper as a baseline, building on it to include sexual orientation, gender identity, and sex characteristics.<sup>83</sup> A group of UN Experts, in their commentary to the ILC, also

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processes. They are context/time-specific and changeable.”); UN WOMEN, *Concepts and Definitions*, available at <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>, at 1 (same definition of “gender”); COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/GC/28)* ¶ 5 (2010) [hereinafter “CEDAW”] (“The term ‘gender’ refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women.”).

<sup>78</sup> See *id.*

<sup>79</sup> 2014 POLICY PAPER, n. 23. See, e.g., CEDAW ¶ 18; AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or imputed Sexual Orientation or Gender Identity* (12 May 2014).

<sup>80</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS, *Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples: State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1, of the American Convention on Human Rights)*, Advisory Opinion, Series A No. 24 (24 November 2017) ¶¶ 32(a), 32(e).

<sup>81</sup> IACHR, *Advisory Opinion Requested by the Republic of Costa Rica* (OC-24/17) ¶¶ 68–70, 78–79, 84 (2017) (quote at ¶ 69).

<sup>82</sup> See *G. v. Australia*, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2172/2012* (Comm. No. 2172/2012) (28 June 2017) (holding that an Australian law prohibiting a transgender person from changing the sex designation on a birth certificate constituted discrimination on grounds of gender identity and marital status under Article 26 of the International Covenant of Civil and Political Rights); *Identoba and Others v. Georgia*, ECHR App. No. 73235/12), Judgment ¶ 96 (12 May 2015) (holding that prohibition against discrimination “duly covers questions related to sexual orientation and gender identity”); *A.M. and Others v. Russia*, ECHR App. No. 47220/19 ¶ 79 (6 July 2021) (finding discrimination on grounds that the domestic courts had “singled out [the applicant] on the ground of her status as transgender person”).

<sup>83</sup> Grey, *Road Ahead* at 959.

referred to the 2014 Policy Paper and urged the ILC to (1) “recognize[] gender as the social attributes associated with being male and female, an evolving social and ideological construct that justifies inequality and provides a means to categorize, order and symbolize power relations”; and (2) acknowledge that “gender should not be confused with sex.”<sup>84</sup>

The movement toward a broader, more modern conception of “gender” is essential to the protection of marginalized groups that fall outside the gender “binary.” While women and girls are overwhelmingly the victims of gender-based persecution—which the OTP has duly recognized<sup>85</sup>—gay men and transgender individuals have historically been, and continue to be, victims of horrific forms of persecution.<sup>86</sup> The OTP’s preliminary examination into Colombia, for example, discovered that “lesbian, gay, bisexual and transgender persons” appeared “particularly vulnerable to torture.”<sup>87</sup>

In line with Article 21(3)’s mandate of consistency with international standards, the OTP should adopt the shared understanding of “gender” as a “social construct” distinct from sex, which is prevalent in international human rights jurisprudence and scholarship. The gender persecution policy is an opportunity for the Office to take a leading role in the development of international criminal law beyond the gender “binary.” Doing so would ensure the much-needed protection of marginalized groups, who have suffered and continue to suffer from persecution on account of their sexual orientation, gender identity, or gender expression.

***Broadening the Criteria for “Gender-Based Persecution”.*** In addition to broadening its understanding of “gender,” the OTP has the opportunity to revisit the meaning of gender-based persecution, by considering the perpetrator’s perspective.

Rather than viewing persecution as carried out against a class of victims that share the same *characteristics*—which may be difficult in light of the broad and socially-constructed conception of “gender” that has now been widely adopted—the OTP could consider instead the *basis* for the persecution. In other words, the OTP could adopt a *subjective* approach to persecution.

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<sup>84</sup> *Joint Comments to the Draft Crimes Against Humanity Convention to the International Law Commission by 24 Special Rapporteurs, Working Groups and Independent Experts*, at 2 (30 November 2018), available at <https://www.ohchr.org/Documents/Issues/Executions/LetterGender.pdf> Joint Comments (noting that no other protected characteristics are explicitly defined). Ultimately, the ILC draft articles do not define “gender” explicitly. *Crimes Against Humanity, Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.935 (15 May 2019).

<sup>85</sup> See, e.g., Bensouda at 2; ICC, “Statement of ICC Prosecutor, Fatou Bensouda, on the Occasion of this Year’s International Day for the Elimination of Violence against Women” (27 November 2020), available at <https://www.icc-cpi.int/Pages/item.aspx?name=201127-prosecutor-statement>.

<sup>86</sup> See Davis, *Dusting* at 35 (discussing the persecution of gay men and transgender persons by the Nazi regime).

