

ARTICLE

PROSECUTING GENDER PERSECUTION AT THE ICC: DEFINITIONS, POLICIES, AND PRACTICE

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I. INTRODUCTION

As Beth Van Schaack, now Ambassador-at-Large for Global Criminal Justice, has aptly noted: “[f]or most of human history, the rape and sexual abuse of women associated with the enemy was an expected spoil, inevitable by-product, or legitimate tactic of war. Where gender violence was condemned, humanitarian law—which primarily reflected the male experience with armed conflict—conceptualized such conduct as an offense against a woman’s dignity or a family’s honor.”¹ Indeed, history has demonstrated that although “war-time abuses against women, girls, lesbian, gay, bisexual, intersex, queer, non-binary and gender nonconforming persons” are common,

1. Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER SOC. POL’Y & L. 361, 361 (2009). See also Cate Steains, “Gender Issues,” in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 358 (Roy S. Lee, ed., 1999) (stating that crimes of sexual and gender-based violence were rarely prosecuted and typically seen as an unfortunate, but expected incidence in armed conflict).

perpetrators of such abuses are rarely held accountable.² Although the crime of gender persecution has been long-recognized, charges have rarely been pursued.³

There is, however, hope that the course of human history will change. With the adoption of the Rome Statute creating the International Criminal Court (“ICC”), the international community has made great strides in finally recognizing that sexual and gender-based crimes (“SGBV”) are amongst the gravest and most serious crimes worthy of condemnation.⁴ As discussed below, the ICC statute was the first international criminal instrument to contain the definition of gender.⁵ As compared to other international criminal tribunals, the ICC is authorized to investigate and prosecute a wider range of SGBV crimes, and the first to expressly recognize the crime of gender persecution as a crime against humanity.⁶ Moreover, for at least the past decade, the ICC’s Office of the Prosecutor (“OTP”) has been focused on investigating and prosecuting SGBV crimes, including the crime of gender persecution.⁷ That office is aiming to draw the worlds’ attention to the many SGBV crimes that are being committed and to provide justice to the victims of those crimes. The OTP announced its intention to focus its resources and attention on SGBV crimes with the publication of its 2014 Policy on Sexual and Gender-Based Crimes (“2014 Policy Paper”).⁸ With the launch of its Policy on Gender Persecution (“Gender Persecution Policy”) in December 2022, the OTP signaled its intention to continue the path of pursuing accountability for SGBV crimes, specifically the crime of gender persecution.⁹

2. See Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS 1, 2 (2021).

3. See *id.* at 2 and n.4 (stating that as of 2021, only the War Crimes Chamber of the State Court of Bosnia and Herzegovina had made a finding of gender persecution). See also *infra* Section III. B. 3 for a discussion of two ICC cases that are ongoing and in which the OTP has pursued gender persecution charges.

4. See discussion *infra* at notes Sections II.A. and B.

5. See discussion *infra* at Section II.A.

6. See discussion *infra* at Section II.B.

7. See discussion *infra* at Section III.

8. See *Policy Paper on Sexual and Gender-Based Crimes*, INT’L CRIM. CT. [ICC], OFF. OF THE PROSECUTOR (June 2014), <https://www.icc-cpi.int/sites/default/files/icedocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes—June-2014.pdf> [<https://perma.cc/HCA8-DMKG>] [hereinafter 2014 Policy Paper].

9. See *Policy on the Crime of Gender Persecution*, INT’L CRIM. CT. [ICC], OFF. OF THE PROSECUTOR 3 (Dec. 7, 2022), <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [<https://perma.cc/N394-4JH3>] [hereinafter Gender Persecution Policy].

This Article, like other commentaries,¹⁰ applauds the OTP'S recent launch of its Policy on Gender Persecution and remains hopeful that the policy will lead to robust development of this specific area of international criminal law and do justice for gender persecution victims. As Lisa Davis, Professor and Special Adviser to the ICC's OTP, has stated:

By definition, gender-based crimes target women, men, children, LGBTIQ, non-binary and gender non-conforming persons, on the premise of gender discrimination. At its core, gender-based crimes are used as punishments against those who are perceived to transgress assigned gender narratives that regulate “accepted” forms of gender expression manifest in, for example, roles, behaviors, activities, or attributes Gender-based crimes may meet the threshold for persecution when, for example, underlying crimes such as rape, enslavement, torture, or murder are used as punishments for deviating from gender narratives, or when the crime itself is the narrative, as it often is in the case of enslavement and forced marriage.¹¹

By committing to investigate and prosecute the crime of gender persecution, the OTP continues the positive trajectory outlined above in its commitment to hold perpetrators of SGBV crimes accountable. One hopes that the practice will live up to the policy's goals, and lead to the protection and recognition of the fundamental rights of women, girls, lesbian, gay, transgender, intersex and queer people, and any and all persons who defy gender norms and stereotypes.

This Article's primary goal is to highlight the OTP's Gender Persecution Policy, while also demonstrating its place in the trajectory of the ICC's progress in changing the course of human history as relates

10. See, e.g., *Ending Impunity for Anti-LGBTIQ Persecution: ICC Launches Gender Persecution Policy Paper*, OUTRIGHT INT'L (Dec. 26, 2022), <https://outrightinternational.org/insights/ending-impunity-anti-lgbtiq-persecution-icc-launches-gender-persecution-policy-paper> [<https://perma.cc/DLA2-27BJ>] (“The policy paper on gender persecution is an important step forward for holding perpetrators accountable when they commit violence against people due to their perceived sexual orientation, gender identity or expression, or sex characteristics.”); *Gender Persecution: Strengthening International Norms to Ensure Accountability*, MADRE, <https://www.madre.org/gender-persecution> [<https://perma.cc/7XJ9-3WNZ>] (last visited Apr. 17, 2022) (“This Policy Paper strengthens recognition of the crime of gender persecution in investigations and legal proceedings and reaffirms the understanding of gender in international criminal law. This moment reaffirms – once and for all – that targeting women and LGBTIQ+ persons in peacetime and conflict can amount to a crime against humanity, and that survivors of these crimes cannot be silenced.”).

11. See Davis, *supra* note 2, at 6.

to the recognition of and prosecution of SGBV crimes. To that end, some background is necessary to contextualize the ICC's current policy and practice as relates to the crime of gender persecution. Part II of this Article discusses the Rome Statute's unique contributions to the development of international criminal law regarding SGBV crimes, including the crime of gender persecution. Part III moves from codification to practice, addressing the OTP's 2014 Policy Paper, and some of the investigations and prosecutions of SGBV crimes that resulted from the Office's specific decision to develop and devote resources to ensure that such crimes were not overlooked—as they often had been historically. Part IV turns to the 2022 Gender Persecution Policy which was released in December 2022, detailing the Policy's key features. Part IV concludes by addressing implementation and some key challenges that may arise. As past practice demonstrates, achieving positive outcomes in terms of convictions is no easy task. Nevertheless, this Article commends the OTP for plainly stating its intention to engage in training, and to educate their staff and others to ensure the successful implementation of the policy.

II. THE ROME STATUTE: DEVELOPING INTERNATIONAL CRIMINAL LAW AS RELATES TO INVESTIGATING AND PROSECUTING SEXUAL AND GENDER-BASED CRIMES

After the negotiations leading to the adoption of the Rome Statute in July 1998,¹² the creation of the ICC in 2002 was a momentous occasion for many reasons.¹³ From an overarching perspective, after the required sixty states ratified the Rome Statute, the world's first permanent international criminal court came into being—after decades in the making.¹⁴ States that ratified the Rome Statute agree that the ICC

12. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF 183/9 [hereinafter Rome Statute].

13. For a discussion of the negotiations leading to the adoption of the Rome Statute on July 17, 1998, see, e.g., John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 361–62 (1999); Leila Nadya Sadat, *The Establishment of the International Criminal Court: From The Hague To Rome and Back Again*, 8 J. INT'L L. & PRAC. 97, 117 (1999).

14. In 1948, the Genocide Convention referenced the possibility of individuals being tried by “such international penal tribunal as may have jurisdiction.” See Convention on The Prevention and Punishment of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277. Soon after, the International Law Commission (ILC) was tasked with preparing a draft statute for such a permanent court. See ANTONIO CASESSE, INT'L CRIM. L. 323 (2d ed., 2008). With the Cold War, however, there was little demonstrable progress towards the creation of the court, and another

has automatic jurisdiction over crimes of genocide, crimes against humanity, and war crimes when those crimes are committed on the state's territory or by its nationals.¹⁵

Thus, as a permanent court, the ICC has more extensive jurisdiction than the international ad hoc criminal tribunals that preceded it. The ad hoc courts are empowered to prosecute individuals charged with committing atrocity crimes, but their jurisdiction was constrained both geographically and temporally. The ICC operates based on a system of complementarity where it may only seize a case if the state that would otherwise have jurisdiction over the matter is “unwilling or unable” to prosecute.¹⁶ Though this limits the ICC's exercise of jurisdiction, it also means that through complementarity, the ICC can promote accountability in national jurisdictions and further the development of international criminal law.¹⁷ In short, the Court's

four decades passed before in 1994, the global community turned its attention to moving forward with the project. *Id.* at 323-28.

15. Rome Statute, *supra* note 12, at arts. 5–8, 11, 12(2). The ICC also has jurisdiction over the crime of aggression, but it may only prosecute that crime against states that have ratified a special aggression amendment. Even then, the Rome Statute provides that states have free reign to opt out of the ICC's aggression jurisdiction. *See, e.g.*, Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197, 210–12 (2018); Alex Whiting, *Crime of Aggression Activated at the ICC: Does It Matter?*, *Just Security* (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/> [<https://perma.cc/L7M7-MW3P>].

16. Rome Statute, *supra* note 12, art. 17. For a more detailed discussion of the complementarity regime, *see generally*- missing source? *See also* Dragana Radosavljevic, *An Overview of the ICC Complementarity Regime*, 1 USAK Y.B. INT'L POL. & L. 125, 129 (2008).

17. *See, e.g.*, *Strategic Plan 2019-2021*, INT'L CRIM. CT. [ICC], OFF. OF THE PROSECUTOR 10 (July 17, 2019), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20190726-strategic-plan-eng.pdf> [<https://perma.cc/ASQ5-YUFX>]. According to the 2019-2021 Strategic Plan, the OTP is making progress in operationalizing its approach to positive complementarity, as demonstrated by evidence of: (1) new investigations started by countries or investigations progressed based on information provided by the OTP; (2) increased requests for assistance from domestic jurisdictions; and (3) increased investigative cooperation between the OTP and various countries—all of which are assisting in closing the impunity gap. Indeed, scholars have highlighted the important role the ICC can play in prompting domestic accountability through the complementarity regime. *See* Lisa J LaPlante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J. MARSHALL. L. REV. 635, 637 (2010) (stressing the importance of aligning domestic justice initiatives with those of the ICC and international law generally, indicating that domestic assent to ICC goals helps encourage more effective systems of both domestic justice and international justice); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008) (detailing how the Rome Statute provides for mechanisms of increased cooperation by nations and the ICC to ensure goals of international criminal justice are fully realized on both

creation was generally applauded as a huge achievement, and one that could contribute to ending impunity for atrocity crimes and contribute to the prevention of such crimes in the future.¹⁸

A. Including a Definition of Gender

The ICC's creation is also significant in regards to the investigation and prosecution of SGBV crimes. The adoption of the Rome Statute and the creation of the ICC was "celebrated as an important step towards ending impunity for sexual crimes under international law."¹⁹ Notably, for example, the ICC is the first international criminal tribunal to define the term "gender" in its founding statute.²⁰ According to Article 7(3) of the Rome Statute, "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."²¹

The Rome Statute's definition of "gender" is not without its critics who have argued among other criticisms, that it is ambiguous, circular, narrow, and limiting.²² Specific criticisms tend to center on the binary nature of the definition and reflect concerns that the ICC definition "equates 'gender' with biologically determined 'sex,' thereby

domestic and international scales); Maartje Weerdesteijn & Barbora Hola, "Tool in the R2P Toolbox"? *Analysing the Role of the International Criminal Court in the Three Pillars of the Responsibility to Protect*, 31 CRIM. L.F. 377 (2020) (discussing how, in a complementarian regime of international law, the ICC is empowered to prosecute only when domestic judicial systems are unwilling or unable to do so, thereby theoretically increasing the desire of domestic judiciaries to resolve matters in-country).

18. Rome Statute, *supra* note 12, at Preamble.

19. See Tanja Altunjan, *The International Criminal Court and Sexual Violence: Between Aspirations and Reality*, 22 GERMAN L. J. 878, 878 (2021) (quoting Richard Goldstone, former prosecutor for the ad hoc tribunals as stating that with the adoption of the Rome Statute and the creation of the ICC "gender crimes are now given the recognition they were denied for so many years").

20. See, e.g., Valerie Oosterveld, *The Definition of 'Gender' in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Justice?* 18 HARV. H. R. J. 55, 56 (2005) [hereinafter Oosterveld, *Definition of Gender*] (explaining that "gender" was first used and defined in an international criminal law treaty with the adoption of the Rome Statute in 1998); ROSEMARY GREY, PROSECUTING SEXUAL AND GENDER-BASED CRIMES AT INTERNATIONAL CRIMINAL COURT: PRACTICE, PROGRESS, AND POTENTIAL 113 (2019).