<sup>87</sup> ICC, Office of the Prosecutor, *Situation in Colombia: Interim Report ¶ 76* (November 2012); see Lisa Davis, *Third Party at the Table: Afro-Colombian Women’s Struggle for Peace and Inclusion*, 4 COLUM. HUM. RTS. L. REV. ONLINE 363, 375 (2020); Davis, *Dusting*, at 43–44.

The subjective approach criminalizes persecution based on the perpetrator’s beliefs about what it means to be “male” or “female.”<sup>88</sup> In other words, gender persecution encompasses not just the persecution of a group that shares a biological sex but also persecution based on the discriminatory social meanings that perpetrators assign to biological sex. Under this approach, the gender binary “defines the grounds on which the group is victimized, rather than the identifying feature of the group.”<sup>89</sup> Thus, gender persecution is conceptualized to encompass not only acts committed *against a gender group*, but also acts motivated *based on gender grounds*.

The Court has been open to this approach. In its decision authorizing the Myanmar investigation, for example, the Pre-Trial Chamber found that the identity of a persecuted group may be examined both objectively and subjectively, with the former considering the group’s identifying characteristics and the latter measuring how a group is perceived by its members and by the perpetrator.<sup>90</sup>

In *Al Hassan*—the first case to charge the crime of gender persecution—the OTP has also adopted the subjective approach. In that case, acts of gender persecution reflect prejudicial perspectives concerning the proper behaviors of females in society. As the Trial Chamber found, the violence at issue constituted “persecution on sexist grounds, in that these women were treated as objects”—*i.e.*, they were persecuted because of how they were perceived as objects in the context of their society.<sup>91</sup>

By continuing to move beyond biological sex or physical appearance to consider gender identity and perception, the OTP can more effectively protect groups who may not have any unifying “outward” characteristic. In other words, persecution is capable of being carried out by anyone asserting a traditionally gender-based narrative through an act of dominance on anyone else, regardless of the gender and sex of either individual.<sup>92</sup> This broader lens recognizes that anyone—including non-binary individuals—can be a victim or perpetrator of persecution, pivots

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<sup>88</sup> See *Grey, Road Ahead* at 961–962 (explaining that a perpetrator-focused approach enables prosecutions “based on beliefs about what it means to be ‘male’ or ‘female,’ including acts aimed at enforcing a persecutor’s beliefs about the ideal behavior of males and females, respectively”); see also Davis, *Dusting* at 6 (“[G]ender-based crimes are used as punishments against those who are perceived to transgress assigned gender narratives that regulate [the] ‘accepted’ forms of gender expression [which] manifest in [certain] roles, behaviors, activities or attributes.”).

<sup>89</sup> *Grey, Road Ahead* at 972.

<sup>90</sup> Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27 14-11-2019 ¶ 103 (14 November 2019) (“As regards the subjective criteria, the perception of the group by the perpetrator as well as the perception and self-identification of the victims may be considered”).

<sup>91</sup> See *Prosecutor v. Al Hassan*, ICC-1/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portée contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ¶ 700 (13 November 2019) (our translation of French original: “La Chambre estime que cela constitue également une persécution pour motifs sexistes, en ce que ces femmes étaient traitées comme des objets.”).

<sup>92</sup> Davis, *Dusting* at 20 (citing Eve Ayiera, *Sexual Violence in Conflict: A Problematic International Discourse*, URGENT ACTION FUND 17 (2014)).

away from the notion that gender and sexual-based violence is purely a “women’s issue,” and thus brings more types of criminal conduct within the scope of the Rome Statute.<sup>93</sup>

Approaching gender persecution from the perpetrator’s perspective allows the OTP to be mindful of persecution based on the many different ways in which victims may choose to identify. This does not detract from prosecuting “traditional” gendered crimes, most often committed against women, as the Court has the tools to prosecute both the cases rooted in biology, and those rooted in a modern definition reflective of society. In leading by example, the Court can encourage member states and non-member states alike to take up the mantle of expanding the prosecution of gender persecution and sexual and gender-based crimes in general.

## **B. Developing a Robust Victim Participation Scheme for Gender Persecution<sup>94</sup>**

The Court is unique in the field of international criminal law in permitting victim participation in proceedings.<sup>95</sup> As the OTP has rightly acknowledged, victims and witnesses are “actors of international justice, rather than its passive subjects.”<sup>96</sup> As noted above, they enjoy extensive protections in both the Rome Statute and the Court’s Rules of Procedure.<sup>97</sup> In the 2014 Policy Paper—and in the preceding 2010 Policy Paper on Victim Participation—the OTP resolved to prioritize victim participation in the prosecution of sexual and gender-based crimes in particular.

The forthcoming policy initiative on gender persecution is an opportunity for the OTP to further develop a robust victim participation scheme that builds upon its past work and incorporates a gender analysis at every stage of a gender persecution prosecution: evidence-gathering, charging, trial, and appeal.