21. Rome Statute, *supra* note 12, at art. 7(3).

22. See Oosterveld *Definition of Gender*, *supra* note 21, at 55-56 (outlining various criticisms); Altunjan, *supra* note 20, at 883 (referencing the "circular" and "ambiguous" criticisms).

eliminating the understanding that “gender” is a social construct.”²³ Worth focusing on, however, is the ground that was gained. The International Law Commission’s (“ILC”) 1994 draft of the Rome Statute did not contain any reference to “gender.”²⁴ It was ultimately included in subsequent ILC drafts and debated during the 1998 Rome Conference only because of the lobbying by nongovernmental organizations (“NGOs”)—particularly the Women’s Caucus for Gender Justice²⁵—and the recognition by many state delegations that the ICC would only be able to comprehensively address the covered crimes if the Statute was sensitive to the concept of gender.²⁶ This position was not universally held, and conservative groups, Arabic states, the Holy See, and other states were wary of the term “gender,” fearing that it would include sexual orientation and that its use in the Rome Statute “might be used to alter religious and cultural standards around the world without regard to regional and religious preferences.”²⁷ As a result, the adopted definition reflects a compromise: the Rome Statute employs the word “gender,” and references the “context of society” and “the two sexes.” It also includes the final sentence that “‘gender’ does not indicate any meaning different from the above”—which the opposing gender camp believed reaffirmed the reference to “two sexes.”²⁸ On the other hand, those in

23. See Oosterveld, *Definition of Gender*, *supra* note 21, at 57. See also Oosterveld, *supra* note 21, at 71-72 (quoting various scholars, including Hillary Charlesworth, Christine Chinkin, Brenda Cossman, and Ruth Philips, as criticizing the ICC’s gender definition for conflating gender with two biological sexes and neglecting to consider gender as socially and culturally constructed); Altunjan, *supra* note 20, at 883 (referencing criticisms of the ICC’s gender definition “particularly due to its reference to ‘the two sexes,’ which reproduces a heteronormative and exclusionary conceptualization of sex as a biological binary).

24. See Rep. of the Int’l L. Comm’n 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).

25. See *Rome Statute Enters into Force*, WOMEN’S CAUCUS FOR GENDER JUST. (July 1, 2002), <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/news/prjuly1.html> [https://perma.cc/85ND-39TV].

26. See Oosterveld, *Definition of Gender*, *supra* note 21, at 58-59. See also Gina Erica Hill, *Gender in the International Criminal Court Negotiations*, Thesis, University of Toronto Faculty of Law (2001), at 89-90 (explaining the Women’s Caucus for Gender Justice’s role in advocating for the use of the word “gender” rather than “sex,” because gender recognizes not only biological differences between men and women, but also differences because of socially constructed roles). See also Steains, *supra* note 1, at 360-61 (recognizing the role of the Women’s Caucus for Gender Justice in exposing delegations to the lack of attention to gender issues in the ILC draft and in developing specific proposals to remedy gaps).

27. See Hill, *supra* note 27, at 92; Oosterveld *Definition of Gender*, *supra* note 21, at 63.

28. See Oosterveld, *Definition of Gender*, *supra* note 21, at 65.

the pro-gender camp believed it “reaffirmed the valuable sociological reference to ‘context of society.’”²⁹

Although some commentators were disappointed that the Rome Statute’s gender definition is not as broad, inclusive, and unambiguous as it could be,³⁰ at the time, the inclusion of the definition was considered a step in the right direction. Indeed, as Professor Valerie Oosterveld notes, there were few better alternatives likely to emerge from the Rome Statute negotiations.³¹ Furthermore, as discussed in more detail below, both the OTP’s 2014 Policy Paper and its 2022 Gender Persecution Policy commit to interpreting the Rome Statute’s definition of gender more broadly while taking into account Article 21(3) of the Rome Statute, which requires the statute’s provisions be interpreted and applied “consistent[ly] with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender.”³²

29. See *id.* Notably, Professor Oosterveld was part of the Canadian delegation to the Rome Conference and participated in negotiations on the definition of “gender.” See also Steains, *supra* note 1, at 374 (stating that both sides of the gender debate concluded that although the definition was “unusual” it had “sufficient flexibility as well as precision”).

30. Scholars and other interested parties have continued to press for a more inclusive and modern understanding of “gender.” See, e.g., GREY, *supra* note 21, at 963. Indeed, a group of scholars and non-governmental organizations led a strong campaign to revise the definition of gender included in the International Law Commission’s draft articles for a new treaty on crimes against humanity—a definition that mirrored that in the Rome Statute—arguing that the definition was outdated and did not “properly account for current understanding of gender could sideline women, lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) persons and other marginalized and vulnerable victims.” See *Gendering the Crimes Against Humanity Treaty: A Timeline of HRGJ Clinic Intervention*, CUNY SCH. L., <https://www.law.cuny.edu/academics/clinics/hrgj/projects/new-treaty-crimes-against-humanity/timeline/#:~:text=The%20International%20Law%20Commission%20%28ILC%29%20completed%20its%20first,adopts%20an%20outdated%20and%20opaque%20definition%20of%20gender> [<https://perma.cc/5M9R-3Q5E>] (last visited Apr. 19, 2023). That definition was removed from the latest draft version of the treaty. See *The International Crimes Against Humanity Treaty*, MADRE, <https://www.madre.org/cah> [<https://perma.cc/9QTH-3BCV>] (last visited Apr. 19, 2023).

31. Oosterveld, *Definition of Gender*, *supra* note 21, at 58. See also Valerie Oosterveld, *Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court*, 14 INT’L J. OF FEMINIST POL. 563, 563-66 (2014) [hereinafter Oosterveld *Constructive Ambiguity*] (explaining that the gender definition arrived at was a result of “constructive ambiguity”—“a tactic used by diplomats and other negotiators, especially in consensus negotiations, to adopt indefinite language to seemingly resolve disparate points of view”).

32. See Rome Statute, *supra* note 12, at art. 21(3). See 2014 Policy Paper, *supra* note 8 (“This definition [of gender] acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3).”); See Gender Persecution Policy, *supra* note 9, at 3 (“As

B. Criminalizing a Broad Range of SGBV Crimes

Including a definition of “gender” within the Rome Statute was not the only unique achievement to emerge from the negotiations establishing the ICC. The Rome Statute also criminalizes a broader range of SGBV crimes than any previous international criminal law tribunal.³³ Prior to the creation of the ad hoc tribunals in the 1990s, the international community paid little heed to ensuring that international instruments contained explicit provisions prohibiting rape or other forms of sexual violence—particularly in a manner that could give rise to individual criminal liability.³⁴ For example, the 1907 Hague Convention on Land Warfare (IV) did not include any reference to sexual violence.³⁵ Additionally, the 1949 Geneva Conventions do not include rape or other crimes of sexual violence within the “grave breaches” regime.³⁶ Nor did the Charter for the Nuremberg International Military Tribunal explicitly reference sexual crimes.³⁷ As for the ad hoc tribunals, the statutes for the Yugoslav and Rwandan tribunal both specifically included rape as an underlying crime that could give rise to a prosecution for crimes against humanity.³⁸ However, neither expressly included rape expressly as a war crime.³⁹

a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.”)

33. Steains, *supra* note 1, at 357 (stating that the Rome Statute is the first international treaty to recognize a broad range of acts of sexual and gender-based violence as among the most serious crimes under international law).

34. *See generally* Van Schaack, *supra* note 1, at 362 n. 1 (2009).

35. *See* Hill, *supra* note 26, at 105-06; Van Schaack, *supra* note 1, at 362 n. 1. The regulations annexed to the 1907 Convention required instead that “family honour and rights . . . must be respected.” 1907 Hague Convention IV With Respect to the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

36. *See* Van Schaack, *supra* note 1, at 362 n.1 (noting that such crimes were prohibited elsewhere in the Geneva Conventions in provisions governing state responsibility, as opposed to individual criminal liability). *See also* Hill, *supra* note 27, at 107.

37. *See* Altunjan, *supra* note 20, at 879 (citing to Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284. *See also* Hill, *supra* note 27, at 106 (additionally noting that although the trial record contained evidence of mass rape to support the crimes against humanity charges, no defendant was charged with rape as a war crime).

38. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(g), U.N. Doc. S/25704, (May 3, 1993) [hereinafter ICTY Statute]; S.C. Res. 955, annex, Statute of the International Criminal Tribunal for Rwanda art. 3(g), U.N. Doc. S/RES/955, (Nov. 8, 1994) [hereinafter ICTR Statute]. *See also* Van Schaack, *supra* note 1, at 362 n.1.

39. Steains, *supra* note 1, at 362. As Steains explains, this failure to include rape as a war crime meant that prosecutors often had to meet the more difficult burden of proving the threshold elements for establishing a crime against humanity charge (for example, proving a widespread

A brief review of the many Rome Statute provisions addressing SGBV crimes shows the positive trajectory towards ensuring that victims of such crimes are afforded justice. The acts of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” may be prosecuted as underlying acts supporting a charge of crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴⁰ Those same acts can serve to support a war crimes charge when committed in the context of international or non-international armed conflict.⁴¹

The Rome Statute is also the only international instrument to expressly recognize the crime against humanity of gender-based persecution.⁴² This is not to suggest that other international criminal tribunals have ignored the crime of persecution. Rather, they limited its reach—typically to political, racial, or religious grounds.⁴³

The Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁴⁴ For gender-based persecution to constitute a crime against humanity, the perpetrator must target “any identifiable group or collectivity” based on gender grounds “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”⁴⁵ The gender persecution must also be “committed as part of a widespread or systematic attack directed against any civilian population, with

attack against a civilian population). Steains did note that in some cases, the ICTY prosecutor was able to prosecute individuals who had committed rape under the war crimes provision of the statute by characterizing the acts committed as, for example, “torture” or “other inhumane acts.” See Steains, *supra* note 1, at 362–63.

40. Rome Statute, *supra* note 12, at art. 7(1)(g).

41. See *id.* at arts. 8(2)(b)(xxii), 8(2)(e)(vi).

42. Widney A. Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELBOURNE J. INT’L L. 1, 2–3, 11 (2003) (recognizing as significant the Rome Statute’s codification of the crime of gender persecution, while also arguing that gender persecution is already part of customary international law). *Id.* at 2. See, e.g., 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. COMPAR. & INT’L L. 49, 56 (2006) [hereinafter Oosterveld, *Refugee Law’s Relevance*].

43. See Oosterveld *Refugee Law’s Relevance*, *supra* note 42, at 56 (referencing the definitions of persecution contained in the Nuremberg Charter, ICTY Statute, and ICTR Statute).

44. See Rome Statute, *supra* note 12, at art. 7(2)(g).

45. *Id.* art. 7(1)(h)(1)–(3).

knowledge of the attack.”⁴⁶ As scholars have noted, “persecution differs from other crimes against humanity in that it covers a wider scope of acts than specific crimes such as rape, murder, and extermination”—including “the severe deprivation of fundamental civil, political, social and economic rights, whether the harm resulting from the deprivation is physical or mental.”⁴⁷ Including the crime against humanity of gender persecution within the Rome Statute, therefore, constitutes a significant and important step in the development of international criminal law as relates to the prosecution of SGBV crimes.

In sum, the Rome Statute provisions on gender and SGBV crimes have significantly improved upon the shortcomings in previous international treaties and manifest a commitment to punish crimes that historically have been largely ignored. Of course, codification does not equate with prosecution; laws alone do not hold perpetrators accountable or provide justice to victims of SGBV crimes.⁴⁸ Parts III and IV of this Article turn to the steps that the ICC’s Office of the Prosecutor has taken towards prosecuting SGBV crimes, specifically addressing in Part IV the OTP’s December 2022 Policy on Gender Persecution.

III. THE OTP’S 2014 POLICY PAPER ON PROSECUTING SEXUAL AND GENDER-BASED CRIMES: ON PAPER AND IN PRACTICE

From the time that it began operating in June 2003,⁴⁹ the OTP appears to have at least recognized a need to ensure that SGBV crimes are investigated and prosecuted. In the OTP’s 2006 Report on Prosecutorial Strategy, it stated that it would “endeavor to do a selection of cases that represent the entire criminality and modes of

46. *Id.* art. 7(1).

47. Brown & Grenfell, *supra* note 43, at 2.

48. Indeed, as Beth Van Schaack notes, “strong positive law is irrelevant where a commitment to gender justice does not infuse all stages of the development and implementation of a prosecutorial strategy.” Van Schaack, *supra* note 1, at 364.

49. See *Report on the Activities Performed During the First Three Years (June 2003–June 2006)*, ICC OFF. OF THE PROSECUTOR (Sept. 12, 2006), https://www.icc-cpi.int/sites/default/files/OTP_3yearreport20060914_English.pdf [https://perma.cc/E2HF-D7NS].

victimization,”⁵⁰ paying “particular attention to methods of investigations of crimes committed against children, sexual and gender-based crimes.”⁵¹ The OTP echoed a similar goal in its Prosecutorial Strategy for 2009-2012, which stated that, in connection with its objective to continually improve the quality of its prosecutions, it would address “elements of the crimes and the Office’s charging practices, in particular in relation to gender crimes and crimes against children” in the coming three years.⁵²

With the commencement of Fatou Bensouda’s term as ICC Prosecutor in June 2012,⁵³ the focus on SGBV crimes increased.⁵⁴ In the Office’s 2012-2015 Strategic Plan, it announced six strategic goals, only one of which addressed the investigation and prosecution of a particular type of crime.⁵⁵ By that strategic goal, the OTP was committed “to enhanc[ing] the integration of a gender perspective in all areas of our work and continu[ing] to pay particular attention to sexual and gender-based crimes and crimes against children.”⁵⁶ The OTP also referenced the difficulties associated with uncovering evidence of such crimes and of bringing those who committed them to justice.⁵⁷ However, the OTP was determined to not be deterred, and vowed to not only to learn from its own experience, but also “to draw on the experience of the other tribunals in investigating and prosecuting sexual and gender based violence.”⁵⁸ The OTP promised to develop

50. *Report on Prosecutorial Strategy*, ICC OFF. OF THE PROSECUTOR ¶ 4(e) (Sept. 14, 2006), https://www.icc-cpi.int/sites/default/files/ProsecutorialStrategy20060914_English.pdf [<https://perma.cc/4PM4-VRQQ>].