***Evidence Gathering.*** As past experience confirms, strong evidence of sexual and gender-based crimes should be submitted as early as possible, ideally at the confirmation of charges phase, because requests to bring additional charges or evidence may be denied in

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<sup>93</sup> See *id.* at 26 (“The binary and patriarchal framing of sexual violence as a ‘women’s issue’ has further ensconced the institutionalization of gender discrimination against women and girls and the invisibilization of LGBTIQ non-binary and gender non-conforming persons’ rights.”).

<sup>94</sup> We recognize that the OTP has addressed the issue of victim participation in its 2010 Policy Paper on Victim’s Participation. The intention of our discussion here is to focus on aspects of victim participation that relate to the prosecution of sexual and gender-based crimes in general, and gender-based persecution in particular. We also note that the Policy Paper on Victim’s Participation is in some areas at tension with more recent policy statements of the OTP, and the Office may want to consider updates in this regard as well.

<sup>95</sup> Abhiroop Saha & Surbhi Soni, *Revisiting the Potential for Restorative Justice at the International Criminal Court: A Search for Theoretical Justifications of the Practice of ICC*, 3 DE LEGE FERENDA 92, 94 (2021).

<sup>96</sup> ICC, OTP, POLICY PAPER ON VICTIM PARTICIPATION, at 1 (2010) [hereinafter “VICTIM PARTICIPATION POLICY”].

<sup>97</sup> See *supra* Sec. II.A. ASSEMBLY OF STATES PARTIES, *Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims*, ICC-ASP/12/41 ¶ 28 (11 October 2013) (recognizing the Court was created with both “a punitive and restorative function”). See, e.g., ROME STATUTE, Arts. 54(1)(b), 68(1) (protecting the interests of victims and imposing measures ensuring their safety and wellbeing, including the establishment of a Victims and Witnesses Unit); RPE, Rule 17.2(b)(iii) (tasking the Victims and Witnesses Unit with “[t]aking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings”); RPE, Rules 86–87 (permitting the Chamber to consider the needs of victims of sexual and gender-based violence in particular).



subsequent rounds.<sup>98</sup> In the *Yékatom & Ngaïssona* case, for example, the Court denied the OTP’s request to amend the confirmed charges on grounds of inefficiency and fairness to the accused.<sup>99</sup>

However, as the OTP is well aware, evidence of sexual and gender-based crimes can be exceedingly difficult to gather, given the trauma and other sensitivities associated with these crimes and the potential challenges to reaching victims securely.<sup>100</sup> As set out below, in its forthcoming gender persecution policy, the OTP has the opportunity to adopt enhanced proof-gathering policies and practices through early collaboration with victims and their representatives.

While proof-gathering issues are recurrent in the prosecution of sexual and gender-based crimes more broadly,<sup>101</sup> early collaboration between the OTP and victims is critical to the prosecution of gender persecution in particular. Between the opening of a preliminary examination and the approval of an investigation, victims and witnesses of gender persecution may become unavailable, evidence may deteriorate, and the social stigma often associated with these crimes may coerce victims into silence.<sup>102</sup> Moreover, it takes time not only to identify the victims of gender persecution but also to gather their stories,<sup>103</sup> and the passage of time exacerbates victims’ ability to provide coherent, complete, and logical testimony.<sup>104</sup> Victims of gender persecution are also more likely to face reprisal, recrimination, and social stigma upon telling their stories, making the potential consequences for mishandling this type of evidence much greater.<sup>105</sup>

By collaborating with victims of gender persecution at the first opportunity—and by providing resources and training to victims’ legal representatives on the best practices for evidence gathering at the Court—the OTP can strengthen the factual and legal underpinnings of gender persecution at an early stage, and shape more favorable judicial outcomes. For example, the early engagement and submissions of victims’ legal representatives in the Myanmar case played an important role in expanding the scope of the crimes under investigation to include

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<sup>98</sup> See *supra* n. 55 (discussion of *Yékatom & Ngaïssona*).

<sup>99</sup> See *Prosecutor v. Yékatom & Ngaïssona*, Decision on the Prosecutor’s Request to Amend the Charges against Alfred Yékatom, ICC-01/14-01/18-538 ¶¶ 18–19 (1 June 2020).

<sup>100</sup> See 2014 POLICY PAPER ¶¶ 50, 55–70; see also WORLD HEALTH ORGANIZATION, *Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies* (2007). Grey, *Prosecuting* at 266, Fig. 5.4, 279–282.

<sup>101</sup> Veena Suresh, *The Victim’s Court? An Analysis of the Participation of Victims of Sexual Violence in International Criminal Proceedings*, 8(2) GRONINGEN J. INT’L L. 244, 257 (2021).

<sup>102</sup> See *id.*; Sara Kendall, “Juridified Victimhood at the ICC,” in *Advancing the Impact of Victim Participation at the International Criminal Court: Bridging the Gap between Research and Practice*, UK ECONOMIC AND SOCIAL RESEARCH COUNCIL 137 (Rudina Jasini & Gregory Townsend eds., 2020).

<sup>103</sup> The OTP has recognized these difficulties itself. See POLICY PAPER ¶ 50 (June 2014); Wayne Jordash & Uzay Yasar Aysev, “Victim Participation in the Pre-Situation Phase: Insights from the Pre-Trial Chamber’s Rohingya Decision,” in *Victims at the Center of Justice: From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, FIDH–INT’L FED. HUM. RTS. 20 (2018) [hereinafter “Jordash & Aysev”].

<sup>104</sup> See WORLD HEALTH ORGANIZATION, *Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies*, at 14, Box 5 (2007).

gender-based persecution.<sup>106</sup> Moreover, the Court has often accepted victim observations and participation in early stages of proceedings, even prior to a formal finding of victimhood under Rule 89.<sup>107</sup> The OTP can use the draft policy on gender persecution to commit to strengthening this practice.<sup>108</sup>

**Charging Policy.** In addition to enhancing its proof gathering practices, the OTP can also use the gender persecution policy as an opportunity to reaffirm its 2014 commitment to charging gender-based persecution as a crime against humanity, wherever the evidence allows.<sup>109</sup>

In the Court’s history, evidence of gender persecution has often been used to support charges of persecution on other grounds (for instance, religious or ethnic), and not charged as gender persecution in its own right.<sup>110</sup> Without the benefit of cumulative charging, the OTP will encounter greater difficulty in obtaining convictions or sentences that reflect the gravity of the conduct committed.<sup>111</sup> In *Katanga*, for example, evidence of forced pregnancy and genital mutilation were presented at trial but not charged.<sup>112</sup> *Bemba* is also illustrative: the Pre-Trial Chamber struck certain charges as cumulative of the rape charge, and the Appeals Chamber later

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<sup>106</sup> See *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-RoC46(3)-01/18-37, Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute ¶¶ 74–79 (6 September 2018); ICC-01/19-27 14-11-2019, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 109 (14 November 2019) (citing to evidence gathering of outside groups); Bensouda at 2, 5 (noting that “sexual and gender-based violence pervade the contexts in which the Court operates,” including in Nigeria and Myanmar); Jordash & Aysev at 13–21.

<sup>107</sup> RPE, Rule 89 (Application for Participation of the Victims in the Proceedings). See *Situation in the Republic of Kenya*, ICC/01/09, Order to the Victim Participation and Reparations Section Concerning Victims’ Representations Pursuant to Art. 15(3) of the Statute ¶¶ 7–8 (10 December 2009); *Situation in the Republic of Kenya*, ICC/01/09-6-Conf-Exp, Public Redacted Version of Report Concerning Victims’ Representations, Annexes 2–10 (29 March 2010); *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Order to the Victims Participation and Reparations Section Concerning Victims’ Representations ¶¶ 13–14 (9 November 2017); *Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13, Decision on the Victims’ Participation ¶ 12 (14 April 2015).

<sup>108</sup> See ROME STATUTE, Art. 19(3) (“In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.”).

<sup>109</sup> 2014 POLICY PAPER ¶¶ 71–72; see *id.* ¶ 67 (“[T]he provision relating to persecution on the basis of gender—an innovation in the Statute—will be utilised to the fullest extent possible”).

<sup>110</sup> See *Yékatom & Ngaïssona*, ICC-01/14-01/18, Document Containing the Charges ¶¶ 426, 490, 595 (19 August 2019); see also Grey, *Track Record*.

<sup>111</sup> See, e.g., *Prosecutor v. Lubanga*, Separate and Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06 ¶¶ 21–23 (10 July 2012) (arguing that evidence of sexual violence should qualify as aggravating sentencing factors notwithstanding non-conviction on such grounds: “Although...Mr Lubanga may not have ‘deliberately discriminated against women in committing these offences,’ the crimes for which he was convicted...resulted in serious and often irreparable harm to the victims and their families”).

<sup>112</sup> See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-T-336-ENG, Closing Statements Transcript, at 7 (15 May 2012) (forced pregnancy); *Prosecutor v. Katanga*, ICC-01/04-01/07-T-206-Red, Trial Hearing Transcript, at 17 (19 October 2010) (genital mutilation); *id.* at 25 (“All these women were victimised on the basis of their gender. They were attacked in particular because they were women.”).

acquitted the accused in part because the conduct proved at trial was beyond the scope of the confirmed charges.<sup>113</sup>

The subsuming of gender persecution into other crimes deprives victims of recognition for what they have suffered and may also narrow the class of victims who would otherwise be eligible for participation or reparation, discouraging future victims from coming forward.<sup>114</sup> To mitigate these effects, the OTP can reaffirm its 2014 commitment to charge gender persecution as such, wherever the evidence exists.<sup>115</sup> It can also continue its efforts to increase transparency as to its charging policies by, for instance, publicizing the criteria applied by OTP staff in every case to determine whether gender persecution has been committed.<sup>116</sup>

**Trial.** Once a gender persecution charge goes to trial, measures adopted to preserve evidence or protect victims and witnesses should also reflect a gender analysis. To prevent retraumatizing victims, for example, the OTP can make an affirmative commitment to request all available protective measures, such as the use of prior-recorded testimony or closed testimony sessions, in all cases where such protections would be appropriate and consistent with the accused's right to a fair trial.