51. *Id.*

52. *Prosecutorial Strategy 2009-2012*, ICC OFF. OF THE PROSECUTOR (Feb. 1, 2010), <https://www.icc-cpi.int/sites/default/files/OTPProsecutorialStrategy20092013.pdf> [<https://perma.cc/SA6C-5LTN>].

53. *See Ms. Fatou Bensouda*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/otp/who-s-who/fatou-bensouda> [<https://perma.cc/X6MT-SA8E>] (last visited Apr. 15, 2023).

54. In her Farewell Statement issued in 2021, Prosecutor Bensouda highlighted that when she assumed the duties of Prosecutor in 2012, she “elevated the effective investigation and prosecution of sexual and gender-based crimes and crimes against children as strategic goals.” *See Fatou Bensouda, “Without Fear or Favour”: Reflections on my term as Prosecutor of the International Criminal Court*, ICC OFF. OF THE PROSECUTOR 5 (June 15, 2021), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-prosecutor-fatou-bensouda-end-of-term-farewell-statement.pdf> [<https://perma.cc/9K5C-NFPC>].

55. *See Strategic Plan June 2012–2015*, ICC OFF. OF THE PROSECUTOR (Oct. 11, 2013), <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> [<https://perma.cc/77TH-RQM2>].

56. *See id.* at 27 (outlining Strategic Goal 3).

57. *Id.* ¶¶ 58-59.

58. *Id.* ¶ 61.

and publish a policy paper directly addressing the investigation and prosecution of SGBV crimes in its 2012-2015 Strategic Plan.⁵⁹ That Policy Paper, which was officially published in 2014, is discussed in more detail below, including the Office's subsequent practice in furthering its recommended practices and stated goals.

A. *The 2014 Policy Paper*

After extensive consultations with ICC States Parties, civil society, academia, and relevant UN agencies,⁶⁰ the OTP launched its 2014 Policy Paper on Sexual and Gender-Based Crimes.⁶¹ According to the OTP, the policy is “the first and most comprehensive of its kind adopted by an international institution” with the stated aim of strengthening “the Office’s capacity to investigate and prosecute perpetrators of sexual and gender-based crimes falling within the Court’s jurisdiction in a systematic and comprehensive manner, and to enhance the integration of a gender perspective and expertise in all aspects of operations.”⁶² In connection with the launch, Prosecutor Bensouda noted that as of December 2014, the Office had proffered specific charges of sexual violence in seventy percent of its cases, and committed to continuing on the path to end impunity for the horrific crimes of sexual and gender-based violence that are unfortunately so prevalent in the situations investigated by the OTP.⁶³

The 2014 Policy Paper demonstrates the Office’s determination to shed light on the many SGBV crimes that are being committed and bring justice to victims of those crimes, but past setbacks in this regard also seem to have prompted its creation. Indeed, as Professor Valerie Oosterveld explains:

59. *Id.* ¶ 63.

60. ICC Press Release, *ICC Prosecutor, Fatou Bensouda, launches Policy on Sexual & Gender-Based Crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow* (Dec. 9, 2014) [hereinafter ICC Press Release 2014 Policy Paper], <https://www.icc-cpi.int/news/icc-prosecutor-fatou-bensouda-launches-policy-sexual-gender-based-crimes-ensuring-victims-have> [<https://perma.cc/YX2Z-WJKV>]. See also 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, 443–45 (2018) [hereinafter Oosterveld *ICC Policy Paper*] (detailing the extensive consultations over a two-year period that finally resulted in the launch of the 2014 Policy Paper).

61. 2014 Policy Paper, *supra* note 8.

62. See ICC Press Release 2014 Policy Paper, *supra* note 61.

63. See *id.*

Between 2002–2014, the Office of the Prosecutor brought fifty-seven charges of sexual and gender-based violence in twenty cases, which represents a solid level of attention to these crimes in most cases. Thirty-five of these charges proceeded to the preliminary Confirmation of Charges stage, but only twenty of these charges were actually confirmed. At the judgment stage, the Prosecutor failed to secure a single conviction on these charges. While other types of charges also failed at each of these levels, sexual and gender-based charges were particularly vulnerable. The reasons for this vulnerability resided, in part, in the Office of the Prosecutor, ranging from narrow and inadequate conceptions of gender amongst staff, inadequate investigations and evidence gathering processes, weak case strategies, and weak evidence. The ICC’s judges also contributed to the high failure rate by failing to apply previous international criminal law developments on sexual and gender-based violence when excluding certain forms of sexual violence as insufficiently grave and not permitting cumulative charges of, for example, rape and torture.⁶⁴

With the 2014 Policy Paper, the OTP declared it would forge ahead and adopt concrete steps to address the challenges it had previously faced with new strategies and tools. Although as discussed below, the Policy’s ultimate success must be judged by assessing its implementation in the fight against impunity for SGBV crimes.⁶⁵

For example, in the 2014 Policy Paper, the OTP sets out its interpretation of the much-debated and much-maligned term “gender” that appears in Article 7(3) of the Rome Statute.⁶⁶ It adopts Article 7(3)’s definition, but also addresses the ambiguity in the definition by explicitly interpreting “context of society” as acknowledging “the

64. See Oosterveld, *ICC Policy Paper*, *supra* note 61, at 445–46 (citing LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT* (2016)). See also Harvard *Recent Policy Paper International Criminal Law—Sexual and Gender-Based Crimes—ICC Outlines Policies to Help Improve Prosecutorial Outcomes—The Office of the Prosecutor of the ICC, Policy Paper on Sexual and Gender-Based Crimes* (2014), 128 HARV. L. REV. 793, 794 (stating that despite the flexibility in the Rome Statute permitting the prosecution of SGBV crimes and the Office’s stated commitment to prosecuting such crimes, as of 2014, the OTP had not yet secured a conviction of a defendant charged with such crimes).

65. See, e.g., Harvard *Recent Policy Paper*, *supra* note 65, at 800 (“In its operationalization of a gender-conscious approach to prosecution, the Paper marks an important moment in the history of the international prosecution of sexual and gender-based crimes. The mere publication of this new path forward is significant.”); Altunjan, *supra* note 20, at 887 (suggesting that Prosecutor Bensouda remedied many of the problems surrounding earlier investigations and prosecutions of SGBV crimes, in part with the 2014 Policy paper).

66. 2014 Policy Paper, *supra* note 8, ¶¶ 15–18; See also Oosterveld, *ICC Policy Paper*, *supra* note 61, at 451.

social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.”⁶⁷ Further, in defining “gender-based crimes,” the 2014 Policy Paper offers a progressive understanding that such crimes need not be sexual in nature, nor limited to women and girls.⁶⁸ Moreover, the 2014 Policy Paper states that the Office will interpret and apply the definition of gender consistently with Article 21(3) of the Rome Statute and internationally recognized human rights. Thus, the Office confirmed that it would “consider not only acts of violence and discrimination based on sex, but also those related to socially constructed gender roles.”⁶⁹

The 2014 Policy Paper also commits to confronting the various challenges that previously made the pursuit of SGBV investigations and prosecutions difficult—such as “under- or non-reporting . . . owing to societal, cultural, or religious factors; stigma for victims . . . ; [and] limited domestic investigations, and the associated lack of readily available evidence; lack of forensic or other documentary evidence owing, *inter alia*, to the passage of time; and inadequate or limited support services at national level.”⁷⁰ It further binds the OTP to bringing charges for SGBV crimes whenever it concludes there is sufficient evidence to support them.⁷¹ To achieve these goals, the OTP states:

[I]t will apply a gender analysis to all of the crimes within its jurisdiction. This involves an 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. In the context of the work of the Office, it requires a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.⁷²

67. 2014 Policy Paper, *supra* note 8, ¶¶ 15–18. *See also* Oosterveld, *ICC Policy Paper*, *supra* note 61, at 451.

68. 2014 Policy Paper, *supra* note 8, 12, ¶ 16 (“Gender-based crimes are not always manifested as a form of sexual violence. These crimes 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.”).

69. *Id.* at 15–16, ¶¶ 26–27.

70. *Id.* at 24–25, ¶ 50.

71. *Id.* at 29, ¶ 71.

72. *Id.* at 13, ¶ 21.

The 2014 Policy Paper recommends applying this gender analysis at all stages of the OTP's work. At the Preliminary Examination phase,⁷³ where the Office must consider complementarity, the OTP proposes considering barriers to genuine domestic proceedings.⁷⁴ This includes: (1) "discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes," (2) "the absence of protective measures for victims of sexual violence," (3) "manifestly insufficient steps in the investigation and prosecution of sexual and gender-based crimes;" and (4) "the absence of protective measures for victims of sexual and gender-based violence."⁷⁵

At the investigation phase,⁷⁶ the OTP emphasizes strategies for overcoming challenges related to gathering sufficient evidence to demonstrate that SGBV crimes have been committed. As such, it pledges to collect different types of evidence, including forensic evidence (e.g., clinical examinations, forensic epidemiology, and autopsies), documentary evidence (e.g., video footage, formal and informal notices to perpetrators, and reports of experts), and indirect or circumstantial *indicia* of the commission of the crimes.⁷⁷ It indicates that it will utilize "[a]nalysis techniques such as database design, statistics, and mapping" to "assist in identifying the relevant patterns of crime and organisational structures."⁷⁸ The 2014 Policy Paper also suggests that it will work with local authorities and organizations to identify victims of SGBV crimes, and employ intermediaries to interact with victims.⁷⁹ In both the investigation and the prosecution phase, the 2014 Policy Paper places great emphasis on the psychosocial well-being of victims and witnesses to SGBV crimes by stating its plan to

73. During the Preliminary Examination phase, the OTP investigates with the goal of determining whether there is sufficient evidence of crimes of significant gravity falling within the ICC's jurisdiction and whether opening an investigation would serve the interests of justice and the victims. In this phase, the Office is required to consider complementarity, and accordingly, whether genuine national proceedings are underway. See generally *Policy Paper on Preliminary Examinations*, ICC OFF. OF THE PROSECUTOR (Nov. 2013), <https://www.legal-tools.org/doc/acb906/pdf> [<https://perma.cc/2JLX-6K2R>].

74. 2014 Policy Paper, *supra* note 8, ¶ 41.

75. *Id.*

76. The investigation phase occurs if the OTP determines there is a reasonable basis to believe that crimes have been committed and proceeding before the ICC is otherwise warranted. See Rome Statute, *supra* note 12, at art. 53.

77. 2014 Policy Paper, *supra* note 8, ¶ 51.

78. *Id.*

79. *Id.* ¶¶ 55–56.

ensure that all investigators are properly trained to understand the effects of trauma and cultural issues on the investigative process and to provide support to victims and witnesses throughout the process.⁸⁰

Finally, the OTP does not suggest that it alone can advance its aggressive and progressive agenda with respect to investigating and prosecuting SGBV crimes. Rather, the 2014 Policy Paper references positive complementarity by encouraging “States to carry out their primary responsibility of investigating and prosecuting crimes, including sexual and gender-based crimes” and the OTP will support them in doing so.⁸¹ The guidance contained in the 2014 Policy Paper should greatly aid states in this endeavor.⁸²

B. The 2014 Policy in Practice: A Mixed Record

As explained above, the Policy’s stated purpose was to strengthen the Office’s capacity to investigate and prosecute perpetrators of SGBV crimes by applying a gender analysis at all stages of its work. To measure the Office’s success in implementing the Policy and achieving its objectives and goals, this section briefly examines the 2014 Policy Paper in practice, focusing specifically on outcomes;⁸³ namely, whether the OTP has increased its practice of charging defendants with SGBV crimes and whether the Office secured convictions on those charges.⁸⁴ It highlights the OTP’s efforts to

80. *Id.* ¶¶ 56–58, 61, 63–65, 70, 84–86, 90

81. *Id.* at 41, ¶ 110.

82. *See, e.g.,* Oosterveld, *ICC Policy Paper*, *supra* note 61, at 455 (suggesting that the 2014 Policy Paper is a “noteworthy addition to international guidance to states and others on how to sensitively prosecute sexual and gender-based crimes”).

83. Examining outcomes is not the only way to measure whether and how well the Policy’s objectives and goals were implemented and furthered. One could also examine inputs by looking at the Office’s day-to-day internal practices and activities. Some such evidence about the Office’s internal reforms has been collected by Dr. Rosemary Grey who conducted selected interviews with ICC OTP personnel and other relevant experts with knowledge of the Office’s practices, ICC judges, and defense counsel concerning the ICC’s investigation and prosecution of SGBV crimes in connection with her book entitled *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court*. *See* GREY, *supra* note 21, at 18–19. Dr. Grey shares details about some reforms in (1) investigation practices, (2) formalized practices to review evidence to determine which charges may be sustained, and (3) the practice of increasing legal expertise within the Office and by engaging outside experts. *See* GREY, *supra* note 21, at 261–65. In this Article, we primarily focus on outcomes, since outcomes are likely of greatest concern to victims seeking justice and arguably more measurable.