Prior-recorded testimony, in particular, has proven to protect victims' and witnesses' health and safety and to mitigate the risk that they will change or withdraw their testimony as a result of mental strain or pressure by external actors.<sup>117</sup> As the OTP rightfully recognized in its *Ongwen* submissions, the months and "possibly years" that elapse before witnesses are called to testify increase the "likelihood that...witnesses will no longer be willing to testify, or will do so in accordance with what they feel [are] the wishes of influential members of society around them."<sup>118</sup> The OTP's consistent use of protective procedures will not only improve conviction rates, but may also encourage future victims and witnesses to step forward. Indeed, the OTP's efforts in this regard are already having an impact, as the Court has been more open in recent years to flexibility in the collection of evidence of sexual and gender-based violence.<sup>119</sup>

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<sup>113</sup> *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ¶¶ 297–300, 302, 501 (15 June 2009); *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's Judgment ¶ 196 (8 June 2018).

<sup>114</sup> See RPE, Rule 85(a) ("Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."); *Prosecutor v. Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432 ¶¶ 54, 58, 62, 64–65 (11 July 2008) (determining that victims whose "personal interests" are not linked to formal charges are not entitled to participate in proceedings).

<sup>115</sup> 2014 POLICY PAPER ¶¶ 67, 72.

<sup>116</sup> See Grey, *Prosecuting* at 263, n. 64 (reporting on the OTP's use of a "checklist for gender analysis"); see also *id.* at 262 (citing F. Bensouda, *Gender Justice and the ICC*, 16 (4) INT'L FEMINIST J. POL. 538, 540 (2014)); STRATEGIC PLAN 2012–2015 ¶¶ 4(a), 23, 90 (laying out policy of prioritizing "trial ready" charges for presentation at the confirmation of charges hearing); STRATEGIC PLAN 2016–2018 ¶¶ 35–36 (same).

<sup>117</sup> See Grey, *Prosecuting* at 147 (discussing the use of closed testimony sessions for victims in *Ntaganda*).

<sup>118</sup> *Prosecutor v. Ongwen*, ICC-02/04-01/15-256-Conf, Prosecution Application for the Pre-Trial Chamber to Preserve Evidence and Take Measures under Article 56 of the Rome Statute ¶¶ 7, 8, 12, 14, 17 (27 May 2016).

<sup>119</sup> See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute ¶¶ 204–206 (7 March 2014) (overlooking minor inconsistencies in witness's testimony about traumatic events:

***Appeals and Other Interlocutory Decisions.*** While the participation of victims in the appeals process has historically been fairly limited,<sup>120</sup> the OTP’s new gender persecution policy can include measures that better integrate victims’ concerns in this late-stage process. As the OTP is aware, the *Katanga* appeal demonstrates the real risk that if neither the OTP nor the accused appeal a decision to acquit sexual or gender-based crimes, the victims are left with no opportunity to have their perspective on the appeal decision considered—despite having offered extensive cooperation during the pre-trial and trial stages.<sup>121</sup> A standardized procedure for soliciting victims’ input on the question of appeal, irrespective of whether one of the parties intends to appeal, would help to remedy this gap in victim participation going forward.

In its Policy Paper on Victim Participation, the OTP acknowledged victims’ right to participate in appeals, provided that the victim’s “personal interests are affected by the particular issues on appeal.”<sup>122</sup> However, to our knowledge there are no formal procedures in place to solicit victims’ preferences prior to the OTP’s decision whether to appeal. The OTP could use the persecution policy as an opportunity to articulate the procedure, deadline, and format by which victims can submit preference statements as to appeals. For example, following a decision or appealable order, the OTP could solicit written statements from victims and their representatives as to their preferences for appeal, along with any legal or factual analysis they care to provide. The OTP could accept such statements until the deadline for filing an appeal has passed, and, in the interest of transparency, could establish a policy of responding to victims’ calls for an appeal in cases where the OTP has decided not to appeal an acquittal or not to charge a sexual or gender-based crime. Further, a repository of these types of submissions would further increase transparency and inform future participation by victims and their representatives.

### **C. Accounting for Intersectionality and Cultural Relativism**

Finally, the forthcoming policy allows the OTP to more deeply consider how it will confront the issues of intersectionality and cultural relativism—both of which have emerged in the ongoing *Al Hassan* case—in the prosecution of gender persecution.

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“The Chamber recalls in this regard that victims of sexual violence are particularly vulnerable witnesses.” (quotation at ¶ 204); *Prosecutor v. Ongwen*, ICC-02/04-01/15-T-11-Red-ENG, Trial Judgment ¶ 397 (4 February 2021) (“The Chamber is mindful that much of the accounts of these women concern events which occurred over a decade ago. Failing to remember matters like the precise dates of distant events is understandable[.] . . . Noting that these women are all victims of prolonged enslavement, physical/sexual violence and other suffering, the Chamber has also not placed much weight on failures to articulate difficult details of their life during initial interviews with the Prosecution[.]”); *Prosecutor v. Bemba*, ICC-01/05-01/08-1022 Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence ¶¶ 9, 13, 14 (19 November 2010) (admitting witnesses’ written statements and other documents in lieu of oral testimony).

<sup>120</sup> See Juan-Pablo Perez-Leon-Acevedo, *Victims and Appeals at the International Criminal Court (ICC): Evaluation under International Human Right Standards*, 25 INT’L J. HUM. RTS. 1598, 1605 (2021) [hereinafter “Perez”].

<sup>121</sup> See *Prosecutor v. Katanga*, ICC-01/04-01/07-3498; Press Release, Statement of the Prosecutor of the International Criminal Court on Germain Katanga’s Notice of Discontinuance of His Appeal Against His Judgment of Conviction (25 June 2014), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-25-06-2014>; Perez at 1607; Grey, *Prosecuting* at 270–271.

<sup>122</sup> VICTIM PARTICIPATION POLICY at 16.

**Intersectionality.** Intersectionality refers to how individuals’ overlapping identities (or perceived identities) affect their lived experiences, particularly of discrimination.<sup>123</sup> The concept of intersectional persecution recognizes that victims are targeted not only because of their perceived gender (e.g., woman) and religion (e.g., Muslim), but also because of the overlap in their gender and religion (i.e., a Muslim woman).<sup>124</sup> In *Al Hassan*, for instance, race, age, and pregnancy were exacerbating factors for the persecution committed.<sup>125</sup>

Both the Court and the OTP have recognized the importance of intersectionality in the prosecution of persecution.

- In *Ntaganda*, the Court confirmed that although one prohibited ground of discrimination is sufficient to find persecution, “a combination of more than one may equally form the basis for the discrimination.”<sup>126</sup> This evolution in the Court’s approach to intersectionality continued in the reparations phase, where the Court explicitly held that “[a] gender-inclusive and sensitive perspective should integrate intersectionality as a core component”<sup>127</sup> and highlighted the victims’ multiple and intersecting identities, including their age, gender, and ethnicity, as an element for consideration.<sup>128</sup>
- In its 2014 Policy Paper, the OTP pledged to “[u]nderstand the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities.”<sup>129</sup> It further recognized that “[i]t is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another.”<sup>130</sup>

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<sup>123</sup> See Emily Chertoff, *Prosecuting Gender-Based Persecution: The Islamic State at the ICC*, 126 YALE L.J. 1050, 1069 (2017).

<sup>124</sup> See Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28(1) HARV. H.R.J. 205, 209 (2015) (“Methodologically, intersectionality examines lapses in legal recognition of those existing in the overlap of multiple identity markers.”).

<sup>125</sup> See *Prosecutor v. Al Hassan*, ICC-01/12-01/18-767-Corr-Red, Rectificatif de la Décision Portant Modification des Charges Confirmées le 30 Septembre 2019 à l’Encontre d’Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ¶ 166 (8 May 2020) (“The Chamber recalls, finally, that in the Decision Confirming the Charges, it noted that the violence against women could have been equally motivated by considerations tied to the color of their skin, with women with darker skin more touched by the violence than others.”) (our translation of French original); *id.* ¶ 168 (“The Chamber...recalls in particular the violent way in which [persecutors] treated elderly people, pregnant women, and even children.”) (our translation of French original).

<sup>126</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Judgment with Public Annexes A, B and C ¶ 1009 (8 July 2019).

<sup>127</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Reparations Order ¶ 60 (8 March 2021).

<sup>128</sup> See *id.* ¶ 53 (recognizing that the “differential impact of crimes on boys and girls must be taken into account”); *id.* ¶ 120 (recounting sexual violence against girls under the age of 15 who became pregnant as a result of rape and sexual slavery); *id.* ¶ 66 (citing *Nairobi Declaration of the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, International Meeting on Women’s and Girls’ Right to a Remedy and Reparation*, Nairobi, 10 to 21 March 2007).