84. Though beyond the scope of this Article, one can also look for evidence in domestic courts since the OTP’s goal in developing the 2014 Policy Paper included increasing

investigate and prosecute the crime of gender persecution, which practices would eventually inform the OTP's 2022 Policy on Gender Persecution and its application. This section draws extensively on a report issued in 2021 by the International Federation for Human Rights ("FIDH") and Women's Initiatives for Gender Justice ("WIGJ"), which examines Prosecutor Bensouda's legacy concerning accountability for SGBV crimes at the ICC.⁸⁵

1. SGBV Charging Practices

In terms of pursuing SGBV charges, the evidence suggests that under Prosecutor Bensouda, the Office made significant strides in advancing the goals of the 2014 Policy Paper.⁸⁶ While charges may not necessarily translate into convictions, they are nevertheless a concrete step in the process required to provide justice to victims of such crimes through convictions and reparations awards.⁸⁷ First, under Bensouda's leadership, the OTP initiated thirteen new preliminary examinations, nine of which included SGBV crimes—four of which were brought on the prosecutor's own motion *proprio motu*, and thus, not at the behest of any state party.⁸⁸ Several of these preliminary examinations

accountability through the operation of domestic jurisdictions who can follow the ICC's lead in seeking justice for victims of SGBV crimes.

85. Located in The Hague, the FIDH monitors the investigation and prosecution of SGBV crimes at the ICC, with a particular focus on progress following the adoption of the 2014 Policy Paper. FIDH also works with organizations in situation countries to document allegations of SGBV crimes and provides evidence to the OTP. Among other things, WIGJ monitors the ICC's cases that include SGBV crimes and advocates for the implementation of the 2014 Policy Paper's goals and objectives. See *Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor Bensouda's Legacy*, 9 INT'L FED'N FOR HUM. RTS. & WOMEN'S INITIATIVES FOR GENDER JUST. (June 2021), <https://www.fidh.org/IMG/pdf/cpiproc772ang-1.pdf> [<https://perma.cc/MFQ8-XWAP>] [hereinafter FIDH/WIGJ Report].

86. In March 2022, the authors submitted commentary in response to Prosecutor Khan's call for submissions leading to the launch of the December 2022 Policy on Gender Persecution, doing so through the Public International Law and Policy Group (PILPG) together with PILPG law firm partners, including Debevoise and Plimpton, LLP. See *PILPG Comments on the International Criminal Court Office of the Prosecutor's Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute*, PILPG <https://www.publicinternationallawandpolicygroup.org/pilpg-icc-otp-gender-persecution-initiative> [<https://perma.cc/R9P3-L9K9>] (last visited at Apr. 28, 2023) [hereinafter PILPG March 2022 Commentary]. We draw here on the portion of that PILPG March 2022 Commentary reviewing the OTP's post-2014 practice as relates to charging and prosecuting SGBV crimes. See PILPG March 2022 Commentary, at 7–9.

87. See GREY, *supra* note 21, at 248.

88. The nine situations in which the OTP included SGBV crimes included Mali, Central African Republic II, Ukraine, Iraq/United Kingdom, Burundi, Philippines, Venezuela, Bangladesh/Myanmar, and Bolivia. See FIDH/WIGJ Report, *supra* note 86, at 8–9. The four

including SGBV charges remain ongoing.⁸⁹ In addition, during Bensouda's tenure, the OTP concluded two preliminary investigations—one inherited (Nigeria) and one not (Ukraine), finding that the criteria to proceed with investigations into war crimes and crimes against humanity were met.⁹⁰ In both the Nigeria and Ukraine situations, SGBV crimes were included within the allegations where the evidence was found to be sufficient to proceed to the investigation stage.⁹¹ As to investigations, under Prosecutor Bensouda's leadership, the OTP opened seven new investigations, all but one of which encompassed allegations of SGBV crimes.⁹²

Second, the OTP increased its practice of charging defendants with the commission of SGBV crimes. In the four years after the 2014 Policy Paper's enactment, SGBV crimes amounted to nearly fifty percent of the crimes charged at the ICC.⁹³ As Dr. Rosemary Grey⁹⁴ recounts, SGBV charges constituted "85 out of 173 charges (49.13 percent) in requests for arrest warrants/summons to appear and 50 of 110 charges (45.45 percent) in charging documents."⁹⁵

Not all the news on the charging front is good news, however. In *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*,⁹⁶ a Pre-

proprio motu investigations included Iraq, United Kingdom, Burundi, Philippines, and Bangladesh/Myanmar.

89. *See id.* at 8.

90. *See id.* at 9.

91. *Id.* at 9.

92. The seven new investigations included Mali, Central African Republic II, Georgia, Burundi, Bangladesh/Myanmar, Afghanistan, and the State of Palestine. Only the situation in the State of Palestine did not include allegations of SGBV crimes. *See* FIDH/WIGJ Report, *supra* note 86, at 8.

93. *See* PILPG March 2022 Commentary, *supra* note 87, at 7 (citing to GREY, *supra* note 21, at 253).

94. Dr. Grey is a Senior Lecturer at Sydney Law School and Co-Director of the Sydney Centre for International Law. *See People: Dr. Rosemary Grey*, UNIV. OF SYDNEY, <https://www.sydney.edu.au/law/about/our-people/academic-staff/rosemary-grey.html#collapseprofileresearchinterest> [<https://perma.cc/D3MY-CPYW>] (last visited Apr. 20, 2023).

95. *See* GREY, *supra* note 21, at 253 (noting that the percentages include SGBV charges in the ICC's *Ongwen* and *Ntaganda* cases added after the issuance of the initial arrest warrants).

96. Alfred Yekatom was the alleged former commander in the Anti-Balaka movement and Patrice-Edouard Ngaïssona was the alleged former senior leader and the "National General Coordinator" of that same movement. *See Case Information Sheet: Situation in Central African Republic II, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, INT'L CRIM. CT. (July 2021), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/yekatom-nga%C3%AFssonaEn.pdf> [<https://perma.cc/5K9B-MTYN>] [hereinafter *Yekatom and Ngaïssona Case Information Sheet*].

Trial Chamber⁹⁷ confirmed the OTP's charges against Ngaïssona for rape as a war crime and crime against humanity.⁹⁸ The OTP attempted to later amend the charging instrument to include additional SGBV crimes, including gender persecution.⁹⁹ The Pre-Trial Chamber, however, denied the request to amend citing, among other things, concerns about delaying trial proceedings.¹⁰⁰

2. SGBV Convictions

Regarding SGBV convictions since the launch of the 2014 Policy Paper, the evidence indicates that the OTP continues to face challenges in proving beyond a reasonable doubt that those crimes occurred and that the defendant was responsible for their commission. For example, although the Court confirmed SGBV charges of rape and sexual slavery against Germain Katanga and Mathieu Ngudjolo Chui,¹⁰¹ neither

97. If the suspect is arrested or voluntarily appears before the Court, the matter progresses to the pre-trial stage, whereby the ICC judges will decide whether the prosecution has met its burden of establishing that there are substantial grounds to believe that the suspect has committed the charged crimes. *See* Rome Statute, *supra* note 12, at art. 61.

98. *See* PILPG March 2022 Commentary, *supra* note 87, at 7-8 and n. 55. *See* Yekatom and Ngaïssona Case Information Sheet, *supra* note 96 (concluding there were substantial grounds to believe Ngaïssona was responsible for: "(i) the war crimes of directing attacks against the civilian population, murder, torture, cruel treatment, rape, directing attacks against buildings dedicated to religion, displacement of the civilian population, destroying the property of an adversary, pillaging; and (ii) the crimes against humanity of murder, deportation, forcible transfer of population, imprisonment and other forms of severe deprivation of physical liberty, torture, rape, persecution and other inhumane acts").

99. Rosemary Grey, *The Gender-based Persecution against Men: the ICC's Abd-al-Rahman Case*, OPINIO JURIS (May 30, 2021), <https://opiniojuris.org/2021/05/30/gender-based-persecution-against-men-the-iccs-abd-al-rahman-case/> [https://perma.cc/2C5A-CY7A] [hereinafter Grey, *The Gender-based Persecution*].

100. *See The ICC's Troubled Track Record on Sexual and Gender-Based Crimes Continues: The Yekatom & Ngaïssona Case (Part 1)*, OPINIO JURIS, (Mar. 7, 2020) <https://opiniojuris.org/2020/07/03/the-iccs-troubled-track-record-on-sexual-and-gender-based-crimes-continues-the-yekatom-ngaïssona-case-part-1/#:~:text=In%20May%2C%20PTCII%20denied%20the%20request%20to%20amend,so%20that%20the%20accused%20could%20prepare%20a%20defence> [https://perma.cc/P5UQ-XPWP].

101. Katanga and Ngudjolo were charged with committing crimes in the Ituri region of the Democratic Republic of the Congo in connection with an attack on the village of Bogoro. *See Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga*, INT'L CRIM. CT. (July 2021), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KatangaEng.pdf> [https://perma.cc/29QW-K4ZX] [hereinafter Katanga Case Information Sheet]; *ICC Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Mathieu Ngudjolo Chui*, INT'L CRIM. CT. (July 2021), <https://www.icc->

defendant was convicted of those charges.¹⁰² A Trial Chamber severed the charges against the two in November 2012, six months into the deliberations phase. In late December 2012, Ngudjolo was acquitted of all charges.¹⁰³ In 2014, the Trial Chamber convicted Katanga as an accessory of crimes against humanity and war crimes, based on the underlying crimes of murder, attacking a civilian population, destruction of property, and pillaging.¹⁰⁴ Although the OTP had demonstrated beyond a reasonable doubt that such crimes had been committed, the Trial Chamber acquitted him of the SGBV charges, finding that the evidence did not sufficiently demonstrate Katanga's responsibility for those crimes.¹⁰⁵ The OTP's SGBV charges against Jean-Pierre Bemba Gombo¹⁰⁶ met a similar fate in that, although the OTP secured a conviction against him for such charges, the Appeals Chamber overturned the conviction and acquitted Bemba of all charges.¹⁰⁷

Nevertheless, there is also promising news relating to the development of international criminal law concerning SGBV crimes. In June 2014, a Pre-Trial Chamber unanimously confirmed all charges against Bosco Ntaganda,¹⁰⁸ including SGBV charges, making it the first time in the Court's existence in which all SGBV charges against an accused were unanimously confirmed.¹⁰⁹ In 2021, Ntaganda's conviction for rape and sexual slavery, as a war crime and crime against humanity, was confirmed by the Appeals Chamber, making it the first

[cpi.int/sites/default/files/CaseInformationSheets/ChuiEng.pdf](https://www.cpi.int/sites/default/files/CaseInformationSheets/ChuiEng.pdf) [https://perma.cc/NH8F-LFGX] [hereinafter Ngudjolo Case Information Sheet].

102. See Ngudjolo Case Information Sheet, *supra* note 102.

103. See *id.*

104. See Katanga ICC Case Information Sheet, *supra* note 100.

105. See *id.* See also FIDH/WIGJ Report, *supra* note 85, at 14. Prosecutor Bensouda had indicated the OTP's intention to appeal the acquittal on the SGBV charges, but she later withdrew the appeal after Katanga discontinued his appeal.

106. At the time the arrest warrant against him was issued, Bemba was the President and Commander-in-Chief of the Movement for the Liberation of Congo. See *Bemba Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/car/bemba> [https://perma.cc/SH6R-M34J] (last visited Apr. 20, 2023).

107. See FIDH/WIGJ Report, *supra* note 85, at 15 (noting that the OTP charged Bemba with crimes under the doctrine of command responsibility).

108. Bosco Ntaganda was the Former Deputy Chief of the Staff and Commander of Operations of the Forces Patriotiques pour la Libération du Congo (FPLC). See *Case Information Sheet: Situation in the Democratic Republic of Congo, The Prosecutor v. Bosco Ntaganda*, INT'L CRIM. CT. (July 2021), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf> [https://perma.cc/DV6K-Q5GF] [hereinafter Bosco Ntaganda Case Information Sheet].

109. See FIDH/WIGJ Report, *supra* note 85, at 12.

final conviction for SGBV crimes in the Court’s history.¹¹⁰ In March 2016, an ICC Pre-Trial Chamber unanimously confirmed all charges against Dominic Ongwen,¹¹¹ including nineteen charges for SGBV crimes—the largest number of SGBV crimes confirmed to date by a Pre-Trial Chamber.¹¹² In February 2021, the Trial Chamber found Ongwen guilty beyond a reasonable doubt of “61 crimes characterized as war crimes and crimes against humanity, committed in Uganda between 1 July 2002 and 31 December 2005,”¹¹³ including all SGBV charges.¹¹⁴ Importantly, *Ongwen* is the first case in which the OTP supported a crimes against humanity charge with forced marriage as an inhumane act.¹¹⁵ Ongwen was sentenced to 25 years’ imprisonment,¹¹⁶ and in December 2022, the Appeals Chamber confirmed the Trial Chamber’s decision on guilt and sentencing.¹¹⁷

Although the OTP’s conviction record on SGBV crimes is mixed, it is important to note that prior to the launch of the 2014 Policy Paper, the OTP had not successfully convicted any accused of SGBV crimes. Indeed, the OTP was heavily criticized for failing to bring SGBV charges in its first case against Thomas Lubanga Dyilo,¹¹⁸ notwithstanding significant evidence in NGO and UN reports, and the trial testimony.¹¹⁹ The discussion above shows that since the launch of

110. *See id.* (noting the important step in the development of international criminal law on sexual and gender-based violence). *See also* PILPG March 2022 Commentary, *supra* note 87, at 7 n. 51.