<sup>129</sup> 2014 POLICY PAPER ¶ 27.

<sup>130</sup> *Id.* ¶ 27 n. 25.

As Judge Poisot at the Inter-American Court of Human Rights has explained, intersecting grounds for discrimination entail “different qualitative experiences, creating consequences for those affected in ways that are different from the consequences suffered by those who are subject to only one form of discrimination.”<sup>131</sup> Attention to intersectionality allows the OTP to obtain sentences and reparations that accurately reflect the victims’ lived experiences. To do so, we recommend that the OTP adopt the following practices in its gender persecution policy:

- Training personnel to employ a gender-sensitive and intersectional lens when engaging with victims, striving to avoid simplification and instead to understand the specific combinations of factors that underlie the atrocities experienced. The 2014 Policy Paper acknowledges that gender and sexual-based crimes are under-reported “owing to societal, cultural, or religious factors.”<sup>132</sup> As the Trial Chamber recognized in *Ntaganda*, “acknowledging the complexity and intersectionality” of victims’ experiences would comport with a gender-sensitive approach and could prove beneficial in supporting the victims as they come forward with their testimony.<sup>133</sup>
- Continuing to bring persecution charges on all applicable grounds, rather than subsuming intersectional persecution along a single dimension. As noted above, a uni-sectional approach subsumes sexual or gendered violence or persecution as merely a component of other crimes and erases the unique experience of suffering that gendered violence imposes on victims. Intersectionality should be considered in labelling the charges, charging the counts, and phrasing the charges in a way that is most reflective of the criminal conduct.<sup>134</sup> For instance, the OTP could “approach intersectionality by identifying interlinked grounds of persecution in indictments, and the ICC’s judges could consider persecution without necessarily delinking these grounds.”<sup>135</sup>
- Considering how intersectionality may inform the gravity of the violence perpetrated.<sup>136</sup> In *Akayesu*, for example, the International Criminal Tribunal for Rwanda found that the multi-faceted discrimination (in that case, on grounds of race

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<sup>131</sup> *Gonzales Lluy et al. v. Ecuador*, IACHR (ser. C) No. 102/13, Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot ¶ 11 (1 September 2015).

<sup>132</sup> 2014 POLICY PAPER ¶ 50.

<sup>133</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Reparations Order ¶ 60 n. 151 (8 March 2021) (citing UNGA, Fabian Salvioli, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UNGA Doc. No. A/75/174 ¶¶ 4–5 (17 July 2020); Phillip Schulz, *Towards Inclusive Gender in Transitional Justice: Gaps, Blind-Spots and Opportunities*, 14 J. INTERVENTION & STATEBUILDING 691, 696–701 (2020); Sunneva Gilmore, et al., *Beyond Silence and Stigma: Crafting a Gender-Sensitive Approach for Victims of Sexual Violence in Domestic Reparation Programmes*, QUEEN’S UNIVERSITY OF BELFAST 13 (2020)).

<sup>134</sup> Beringola at 102.

<sup>135</sup> Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT’L L. 49, 86 (2006); see also Beringola at 103–104.

<sup>136</sup> See 2014 POLICY PAPER ¶ 100 (“The commission of a crime with a motive involving discrimination, including on the grounds of gender, or where the victim is particularly vulnerable, in itself constitutes aggravating circumstances.”).

and gender) aggravated the nature of the sexual and gender-based violence, resulting in the perpetration of genocide.<sup>137</sup>

- Building from the *Ntaganda* example, developing victim-specific reparations policies that account for “differentiated harm” on intersectional bases. Specifically, the ICC has emphasized that reparations are to be formulated in a gender-inclusive and sensitive manner, “tak[ing] into account the existence of previous gender and power imbalances, as well as the differentiated harm depending on the victim’s sex or gender identity,” “integrat[ing] intersectionality as a core component.”<sup>138</sup> Given this precedent, reparations may be an area where the OTP can develop legal theories of intersectional harm, and contribute to a remedial system that is tailored to the unique experiences of individuals, rather than treating victims as derivative of a larger group.

**Cultural Relativism.** A related but distinct issue concerns cultural relativism, particularly as it is used to defend against gender-based persecution. As the OTP is aware, for example, Al Hassan has raised cultural relativism—*i.e.* “whether certain Islamic practices are compatible with international criminal law”—in defending against the charge of gender persecution.<sup>139</sup>

While the debate between cultural relativism and universalism is a recurrent theme in international human rights law, cultural relativism does not excuse or avoid accountability for violations of international human rights.<sup>140</sup> Indeed, the advent of international criminal law was in recognition that some crimes should be universally prohibited, and cultural relativism is seldom raised today in defense of crimes such as slavery, genocide and other mass atrocities.<sup>141</sup>

From a normative standpoint, allowing cultural relativism arguments to prevail in the context of gender persecution would only widen the gap between gender and other grounds of persecution. Although ethnic or religious minorities are commonly persecuted in many cultures, cultural relativism arguments in these areas have rarely, if ever, taken hold.<sup>142</sup> Moreover, such arguments carry the risk of undermining the purpose and efficacy of international criminal law, and sanctioning acts that violate of international human rights law, contrary to the mandate of Article 21(3) of the Statute.<sup>143</sup>

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<sup>137</sup> *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment ¶ 731 (2 September 1998); see also Ana Martin Beringola, *Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC*, 9(2) AMSTERDAM L. FORUM 84, 91 (2017) [hereinafter “Beringola”].

<sup>138</sup> *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Reparations Order ¶¶ 60–61 (8 March 2021).

<sup>139</sup> *Prosecutor v. Al Hassan*, ICC-01/12-01/18-376-Red, Request for the Disqualification of Judge Marc Perrin de Brichambaut, ¶ 29(c) (18 June 2019).

<sup>140</sup> See Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMP. L. 1, 4–5 (2005).

<sup>141</sup> See, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 126 n. 145 (2004).

<sup>142</sup> Grey, *Road Ahead* at 973.

<sup>143</sup> See ROME STATUTE, Art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”).

Thus, the forthcoming gender persecution policy is an opportunity for the OTP to clarify that gender-based persecution concerns acts in violation of fundamental rights according to *international law*, and not local customs, national law, or the beliefs (religious or otherwise) held by perpetrators as to fundamental rights. Indeed, the Rome Statute explicitly defines “persecution” by reference to international law.<sup>144</sup> While the cultural context of the violation could be relevant to the Court’s full understanding of the acts and the resulting harms (as outlined above in the discussion of intersectionality), local laws and customs are legally irrelevant in the prosecution of persecution as a violation of international law.

The OTP may also clarify that “cultural relativism” arguments do not defeat the “severity” element of persecution within the meaning of the Statute.<sup>145</sup> In other words, the purported “acceptance” of persecutory acts within a culture does not diminish the severity of such acts as a matter of international law. Moreover, international criminal tribunals apply the severity test on a case-by-case basis.<sup>146</sup> Severity is not measured solely by physical acts but can include a range of acts or omissions, including deprivations of the freedom of movement, restrictions on family life, and limitations on the right to work.<sup>147</sup> The severity test measures the cumulative effect of these underlying acts and omissions.<sup>148</sup> In *Al Hassan*, for instance, the prevalence of gendered restrictions—coupled with severe reprisals for failure to follow such restrictions—can cumulatively evidence the severity of persecution.<sup>149</sup>

#### **IV. Conclusion**

The OTP has the opportunity to develop a gender persecution policy that will be a seminal contribution to the development of international criminal law. Building on its 2014 Policy Paper and its subsequent efforts, the OTP is well placed to protect historically marginalized and oppressed groups and to bring the charges that not only encompass but also best reflect their unique lived experiences. By broadening the meaning of “gender” and “gender persecution” under the Statute, engaging with victims at every stage of the prosecution, and developing firm policies on intersectionality and cultural relativism, the OTP is poised to take a leadership role in the fight to end impunity for gender persecution.

#### **V. About the Authors**

##### **A. Public International Law & Policy Group**

The Public International Law & Policy Group is a global pro bono law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions,

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<sup>144</sup> See *id.* Art. 7(2)(g) (“‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to *international law* by reason of the identity of the group or collectivity.”) (emphasis added).

<sup>145</sup> See *id.* (defining “persecution” as the “intentional *and severe* deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”) (emphasis added).

<sup>146</sup> *Prosecutor v. Tadić*, ICTY Case No. IT-94-1, Opinion and Judgment ¶ 707 (7 May 1997).

<sup>147</sup> *Id.* ¶ 704.

<sup>148</sup> Grey, *Road Ahead* at 973 (quoting *Nahimana et al.*, ICTR-99-52-A, Judgment in the Appeals Chamber ¶ 987 (28 November 2007); *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment ¶ 994 (8 July 2019)).

<sup>149</sup> *Prosecutor v. Al Hassan*, ICC-1/12-01/18, Rectificatif à la Décision Relative à la Confirmation des Charges Portées Contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ¶¶ 949–960 (13 November 2019).



and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution.

Since its founding over 25 years ago, PILPG has provided legal assistance with over two dozen peace negotiations, and over two dozen post-conflict constitutions, and has assisted every international and hybrid criminal tribunal, as well as helped to create a number of domestic transitional justice mechanisms. Over the past 25 years PILPG has operated offices in 25 countries and annually provides \$20 million worth of pro bono legal assistance.

PILPG represents a diverse array of pro bono clients including states, sub-state actors, opposition groups, self-determination movements, civil society, and marginalized actors, including women and youth.

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