111. Dominic Ongwen was a former Lord’s Resistance Army (LRA) commander. *See Case Information Sheet: Situation in Uganda, The Prosecutor v. Dominic Ongwen*, INT’L CRIM. CT. (July 2021), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/OngwenEng.pdf> [<https://perma.cc/NF4E-VBNU>] [hereinafter *Ongwen Case Information Sheet*].

112. *See* FIDH/WIGJ Report, *supra* note 85, at 12.

113. *See* Ongwen Case Information Sheet, *supra* note 112.

114. *See* FIDH/WIGJ Report, *supra* note 85, at 13.

115. *See id.*

116. *See* Ongwen Case Information Sheet, *supra* note 112.

117. *See* ICC Press Release, *Ongwen Case: ICC Appeals Chamber Confirms the Conviction and Sentencing Decisions* (Dec. 15, 2022), <https://www.icc-cpi.int/news/ongwen-case-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions> [<https://perma.cc/J3GZ-U6CU>].

118. The arrest warrant for Lubanga was issued in 2006 under the leadership of Prosecutor Luis Moreno Ocampo. *See Lubanga Case*, INT’L CRIM. CT., <https://www.icc-cpi.int/drc/lubanga> [<https://perma.cc/35EL-NLYD>] (last visited Apr. 23, 2023).

119. *See* FIDH/WIGJ Report, *supra* note 85, at 9. *See also* GREY, *supra* note 21, at 128–30 (explaining the disappointment of the Lubanga case from a gender perspective because despite “leading evidence of sexual violence against UPC ‘child soldiers’ at trial, the OTP did not mention this violence at the pre-trial stage,” such that there could be not accountability for sexual violence in the case, nor reparation for the harms caused to victims); GREY, *supra* note

the 2014 Policy Paper, the OTP's investigation and charging practices concerning SGBV crimes have improved significantly.

3. The Crime of Gender Persecution

As to gender persecution specifically, the record indicates that the OTP's work has only just begun. The OTP has investigated claims of gender persecution in several of its preliminary investigations.¹²⁰ For various reasons, including complementarity, some claims have not moved forward.¹²¹ In other cases, the evidence indicates that the OTP has open investigations that include potential charges of gender persecution of both male and female victims.¹²²

For example, for the first time in the ICC's history, in September 2019, a Pre-Trial Chamber recognized charges of gender persecution¹²³ in *Prosecutor v. Al Hassan*.¹²⁴ The charges against Al Hassan "detail crimes including rape and other forms of sexual violence, torture and murder committed against civilians and, in particular women, on 'sexist grounds.'"¹²⁵ In its charging instrument, the OTP alleges "that Al Hassan and other members of Ansar Eddine particularly targeted women and young girls on the basis of gender, imposing restrictions on them motivated by discriminatory opinions regarding gender roles."¹²⁶

21, at 130–39 (detailing the evidence gathered indicating the commission of SGBV crimes as against Lubanga that ultimately was not included in the confirmed charges against Lubanga).

120. See PILPG March 2022 Commentary, *supra* note 87, at 8–9 n. 58

121. See *id.* (explaining the gender persecution allegations being considered in preliminary examinations in Afghanistan, Colombia, and Iraq).

122. See *id.* at 9 nn. 60–62 (noting that the OTP appears to be considering potential charges of gender persecution in Afghanistan, Nigeria, and Myanmar).

123. See, e.g., FIDJ/WIGJ Report, *supra* note 85, at 13; Davis, *supra* note 2, at 52.

124. According to the ICC's Case Information Sheet, Al Hassan was a member of Ansar Eddine, and a *de facto* chief of the Islamic police, involved in the Islamic court's work in Timbuktu, Mali. See *Case Information Sheet: Situation in Mali, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, INT'L CRIM. CT. (Feb. 2022), <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/al-hassanEng.pdf> [<https://perma.cc/3SG5-E787>] [hereinafter Al Hassan Case Information Sheet]. The OTP alleges that he committed crimes against humanity and war crimes in Timbuktu between 2012 and 2013 as part of the armed group Ansar Eddine (associated with Al Qaeda in the Islamic Maghreb). See *Al Hassan Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/mali/al-hassan> [<https://perma.cc/98Y6-T64S>] (last visited Apr. 23, 2023).

125. See Davis, *supra* note 2, at 52.

126. See FIDH/WIGJ Report, *supra* note 85, at 13 (detailing alleged rules that would be severely sanctioned if they were not followed, including rules requiring women to adhere to a strict dress code, to remain segregated from men, and to leave their homes only under certain conditions, as well as alleging that women were subjected to rape and other inhumane acts).

The trial against Al Hassan commenced in July 2020,¹²⁷ and the evidence, including that for the crime of gender persecution, has been submitted.¹²⁸

More recently, and still under the leadership of Prosecutor Bensouda, the OTP brought gender persecution charges—notably for alleged crimes committed against men—in its case against Ali Muhammad Ali Abd-Al-Rahman.¹²⁹ Although “gender” was not listed as a ground for persecution in the original charges brought against Abd-Al-Rahman in the 2007 arrest warrant application or in a later warrant application filed by Bensouda, the OTP amended the charges against the accused in 2021.¹³⁰ This was presumably in response to commentators who suggested that “the alleged sexual crimes against Fur women, and the alleged sex-specific killings of Fur men, seemed to constitute persecution on intersecting gender and ethnic grounds.”¹³¹ The trial against Abd-Al-Rahman commenced in April 2022 and is ongoing.¹³²

IV. THE OTP’S POLICY ON GENDER PERSECUTION: LOOKING FORWARD TO SUCCESSFUL IMPLEMENTATION

Under the leadership of ICC Prosecutor Karim Khan and in order to enhance the OTP’s ongoing efforts to provide justice to victims of SGBV crimes, the OTP launched its Policy on Gender Persecution in December 2022.¹³³ As is true of all SGBV crimes, gender persecution

127. See Al Hassan Case Information Sheet, *supra* note 125.

128. See Al Hassan Case Information Sheet, *supra* note 125.

129. Abd-al-Rahman is alleged to be a leader of the Militia/Janjaweed in Darfur, Sudan, and is charged with thirty-one counts of war crimes and crimes against humanity committed in Darfur between 2003 and 2004. See *Abd-Al-Rahman Case*, INT’L CRIM. CT., <https://www.icc-cpi.int/darfur/abd-al-rahman> [<https://perma.cc/MU42-DSCJ>] (last visited Apr. 23, 2023). See also Grey, *The Gender-based Persecution*, *supra* note 100 (noting that Bensouda sketched out the charges against Abd-Al-Rahman in her last court appearance as ICC Prosecutor).

130. See *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-325-Conf-Anx1-Corr2, Second Corrected Version of the Document Containing the Charges, INT’L CRIM. CT. (Mar. 29, 2021), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2021_03707.PDF [<https://perma.cc/R4F2-AHEX>].

131. See Grey, *The Gender-based Persecution*, *supra* note 100.

132. See *Abd-Al-Rahman Case*, *supra* note 130.

133. See Gender Persecution Policy, *supra* note 9. The authors attended OTP Prosecutor Karim Khan’s formal launch of the Policy on December 7, 2022, which was held during a Side Event at the 21st Assembly of States Parties meeting in The Hague, The Netherlands. Prosecutor Khan was accompanied by senior members of the OTP, as well as several of the Office’s Special Advisers. During the launch, Professor Lisa Davis, the OTP’s Special Adviser on Gender Persecution, was present and outlined many of the Policy’s key features for audience members.

too has historically been “rarely investigated adequately or charged, whether in international or domestic courts,” thereby contributing to its “lack of visibility in historical records, despite its consistent occurrence.”¹³⁴ The Gender Persecution Policy, which builds on the 2014 Policy Paper, resolves to remedy this wrong.¹³⁵ It recognizes that SGBV crimes, including gender persecution, are “among the gravest crimes in the [Rome] Statute,” and confirms that “investigating and prosecuting such crimes is a key priority” for the OTP.¹³⁶ Consistent with its approach in the 2014 Policy Paper, the OTP has determined to pay “particular attention to the commission of these crimes, including gender persecution, at all stages of its work from preliminary examination, investigation, to trial, sentencing, appeal and reparations.”¹³⁷

The first section below outlines the overall structure, framework, and key terms or features of the OTP’s Gender Persecution Policy. The next section describes implementation challenges related to two of the more complex issues relevant to investigating and prosecuting gender persecution crimes: (1) the distinction between motive and intent; and (2) obtaining the participation of victims. While these issues are not

See Press Release CUNY School of Law, *Professor Lisa Davis appointed Special Adviser on Gender Persecution by Prosecutor of ICC* (Nov. 18, 2021) (on file with author), https://www.law.cuny.edu/newsroom_post/professor-lisa-davis-appointed-special-adviser-on-gender-persecution-by-prosecutor-of-icc/ [<https://perma.cc/9KKE-9P82>]. As the Policy itself recounts, the Prosecutor appointed Professor Davis “to draft [the] Policy on Gender Persecution and to assist the Office in strengthening its capacity to respond effectively to gender persecution and applying a gender-component approach to all aspects of its work.” Gender Persecution Policy, *supra* note 9, ¶ 110.

134. Gender Persecution Policy, *supra* note 9, at 4.

135. The Gender Persecution Policy was developed following a year-long consultative process “engaging Special Advisers and staff of the Office as well as external actors, including representatives of States, UN experts, UN Women, international institutions, civil society organizations, affected communities, activists, academics, scholars and victims/survivors.” *Id.* at 5. Some 500 organizations, individuals, or groups representing 100 countries and territories submitted commentary in response to the OTP’s calls. *Id.* As noted above, the authors, through PILPG and together with PILPG law firm partners, including Debevoise and Plimpton, LLP, submitted commentary in response to that call. *See* PILPG March 2022 Commentary, *supra* note 87. PILPG, together with its law firm partners, also submitted commentary in response to the OTP’s proposed Gender Persecution Policy in November 2022. *See, Debevoise and PILPG Comments to International Criminal Court Prosecutor on Draft Gender Persecution Policy, DEBEVOISE & PLIMPTON* (Nov. 28, 2022), <https://www.debevoise.com/news/2022/11/debevoise-and-pilpg-submit-commentary> [<https://perma.cc/8DDA-9ZX6>] [hereinafter PILPG November 2022 Commentary]. Portions of our discussion below draw on the March 2022 and November 2022 PILPG Commentary.

136. Gender Persecution Policy, *supra* note 9, at 6.

137. *Id.*

insurmountable, as the Policy itself notes,¹³⁸ education and training are fundamental to successful implementation. This Article thus encourages the OTP to follow through on its commitment to education and training, and develop additional guidance and training materials on these two complex issues to assist investigators, prosecutors, judges, and other legal professionals in the investigation and prosecution of the crime of gender persecution.

A. The Key Features of the OTP's Gender Persecution Policy

1. A Brief Overview of Policy

At its outset, the Gender Persecution Policy includes a list of definitions of key terms, such as “gender,” “gender persecution,” “intersex,” and “LGBTQI+” (i.e., lesbian, gay, bisexual, transgender, queer, and intersex).¹³⁹ As to “gender,” the OTP clarifies that gender is a social construct that varies and can evolve over time—again, expressly referencing Article 21 of the Rome Statute.¹⁴⁰ It further defines “gender persecution” to explain that the crime is “committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.”¹⁴¹ Unique to this Policy is the inclusion of definitions for individuals who do not strictly self-identify as male or female.¹⁴² In short, the 2022 Gender Persecution Policy signals that the OTP will employ a broad lens when considering the victim population that may have been subjected to the crime of gender persecution.

Next, the Policy introduces its general framework and outlines its key objectives. It includes: (1) affirming the OTP's commitment to addressing sexual and gender-based crimes; (2) providing clarity and direction to the OTP's staff regarding the interpretation and application of the Rome Statute “in order to ensure the effective investigation and prosecution of gender persecution” through all stages of the ICC's criminal processes; (3) contributing to advancing “a culture of best practice” in terms of the investigation and prosecution of gender persecution within the OTP and more broadly; (4) contributing to the

138. *Id.* ¶¶ 107–11.

139. *Id.* at 3.

140. The plus sign represents people who identify with the broader LGBTQI community, but use other terms for self-identification. *Id.*

141. *Id.*

142. *Id.*

ongoing development of international jurisprudence regarding gender persecution; and (5) “raising awareness regarding the importance of addressing gender persecution, including by supporting genuine national proceedings.”¹⁴³ Here, by affirming the objectives of the Policy, the OTP signals its commitment to investigating and prosecuting SGBV crimes, including the crime of gender persecution, and to the development of international criminal law more broadly.

The Gender Persecution Policy proceeds to announce the OTP’s general policy, which is to analyze and prosecute the crime of gender persecution within the scope of its mandate.¹⁴⁴ The Policy specifies that the OTP will take concrete steps to: (1) enhance its staff’s skills in the application of a gender approach to its work; (2) pursue an intersectional approach to discrimination; and (3) encourage complementary efforts by States and other stakeholders to prevent and punish gender persecution.¹⁴⁵ Again, the Policy sets out a clear plan that builds upon its objectives in the preceding section and provides a segue into the Policy’s discussion of the specific elements of the crime of gender persecution.

Next, the Policy analyzes the six elements of persecution as a crime against humanity under Article 7(1)(h) of the Rome Statute; specifically how they apply to gender persecution.¹⁴⁶ The Policy then describes how the OTP will approach its investigation and prosecution of gender persecution throughout the different stages of the ICC’s criminal process, including preliminary examinations, investigation, prosecutions, sentencing, appeals, and ancillary processes such as reparations, cooperation and external relations, and institutional development.¹⁴⁷

In its final section, the Gender Persecution Policy addresses implementation challenges with a promise that the Policy, and other relevant rules and procedures will be regularly reviewed, and that the OTP itself will “monitor and evaluate the implementation of this Policy.”¹⁴⁸ In short, the OTP demonstrates an understanding that regular monitoring and review will be required to achieve the Policy’s stated goals and objectives.

143. *Id.* ¶ 16.

144. *Id.* at 10.

145. *Id.* at 11.

146. *Id.* at 13–19.

147. *Id.* at 21–30.

148. *Id.* at 30.

2. Specific Features of the Gender Persecution Policy

This section highlights some specific features of the Gender Persecution Policy that represent particularly welcome developments in this subfield of international criminal law focusing on SGBV crimes.

a. Broadly Defining Gender

First and foremost, the Gender Persecution Policy pledges to broadly interpret the term “gender” to reflect the evolving nature of societies, as well as internationally recognized human rights, conceptualizing “gender” beyond the male-female binary. This approach is laudable and consistent with the progressive development of international human rights law on gender. In fact, the Gender Persecution Policy expressly conveys the OTP’s understanding that:

Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.¹⁴⁹

As noted above, the Rome Statute’s definition of “gender” included the key phrase, “the two sexes, male and female, *within the context of Society*.”¹⁵⁰ Article 21(3) of the Rome Statute provides, however, that the treaty’s provisions must be interpreted “consistent with internationally recognized human rights”¹⁵¹—a fact highlighted in the Gender Persecution Policy. The 2022 Policy, like the 2014 Policy, heeds this mandate by concluding that the definition of gender within the Rome Statute should be understood in the manner that has come to pervade modern international human rights practice—as both a biological *and* socially constructed concept.¹⁵²

The Gender Persecution Policy contributes to this understanding of the Rome Statute’s definition of gender in two ways. First, the Policy’s express reference to changing understandings of gender is an important interpretive clarification by highlighting that context matters in each investigation and prosecution of gender persecution and related

149. See Gender Persecution Policy, *supra* note 9, at 3.

150. See *supra* Section II.A; see also PILPG March 2022 Commentary, *supra* note 87, at 11 (citing the Rome Statute).

151. Rome Statute, *supra* note 12, at art. 21(3).

152. PILPG March 2022 Commentary, *supra* note 87, at 11–12 n. 77–85.

crimes. In fact, one key term specifically defined in the Policy is “intersex;”¹⁵³ the inclusion of this definition signals the OTP’s evolved understanding of gender as non-binary and reflects its willingness to apply this progressive view of gender to its future investigative and prosecutorial work.

Second, the Policy goes a step further by explicitly defining “context of society” to mean:

Group of social constructs and criteria used to define gender. These include, for example, sexual orientation, gender identity and gender expression, e.g., “woman,” “man,” “girl” and “boy.” Just as social constructs and criteria are used to define the understanding of race, ethnicity or culture, so are social constructs and criteria used to define the understanding of gender.¹⁵⁴

Thus, the Gender Persecution Policy specifically clarifies that gender under the Rome Statute should be understood as an evolving concept, which corresponds to current societal understandings of gender identity, modern-day case law on gender persecution from other

153. *See* Gender Persecution Policy, *supra* note 9, at 3.

154. *Id.*

jurisdictions,¹⁵⁵ and the prevailing views of international organizations¹⁵⁶ and experts in this area of the law.¹⁵⁷

155. In Colombia, the Special Jurisdiction for PEACE (JEP), generally charged with holding perpetrators of various crimes committed during the Colombian civil war, has confirmed charges of gender persecution as a crime against humanity committed against several LGBTQI persons in armed conflict. The JEP has thus recognized gender-based persecution as a crime against humanity potentially involving persons who do not perceive themselves as male or female and thus do not fit within the male-female gender binary. Susann Aboueldahab, *Gender-Based Persecution as a Crime Against Humanity: A Milestone for LGBTQI Rights before the Colombian Special Jurisdiction for Peace*, EJIL:TALK (May 4, 2021), <https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/> [https://perma.cc/NBQ5-K8X4].

156. Several United Nations and other intergovernmental bodies have adopted broad and socially constructed definitions of gender in their practice. *See, e.g.*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., INTEGRATING A GENDER PERSPECTIVE INTO HUMAN RIGHTS INVESTIGATIONS: GUIDANCE AND PRACTICE 7 (2018) (“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.”); OFF. OF THE SPECIAL ADVISOR ON GENDER ISSUES & ADVANCEMENT OF WOMEN, GENDER MAINSTREAMING: STRATEGY FOR PROMOTING GENDER EQUALITY 1 (2001), <https://www.un.org/womenwatch/osagi/pdf/factsheet1.pdf> [https://perma.cc/Z5DG-66B6] (“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 processes. They are context/time-specific and changeable.”); UN WOMEN, CONCEPTS AND DEFINITIONS 1 (Aug. 2001), <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> [https://perma.cc/7R8W-X9AC] (same definition of “gender”); COMM. 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.”).

157. *See e.g.*, Rosemary Grey, *Submission for ICC Prosecutor’s Policy on Gender-Based Persecution*, 7–9 (Mar. 21, 2022), <https://ses.library.usyd.edu.au/bitstream/handle/2123/28769/Grey%20%28OTP%20Gender%20Persecution%20Policy%29%2021.3.22.pdf?sequence=1&isAllowed=y> [https://perma.cc/788R-G9YS] (explaining the academic debate regarding the definition of gender under the Rome Statute and concluding that the non-binary interpretation of gender advanced in OTP’s 2014 Policy Paper is the correct one) [hereinafter Grey, ICC Submission]; UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES, POSITION OF THE UN SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES, AND CONSEQUENCES, SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH, THE INDEPENDENT EXPERT ON SEXUAL ORIENTATION AND GENDER IDENTITY, AND THE WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS ON THE INTERNATIONAL CRIMINAL COURT POLICY ON GENDER-

b. Adopting an Intersectional Approach

Besides broadly defining gender, the Gender Persecution Policy expressly adopts an intersectional approach that “fully reflect[s] the inter-relationship between gender . . . and other aspects of an individual’s identity or circumstances”¹⁵⁸ Intersectionality refers to how an individual’s overlapping identities affect their lived experiences, including discrimination.¹⁵⁹ The concept of intersectional persecution recognizes that victims may be targeted not only because of their perceived gender but also because of other factors, such as race, religion, pregnancy, or sexual orientation.¹⁶⁰ Both the OTP and ICC judges have already signaled their willingness to adopt an intersectional approach when it comes to investigating and prosecuting cases involving discrimination. 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.”¹⁶¹ And the Court has adopted an intersectional view of persecution in several cases. In *Al Hassan*, the ICC judges cited to the victims’ race, age, and pregnancy status as potential factors in confirming the persecution charges against the defendant.¹⁶² And in *Ntaganda*, the Court explained that although one prohibited ground of

RELATED PROSECUTIONS, OFF. OF UN HIGH COMM’R FOR HUM. RTS. (Apr. 21, 2022), <https://www.ohchr.org/sites/default/files/2022-04/ICC-Position-Paper21April2022.pdf> [<https://perma.cc/Q6VW-F4EA>] (recommending that the 2022 Policy “should go beyond the binary mold to recognize the identity and rights of non-binary persons”) [hereinafter UN Special Rapporteur Report].

158. Gender Persecution Policy, *supra* note 9, ¶ 29.

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

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

161. See 2014 Policy Paper, *supra* note 8, ¶ 27.

162. See, e.g., *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 (May 8, 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.”) (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.”) (translation of French original).

discrimination is sufficient to conclude that the crime of persecution has been committed, a “combination of more than one may equally form the basis for the discrimination.”¹⁶³ In the same case, at the reparations stage, the Court further highlighted the victims’ multiple and intersecting identities, such as their age, gender, and ethnicity.¹⁶⁴

Adopting an intersectional perspective was one of the key recommendations by these authors and other experts’ Commentary submitted to the OTP regarding its Draft Gender Persecution Policy in March 2022.¹⁶⁵ Such Commentary has garnered increasing attention by the ICC, other human rights bodies, and scholars of international law.¹⁶⁶ The Gender Persecution Policy not only embraces intersectionality in principle, but also contains express recommendations for incorporating intersectionality at every stage of an ICC proceeding, including charging decisions,¹⁶⁷ investigations,¹⁶⁸ and sentencing.¹⁶⁹ The OTP’s willingness to embrace an intersectional

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

164. See PILPG November 2022 Commentary, *supra* note 136, at 20 (citing *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Reparations Order ¶ 60 (Mar. 8, 2021)); *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.

165. See PILPG March 2022 Commentary, *supra* note 87, at 20–22, n. 123–38.

166. *See id.*; *see also* Grey, ICC Submission, *supra* note 158, at 9–10 (noting that gender “is understood to intersect with other variables, such as race and caste, leading to further inequalities;” noting also that it is possible to argue that some victims face persecution on intersecting gender and ethnic grounds); UN Special Rapporteur Report, *supra* note 158 (noting that “gender intersects with other protected grounds, including sex and sexual orientation, to produce particularly heightened vulnerabilities for certain groups and individuals”); Karim A. Khan, Letter to the Prosecutor of the International Criminal Court, MADRE (Mar. 18, 2022), https://www.madre.org/sites/default/files/PDFs/Global-Civil-Society-Letter-on-GP-Policy-Paper_March-2022.pdf [<https://perma.cc/3NXK-UZPU>] (noting that gender often intersects with “other discriminatory regulations used to reinforce systems of oppression, including, but not limited to, race, ethnicity, nationality, religion, Indigenous status, immigration status, or disability status” and that when prosecuting gender-based violence accountability mechanisms should “take into consideration other intersecting forms of discrimination”).

167. Gender Persecution Policy, *supra* note 9, ¶ 33 (“Apply an intersectional approach to gender persecution with persecution based on political, racial, national, ethnic, cultural, religious or other grounds . . . and hold perpetrators accountable for multiple or intersecting forms of persecution recognised under the Statute.”).

168. *Id.* ¶ 81 (“The Office will further apply an intersectional analysis to gender persecution conduct, recognizing that such acts or crimes may also be motivated by additional and intersecting persecutory grounds under article 7(h).”).

169. *Id.* ¶ 67 (“When assessing gravity, the Office will take into account whether there were multiple forms of persecution, the multi-faceted character of the act or acts . . . [and] will apply an intersectional approach to its assessment of the discriminatory basis for such acts.”).

approach, as expressed comprehensively in its Gender Persecution Policy, builds upon its 2014 Policy Paper’s view on intersectionality, and is supported by existing ICC persecution cases, such as the *Ntaganda* and *Al Hassan* cases.

c. Taking a Stand on the Defense of Cultural Relativism

Additionally, the Gender Persecution Policy takes a clear stance on cultural relativism, stating that “human rights violations prohibited under international law are not culturally determinative,” and that “breaches of fundamental rights cannot be ignored, dismissed or justified on the basis of culture.”¹⁷⁰ Cultural relativism is the view that “ethical and social standards reflect the cultural context from which they are derived.”¹⁷¹ Those who embrace the concept argue that cultures differ fundamentally from one another, and so do the moral frameworks that structure relations within different societies. In international relations, for example, cultural relativists may “determine whether an action is ‘right’ or ‘wrong’ by evaluating it according to the ethical standards of the society within which the action occurs.”¹⁷² Cultural relativism has been a prominent theme in international human rights law and was raised as an argument in defense of the gender persecution charges brought by the OTP against *Al Hassan*—with *Al Hassan* arguing that certain Islamic practices may not give rise to persecution charges.¹⁷³ However, it has become apparent over the past several decades that cultural relativism does not excuse accountability for violations of human rights, and, apart from the *Al Hassan* case, cultural relativism has been seldom raised successfully in defense of atrocity crimes.¹⁷⁴ The Gender Persecution Policy thus aligns with the modern understanding that arguments about cultural relativism cannot defeat accountability for grave violations of

170. *Id.* ¶ 27.

171. *Cultural Relativism*, CARNEGIE COUNCIL, <https://www.carnegiecouncil.org/explore-engage/key-terms/cultural-relativism> [<https://perma.cc/Z6Q5-CJKG>] (last visited Apr. 23, 2023).

172. *Id.*

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

174. *See* Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12 ILSA J. INT’L & COMPAR. L. 1, 4–5 (2005); *see also* David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 126 n. 145 (2004).

human rights, including the crime of gender persecution.¹⁷⁵ The Policy further contributes to this view by expressly affirming that the fundamental right to be safe from gender persecution is non-derogable under the framework governing the Rome Statute.

d. Distinguishing Motive from Intent

The Gender Persecution Policy provides a useful and detailed analysis on the distinction between motive and intent when investigating and prosecuting acts that may amount to gender persecution.¹⁷⁶ The Policy rightly recognizes that: (1) the two concepts “should not be conflated”;¹⁷⁷ (2) “personal motives . . . do not negate a discriminatory intent”;¹⁷⁸ and (3) each motive and intent “must be carefully examined and unpacked when conducting a gender analysis.”¹⁷⁹ The Policy further specifies that while personal motives “may serve as aggravating factors,”¹⁸⁰ only intent to discriminate on grounds of gender must be affirmatively established to prove the crime of gender persecution.¹⁸¹

The importance of distinguishing motive from intent has long been recognized and discussed by international criminal tribunals¹⁸²

175. See, e.g., Luban, *supra* note 175, at 126; see also GREY, *supra* note 21, at 973.

176. Gender Persecution Policy, *supra* note 9, ¶¶ 46–54.

177. *Id.* ¶ 48.

178. *Id.* ¶ 52 (emphasis omitted).

179. *Id.* ¶ 54.

180. *Id.*

181. Rome Statute, *supra* note 12, at art. 7(2)(g) (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”); INTERNATIONAL CRIMINAL COURT ELEMENTS OF CRIMES (2011), art. 7(1)(h)(6) (“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.”).

182. See, e.g., *Prosecutor v. Bagilishema*, ICTR Case No. ICTR-95-1A-T, Judgment, ¶ 95 (June 7, 2001) (“It is worth noting that the motives (as distinct from the intent) of the Accused are not of relevance to the legal constitution of a crime against humanity.”); *Prosecutor v. Kunarac*, ICTY Case Nos. IT-96-23 & 23/1-T, Judgment, ¶ 433 (Feb. 22, 2001) (“[T]he motives of the accused for taking part in the attack are irrelevant and [] a crime against humanity may be committed for purely personal reasons.”); *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 558, (Jan. 14, 2000) (“Nor are the motives (as distinct from the intent) of the accused, as such, of special pertinence.”); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 270 (July 15, 1999) (hereinafter “*Tadić*”) (“[T]he relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.”); *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute of March 7, 2014, ¶ 1125 (“The perpetrator’s

and scholars of international criminal law.¹⁸³ Motive corresponds to “a sort of causal power, a moving force, that which impels the agent toward his or her action.”¹⁸⁴ Moreover, motive is affective as opposed to intentional.¹⁸⁵ Intent, on the other hand, reflects the most immediate intention; it is “consciously chosen and purposeful.”¹⁸⁶

In the context of persecution on gender grounds, “only the most immediate intention is called the intention in the criminal law;” whereas an “ulterior” intent is typically referred to as the motive.”¹⁸⁷ For example, a defendant may have the intent to commit persecution on gender grounds but their motive may be for “sexual gratification” or the “opportunity” to commit rape.¹⁸⁸ The traditional view is that motive is irrelevant to liability, as adjudication of a person’s guilt would become tremendously complicated if one had to inquire into what a person’s motivation was for committing a criminal act.¹⁸⁹ Thus, unless motive is expressly listed in the elements of a specific crime, the traditional view is that “the defendant’s motive is strictly irrelevant to liability.”¹⁹⁰ However, as one international criminal tribunal has already stated, motive becomes relevant for mitigation or aggravation of the sentence.¹⁹¹ Moreover, international tribunals have confirmed that prosecutors should not dismiss underlying racist or misogynist beliefs that may have motivated perpetrators. .¹⁹² Tribunals have thus made it clear that personal motivation to commit an act of sexual violence does not void the intent to discriminate. In other words, although the traditionally held view is that motivation is irrelevant for the purpose of determining the defendant’s liability, jurisprudence

motive is [] irrelevant to such proof and for his or her act to be characterised as a crime against humanity, it suffices to establish, in view of the context, knowledge of the particular fact that his or her act formed part of the attack.”).

183. See, e.g., Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317 (2003); Oosterveld, *Refugee Law’s Relevance*, *supra* note 42, at 49; Davis, *supra* note 2, at 20.

184. Kaufman, *supra* note 184, at 322.

185. See *id.*

186. *Id.*

187. *Id.* at 323; see also *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment of ¶ 694 (July 29, 2004) (hereinafter “*Blaškić*”), (“*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act.”).

188. Gender Persecution Policy, *supra* note 9, ¶ 49.

189. See Kaufman, *supra* note 184, at 319.

190. *Id.* at 317.

191. See *Tadić*, *supra* note 183, ¶ 269.

192. See Aboueldahab, *supra* note 156, at 130.

from international criminal tribunals affirms that motivation does not on its own negate the defendant's discriminatory intent.

The Gender Persecution Policy affirms this view and holds that motive is not only irrelevant to liability, but that motive on its own does not negate discriminatory intent.¹⁹³ As long as the perpetrator "intended to act in a way which, in the normal course of events, would cause [the crime of gender persecution]," then intent is satisfied even if the perpetrator was motivated to commit the crime "for purely personal reasons."¹⁹⁴ Notably, the Gender Persecution Policy also recognizes that investigators, prosecutors, and judges may benefit from additional guidance on how to apply the two concepts of motive and intent in a variety of factual circumstances that may give rise to a charge of gender persecution; such additional guidance and training may be particularly relevant toward a successful implementation of the Policy, as we further discuss below.¹⁹⁵

e. Adopting a Subjective Approach to the Crime of Persecution

The Gender Persecution Policy adopts a broader view of persecution, viewing it not as carried out against a class of victims that share the same *characteristics*, but instead by focusing on the *basis* for the persecution. The OTP has thus adopted a *subjective* approach to persecution, which criminalizes persecution based on the perpetrator's beliefs about what it means to be "male" or "female."¹⁹⁶ Indeed, the Gender Persecution Policy specifies that:

[P]ersons may be targeted for gender persecution because of sex characteristics and/or because of the social constructs and criteria used to define gender roles, behaviours, activities and attributes. For example, persons may be targeted for gender persecution when they are *perceived* to have or carry (gender) criteria prohibited by the perpetrator; or are perceived to not have or carry (gender) criteria required by the perpetrator Not all targeted persons

193. See Gender Persecution Policy, *supra* note 9, ¶ 52.

194. See *Kunarac*, *supra* note 183, ¶¶ 103, 153.

195. See *infra* Section IV.

196. See GREY, *supra* note 21, at 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, *supra* note 2, 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.").

are required to be directly part of the targeted group. It is sufficient if they are sympathisers or affiliates of targeted members. For example, if a perpetrator targets a school to prevent girls from attending, men who are teachers and staff at that school may form part of the targeted group, where the grounds for targeting are based on gender.¹⁹⁷

The subjective approach adopted by the OTP in the Gender Persecution Policy also aligns with other experts' views. For example, Professor Grey, a prominent scholar in this area of the law, has argued that the gender binary "defines the grounds on which the group is victimized, rather than the identifying feature of the group."¹⁹⁸ The Policy similarly conceives of gender persecution as encompassing not only acts committed against a gender group, but also acts motivated based on gender grounds.

The ICC itself has adopted a subjective view of gender persecution in previous cases. As one example, in its decision authorizing the Myanmar investigation, the Pre-Trial Chamber found that the identity of a persecuted group may be examined both objectively and subjectively; the group's objective identity includes its identifying characteristics while its subjective identity refers to how a group is perceived by its members and by the perpetrator.¹⁹⁹ Also, as mentioned above, in the *Al Hassan* case, the OTP charged the defendant with the crime of gender persecution, proceeding from a subjective approach. The Trial Chamber in the *Al Hassan* case adopted that approach, finding that the violence at issue constituted "persecution on sexist grounds, in that these women were treated as objects;" they were persecuted because of how they were perceived as objects in the context of their society.²⁰⁰

197. Gender Persecution Policy, *supra* note 9, ¶¶ 42–43.

198. GREY, *supra* note 21, at 972.

199. Decision Pursuant to Article 15 of the Rome Statute on the Authorization 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 (Nov. 14, 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").

200. *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 (Nov. 13, 2019) (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.").

The Gender Persecution Policy is consistent with these authors' and other group's commentary to the OTP's policy²⁰¹ and with existing understandings of gender persecution within the OTP, leading to an adoption of a broader lens in recognizing that anyone can be a victim or perpetrator of persecution. Indeed, as we argued in the Public International Law & Policy Group's ("PILPG") March 2022 Commentary to the OTP's Draft Policy:

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.²⁰²

The policy thus pivots away from the notion that gender and sexual-based violence is purely a "women's issue."²⁰³

f. Recognizing the Challenges to Victim Participation

The Gender Persecution Policy recognizes the special challenges that arise when interacting with victims of gender-based persecution; many of whom may be members of especially vulnerable populations and for a variety of reasons may be unwilling to publicly share the

201. See PILPG March 2022 Commentary, *supra* note 87, at 13–14; see also Comments on the Development of a Policy on the Crime against Humanity of Gender Persecution, Submission from UN Women to Office of the Prosecutor at the International Criminal Court, UN WOMEN (Mar. 2022), <https://www.unwomen.org/sites/default/files/2022-10/Brief-Comments-on-the-development-of-a-policy-on-the-crime-of-gender-persecution-en.pdf> [<https://perma.cc/GKP4-QJPK>]; KCASEY MCLOUGHLIN, ET AL., SUBMISSION TO THE OFFICE OF THE PROSECUTOR, PUBLIC CONSULTATION ON POLICY INITIATIVE TO ADVANCE ACCOUNTABILITY FOR THE CRIME AGAINST HUMANITY OF PERSECUTION ON THE GROUNDS OF GENDER UNDER THE ROME STATUTE (Mar. 17, 2022), <https://www.humanrights.unsw.edu.au/sites/default/files/documents/Feminist%20Judgments%20ICC%20Project%20-%20Gender%20Persecution%20Policy%20Submission.pdf> [<https://perma.cc/3XUU-MTSZ>]; Grey, ICC Submission, *supra* note 158.

202. PILPG March 2022 Commentary, *supra* note 87, at 15.

203. See Davis, *supra* note 2, 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.").

details of what happened to them.²⁰⁴ It also acknowledges and elaborates on the different measures taken by the OTP “to protect the safety, physical and psychological well-being, privacy and dignity” of the victims of gender persecution.²⁰⁵ The Gender Persecution Policy pledges to “actively engage with States, civil society organisations, and other key stakeholders in order to continue to improve the effectiveness of preventing and addressing gender persecution.”²⁰⁶ The Policy is commendable for explicitly recognizing the importance of engaging with victims and victim groups to successfully investigate and prosecute the crime of gender persecution. Indeed, the ability for victims to safely partake in proceedings is central to achieving the ICC’s mandate of holding perpetrators accountable for the most egregious crimes, including the crime of gender persecution. And, as the section below discusses, because including victims throughout the different stages of the OTP’s investigative and prosecutorial work poses unique challenges, the Gender Persecution Policy rightly builds upon the OTP’s 2014 Policy Paper by expressing further commitments to engage with and support victims throughout the process. As noted in the PILPG Commentary, the OTP may consider incorporating more specific commitments to victims as key stakeholders in the fight to bring perpetrators of gender persecution crimes to justice.²⁰⁷ Such specific commitments to victims would align with the unique opportunity for victim participation at the ICC,²⁰⁸ as well as with the OTP’s exemplary prior work in this arena.²⁰⁹

B. Ensuring Successful Implementation

Overall, the Gender Persecution Policy is impressively comprehensive. It includes: (1) clarifying the Office’s broad

204. PILPG March 2022 Commentary, *supra* note 87, at 16–19; Gender Persecution Policy, *supra* note 9, at paras. 29, 76–78.

205. Gender Persecution Policy, *supra* note 9, at ¶ 78.

206. *Id.* at ¶ 106.

207. See PILPG March 2022 Commentary, *supra* note at 87, 15; PILPG November 2022 Commentary, *supra* note 136, at 10.

208. See ICC, *Understanding the International Criminal Court*, ICC-PIOS-BK-05-009/20_Eng (2020) ¶ 70, <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> [<https://perma.cc/W4W9-L2UB>] (“Victims before the ICC have rights that have never before been granted before an international criminal court.”).

209. See ICC, OFF. OF THE PROSECUTOR, POLICY PAPER ON VICTIMS’ PARTICIPATION I (Apr. 2010), https://www.iccpi.int/sites/default/files/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf [hereinafter ICC Victims Policy Paper].

understanding of gender and other key terms; (2) proposing important procedural improvements at all stages of ICC proceedings; (3) addressing the need to further engage with civil society and other stakeholders; (4) proposing training and institutional development for OTP staff; and (5) shedding much-needed light on one of the most egregious crimes under the Rome Statute. Yet, as with the 2014 Policy Paper, the OTP will face challenges to successful implementation. Stakeholders will be looking for outcomes: namely, investigations, prosecutions, and convictions of gender persecution crimes. Further, the OTP must be able to demonstrate its ability to lead in the development of international criminal law regarding the crime of gender persecution so that states will also take up the call to ensure that the many victims of gender persecution get their day in court.

The Gender Persecution Policy acknowledges that implementation may pose a challenge, stating that the Policy “will be regularly reviewed” and the OTP “will monitor and evaluate the implementation of this Policy.”²¹⁰ In doing so, the Policy adopts a forward-looking approach, affirming that the document is not a conclusion but rather a starting point for continuing the fight against impunity for gender persecution. Accordingly, the Gender Persecution Policy recommends the implementation of staff training protocols, the creation of additional materials, and internal monitoring so that its guidelines can be translated into practice.²¹¹ Below, we discuss two such issues where further training may be particularly useful: the distinction between motive and intent, and victim participation.²¹²

The discussion above on the difficulty of sometimes distinguishing between and conflating motive and intent explains why we suggest it as an area for further education and training. Simply put, investigators and prosecutors must be able to distinguish between the two types of evidence and be able to adequately utilize such evidence to further the Gender Persecution Policy’s progressive and subjective view of the crime of gender persecution. If investigators can do so, then successful prosecutions of the crime will result. This is important because, among other things, “judicial analyses on persecution would offer formal recognition that gender, racial and ethnic minorities and

210. Gender Persecution Policy, *supra* note 9, at ¶¶ 113–14.

211. See Gender Persecution Policy, *supra* note 9, ¶¶ 73, 111–14.

212. In this section, we specifically draw on some of our prior commentary submitted on behalf of PILPG, Debevoise and Plimpton, LLP, and other law firm partners, submitted in November 2022. See PILPG November 2022 Commentary, *supra* note 136.

their communities endured.”²¹³ This in turn is key toward providing victims with the opportunity to combat racist, misogynist, or homophobic ideology, which likely played a key role in the violence committed against such victims.

As to victim participation, the discussion above also indicates that the vulnerability of victims who have suffered SGBV crimes, including gender persecution, is a primary reason the OTP has suffered some previous prosecutorial setbacks.²¹⁴ Numerous scholars, courts, and international organizations have recognized that successful investigations and prosecutions are unlikely to occur unless victims actively participate in all transitional justice processes.²¹⁵ Victim participation not only supports the sustainability of transitional justice processes, such as prosecutions, but it also provides victims with the opportunity to be perceived as and to act as rights-holders. Yet, in some cases, evidence of SGBV crimes may be particularly hard to gather as victims may be coerced into silence due to risks of recrimination and/or social stigma; in other cases, victims may become unavailable due to other reasons and evidence may deteriorate.²¹⁶ Because of the trauma that they suffered, victims may not be able to accurately recall the relevant events, and their memory may be affected by the nature, duration, and context of the trauma.²¹⁷

Recognizing both the difficulty associated with victim engagement but also the need for such engagement, the OTP’s 2014

213. See Davis, *supra* note 2, at 51.

214. See *supra* Part III.

215. See *id.* at 56; see also U.N. Secretary General, *Guidance note of the Secretary-General : United Nations approach to transitional justice* 2 ST/SG(09)/A652 (2010) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf [<https://perma.cc/5MPK-F4QX>] (affirming that one of the United Nations’ guiding principles is the inclusion of the experiences of survivors); S.C. Res. 2467 (Apr. 23, 2019) (calling for survivor participation in peace and transitional justice processes and recognizing survivors of both sexual and gender-based violence as rights holders).

216. See Veena Suresh, *The Victim’s Court? An Analysis of the Participation of Victims of Sexual Violence in International Criminal Proceedings*, 8 GRONINGEN J. INT’L L. 244, 257 (2021); *Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies*, WHO, at 14, Box 5 (2007).

217. See ICC, *Prosecutor v. Bosco Ntaganda*, Prosecution’s list of expert witnesses and request pursuant to regulation 35 to vary the time limit for disclosure of the report of one expert witness, April 16, 2015, ICC-01/04-02/06-560, ¶ 10(vi), <http://www.legal-tools.org/doc/210cb9/> [<https://perma.cc/BRD2-X5ZA>] (specific instructions to the expert are referenced in the transcripts of the expert’s evidence); ICC, *Prosecutor v. Bosco Ntaganda*, Trial Chamber, Transcript, April 18, 2016, ICC-01/04-02/06-T-84-ENG, 10, <http://www.legal-tools.org/doc/6e8319/> [<https://perma.cc/G36C-LTJD>] (testimony of Prosecution expert, Dr. John Yuille, Professor Emeritus, Department of Psychology, University of British Columbia).

Policy Paper acknowledged the need to adopt a victim-responsive approach, as well as to “seek opportunities for effective and appropriate engagement and consultation with victim groups . . . in order to take into account the interests of victims . . .”²¹⁸ In addition, the OTP also previously developed a Policy Paper on Victims’ Participation which highlighted that victims are “actors of international justice rather than its passive subjects.”²¹⁹ The Gender Persecution Policy builds upon OTP’s prior work on the subject by equally recognizing the need to engage with victims of gender persecution. Additional education, resources, training, and guidance should aid the OTP in realizing its goal of not only including victims in all phases of its gender persecution cases, but also its goal to protect them from psychosocial and other harms that could potentially result because of that participation.

We understand that further guidance and training may be necessary on all or many aspects of the Gender Persecution Policy to ensure its successful implementation, but we leave those discussions aside and focus instead on these two challenging aspects of the Policy.

1. Ensuring Education and Training on the Distinction between Motive and Intent

At each stage of the investigative and prosecutorial process, OTP staff should be trained on implementing a subjective approach to gender persecution, which would allow investigators and prosecutors to more clearly distinguish between evidence related to motive versus that related to intent. As explained above, such a subjective approach is more nuanced and considers the objective characteristics shared by the victims and how the perpetrator subjectively perceives his or her victims, which can be investigated as soon as a perpetrator is identified.²²⁰ The subjective approach more accurately captures the persecution of marginalized, non-binary individuals who do not necessarily share any unifying “outward” characteristics.²²¹

As we previously argued in the PILPG March 2022 Commentary, “[t]he subjective approach is also consonant with the need to prove intent. In every case it brings, the OTP will need to establish that the perpetrator subjectively held discriminatory intent, no matter how

218. See 2014 Policy Paper, *supra* note 8, ¶ 22.

219. See ICC Victims Policy Paper, *supra* note 210.

220. See *supra* Section IV.A.1.

221. PILPG March 2022 Commentary, *supra* note 87, at 13–15.

apparent or obscure the unifying characteristics of the victims.” In other words, instead of focusing on discovering evidence related to some unifying objective characteristics of the victims, the OTP could focus on amassing evidence of the subjective persecutory intent of the accused. By explicitly adopting and providing staff training on the subjective approach at the investigative stage, the OTP could shape better judicial outcomes by ensuring that appropriate evidence of intent is uncovered earlier in the proceedings and available for the trial phase.

Thus, as we previously suggested in the PILPG November 2022 Commentary:

[the] OTP’s contemplated staff trainings could include: identifying and distinguishing each category of evidence; clearly referring to each category as such at trial; maintaining clear parameters of what is needed to satisfy the elements of gender persecution; and the preservation of motive evidence for appropriate phases of trial and sentencing.²²²

Finally, because evidence related to motive can play a mitigating or aggravating factor at the sentencing stage, the OTP could consider developing additional training and guidance on how such evidence can be best utilized in cases involving gender persecution.²²³

2. Addressing the Special Challenges Surrounding Victim Participation

The OTP may also consider developing further guidance on victim participation at the evidence gathering stage, at the charging stage, and for the purposes of reparations. As the Gender Persecution Policy acknowledges, early and regular collaboration with victims can facilitate: (1) the early establishment of discriminatory intent;²²⁴ (2) the

222. PILPG November 2022 Commentary, *supra* note 136, at 8.

223. The OTP has already expressed a general commitment toward increased staff training on the nuances of prosecuting gender-based persecution. *See* Gender Persecution Policy, *supra* note 9, ¶ 111 (“the Office will create and maintain regular and situation-specific updates for investigative materials to further assist in identifying and investigating gender persecution, such as: (1) topic questionnaires, (2) elements guidelines, and (3) practical guidelines for implementation of this Policy. The Office will also provide ongoing staff trainings on how properly to conduct Court examinations of cases for persecution contexts. The Office will also provide ongoing staff trainings on methodologies in the collection and analysis of evidence of gender persecution, presentation of in-court witness testimony, the relevant legal framework, and cultural and gender issues related to the situation and specific communities where the investigation is being conducted.”).

224. *See* Gender Persecution Policy, *supra* note 9, ¶¶ 10, 49–54, 94–95.

bringing of charges that fully and accurately reflect the harm done;²²⁵ and (3) the designing of effective and restorative forms of reparation that respond to the crimes committed, while also accounting for cultural practices and gender-specific impact.²²⁶ Because of complex evidentiary challenges associated with victim participation, in the Gender Persecution Policy, the OTP advocates for additional training for investigators in trauma-informed interviewing and fact-gathering tactics.²²⁷ To combat these risks, the OTP could adopt and implement clear policies and guidelines for victims and their legal representatives to intervene as early as practicable during preliminary investigations into situations of gender persecution.

In addition, the OTP may contemplate developing additional training on charging decisions and cumulative charging. The practice of prior international criminal tribunals indicates that evidence of gender persecution has been used to support charges of persecution on other grounds, but not in its own right.²²⁸ Both the OTP's 2014 Policy Paper and the new Gender Persecution Policy acknowledge this reality, commit to charging gender persecution as such, and to continue pursuing cumulative charging where appropriate.²²⁹ "Cumulative charging in particular is a crucial, and welcome, step toward obtaining convictions and sentences that reflect the gravity of the conduct

225. *See id.* ¶ 84.

226. *See id.* ¶¶ 100–01.

227. *See* Gender Persecution Policy, *supra* note 9, ¶¶ 73–77, 111.

228. *See, e.g., Prosecutor v. Katanga*, ICC-01/04-01/07-T-336-ENG, Closing Statements Transcript of 15 May 2012, at 7 (evidence of forced pregnancy presented at trial but not charged); *Prosecutor v. Katanga*, ICC-01/04-01/07-T-206-Red, Trial Hearing Transcript, at 17 (Oct. 19, 2010) (same for genital mutilation); *Prosecutor v. Katanga*, ICC-01/04-01/07-T-80-ENG, Trial Hearing Transcript of November 24, 2009, at 25 ("All these women were victimized on the basis of their gender. They were attacked in particular because they were women."). *See also 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 of 15 June 2009, ¶¶ 297–300, 302, 501 (Pre-Trial Chamber striking certain charges as cumulative of the rape charge); *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 of June 8, 2018, ¶ 196 (Appeals Chamber acquitting the accused in part because the conduct proved at trial was beyond the scope of the confirmed charges); *Prosecutor v. Lubanga*, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito of July 10, 2012, ¶¶ 21–23 (arguing that evidence of sexual violence should qualify as aggravating sentencing factors notwithstanding non-conviction on such grounds).

229. 2014 Policy Paper, *supra* note 8, ¶ 7; Gender Persecution Policy, *supra* note 9, ¶¶ 83–84.

committed.”²³⁰ The OTP could thus consider codifying procedures to engage victims in all aspects of charging decisions.

Finally, the OTP may wish to develop further guidance regarding the inclusion of victims at the reparations stage. In fact, if victims are included at the charging stage, this may inform how a case is tried and eventually how reparations are approached. Although the Gender Persecution Policy emphasizes reparations for gender-based persecution,²³¹ such reparation-specific goals cannot be meaningfully realized without appropriate victim participation.

Finally, we note that the Gender Persecution Policy provides an opportunity for the OTP to strengthen the ICC’s legacy as a victim-focused institution. Beyond shaping positive judicial outcomes, participation is valuable in its own right: it affords victims a degree of recognition that is itself a component of reparation.²³² Meaningful engagement with victims is a crucial component of the OTP’s prosecutions of gender-related crimes, including the crime of gender persecution. This is another reason why successful implementation of the Gender Persecution Policy may require developing training regarding a robust victim participation regime throughout every stage of the judicial process.

V. CONCLUSION

The Gender Persecution Policy is a comprehensive and commendable document which builds upon the OTP’s 2014 Policy Paper and signals the OTP’s willingness to investigate and prosecute the crime of gender persecution—a crime which has been ignored in the past and only recently been investigated and prosecuted by the OTP in the *Al Hassan* case. Although the OTP’s record on prosecuting SGBV crimes had been mixed with the Office suffering some setbacks, this Article demonstrates a clear positive trajectory. The Gender Persecution Policy issued in December 2022 is an important step in this

230. PILPG November 2022 Commentary, *supra* note 136, at 11.

231. Gender Persecution Policy, *supra* note 9, ¶¶ 100–03.

232. Consistent with the ICC’s recognition that reparation may include “monetary compensation, return of property, rehabilitation, medical support, victims’ services centers, or symbolic measures such as apologies or memorials,” the chance for a victim’s voice to be heard is both symbolic and practical, as it allows victims to speak their truth and conduct to be preserved in the historical record; and may lead to a conviction and concrete reparations in the future. See *Victims*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/victims> [<https://perma.cc/Z7U8-ZT5G>] (last visited Apr. 23, 2023).

trajectory and one that provides hope that SGBV crimes, including the crime of gender persecution, will be recognized, such that perpetrators will be held accountable, and victims will receive justice.

Yet, as with the OTP's 2014 Policy Paper, the 2022 Policy Paper on Gender Persecution will likely be judged on how well and swiftly the policy objectives and goals are translated into practice. A well-implemented Gender Persecution Policy would enable the OTP to overcome some of its prior challenges in investigating and prosecuting SGBV cases, including crimes of gender persecution. Moreover, a successful implementation of the Policy may ensure that the OTP's focus remains on the prosecution of gender persecution and may likely contribute to future successful cases.

However, to successfully implement the Policy, the OTP will need the cooperation of relevant stakeholders; namely, investigators, prosecutors, judges, as well as victims and their representatives—all of whom would benefit from a clear understanding of the elements of the crime of gender persecution. As discussed above, education and training are an integral step in translating policy into practice. This translation will necessarily require time, effort, and resources, but the potential rewards are immense. If the OTP can successfully investigate and prosecute the crime of gender persecution—pursuant to a progressive understanding of the crime and its elements—justice will be brought to a whole range of victims having suffered from gender persecution, including women, men, those who do not identify as male or female, and those who have suffered persecution on other grounds in addition to gender-based persecution. This includes not only the victims the ICC serves directly, but also the innumerable victims that states can serve through prosecutions they mount as a result of the ICC's development of this area of international criminal law.

