

# The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law

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THE ICC POLICY PAPER ON SEXUAL AND GENDER-BASED  
CRIMES: A CRUCIAL STEP FOR INTERNATIONAL  
CRIMINAL LAW

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In 2014, the Office of the Prosecutor of the International Criminal Court (ICC) launched its Policy Paper on Sexual and Gender-Based Crimes, the first policy issued by the Office.<sup>1</sup> It was the culmination of more than two years of effort by the ICC's second Prosecutor, Fatou Bensouda, to strengthen her office's focus, expertise and commitment to the prosecution of sexual and gender-based crimes.<sup>2</sup>

This Policy Paper represented an important step within international criminal law and has the potential to transform how gendered acts within genocide, mass atrocity, and war are prosecuted. The basis for the policy was the explicit inclusion in the Rome Statute of the ICC of an expansive list of sexual and gender-based violations, including "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization," other forms of sexual violence of comparable gravity and gender-based persecution.<sup>3</sup> This was the first time in international criminal law that sexual and gender-based acts had been this extensively enumerated as crimes.<sup>4</sup>

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1. INT'L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 5 (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [<http://perma.cc/L264-QZ8Z>] [hereinafter ICC OTP POLICY PAPER].

2. Fatou Bensouda, Prosecutor of the International Criminal Court, *The Prosecution of Sexual and Gender-Based Crimes by International Courts* (July 16, 2016), at 3, [https://www.icc-cpi.int/itemsDocuments/160716\\_Pros\\_int\\_courts\\_and\\_the\\_fight\\_against\\_SGBC.pdf](https://www.icc-cpi.int/itemsDocuments/160716_Pros_int_courts_and_the_fight_against_SGBC.pdf) [<http://perma.cc/4KN4-X8JT>] [hereinafter Bensouda 2016 Speech].

3. Rome Statute of the International Criminal Court, Arts. 7(1)(g), (h), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

4. ICC OTP POLICY PAPER, *supra* note 1, ¶ 1. The Policy Paper sets out the groundbreaking nature of this list:

The Statute is the first instrument in international law to include an expansive list of sexual and gender-based crimes as war crimes relating to

While the basis of the policy may have been the gender provisions in the Rome Statute, the impetus for the Policy Paper was the disconnect between those provisions and the weaknesses evident within the Office on the investigation and prosecution of gender-based violations, including rape and sexual slavery.<sup>5</sup> Given this history, the main objective of the policy is to ensure that the ICC's Office of the Prosecutor systematically takes sexual and gender-based crimes into account in its investigations and prosecutions, "so that the Court responds to such crimes in a consistent and methodological manner."<sup>6</sup>

This Essay posits that the Policy Paper is innovative in three significant ways. First, it adopts a fulsome understanding of gender, aimed at avoiding the historical conflation of gender with narrower terms such as "women," "sex," and "female," a recurring problem in a number of international criminal tribunals. Second, it clarifies the meaning and application of the term "gender" in order to address confusion created by the Rome Statute's definition of the term. Finally, the Policy Paper provides an excellent framework for best practices in the investigation and prosecution of sexual and gender-based crimes. This Essay examines each of these innovations in turn, and concludes with a discussion of the possibilities created by the Policy Paper with respect to a deeper and more holistic application of gender analysis to an evaluation of harms in situations of mass atrocity and armed conflict.

## I. BACKGROUND

The Policy Paper on Sexual and Gender-Based Crimes was the result of over two years of work by the ICC's Office of the Prosecutor and extensive consultations.<sup>7</sup> The Office created a draft Policy over the course of 2012 and 2013, with input from staff and the Prosecutor's Special Gender Adviser, Brigid Inder.<sup>8</sup> Inder commented on the challenge of balancing the various goals of the paper:

As the first policy on these issues produced by an international court or tribunal, we focused on trying to find the right mixture

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both international and non-international armed conflict. It also expands the list of sexual and gender-based crimes as crimes against humanity to include not only rape, but other forms of sexual violence, as well as persecution on the basis of gender. Sexual and gender-based crimes . . . may also constitute acts of genocide.

*Id.*

5. LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT* 124–26 (2016).

6. Bensouda 2016 Speech, *supra* note 2, at 3.

7. ICC OTP POLICY PAPER, *supra* note 1, ¶¶ 2–3.

8. *Id.* ¶¶ 13, 113.

of attention to detailed practice and process issues, articulating a strong conceptual basis for the [Office of the Prosecutor's (OTP's)] work in this area, as well as providing a sound policy framework which was practical, aspirational and drew on the experience of the OTP and the broader field of international justice.<sup>9</sup>

The draft policy was then distributed as part of a wide-ranging consultation process to consider its content, receiving input from ICC member states, international organizations, civil society, academia and individual experts.<sup>10</sup> The views and suggestions submitted during these consultations were considered and the draft was revised.<sup>11</sup> The Policy Paper was finalized and publicly released by the Office of the Prosecutor in June 2014.<sup>12</sup> The Policy is meant to guide all aspects of the work of the Office of the Prosecutor, in preliminary examinations, investigations, charges, prosecutions, determination of requested sentences and reparations, and in the implementation of complementarity between the Court and ICC member states.<sup>13</sup>

The policy was necessary due to difficulties the Office had faced in retaining charges for sexual and gender-based violence at the Confirmation of Charges stage and in securing convictions for these charges.<sup>14</sup> As Louise Chappell puts it, "the predominant path of the ICC's early years has been toward gender *mis*recognition and ongoing gender status subordination."<sup>15</sup> Between 2002–2014, the Office of the Prosecutor brought fifty-seven charges of sexual and gender-based violence in twenty cases,<sup>16</sup> 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.<sup>17</sup> At the judgment stage, the Prosecutor failed to secure a single conviction on these charges.<sup>18</sup> While other types of charges also failed at each of

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9. *Special Adviser on Gender completes her mandate*, WOMEN'S INITIATIVES FOR GENDER JUSTICE (Aug. 26, 2016), <http://4genderjustice.org/pub/Special-Adviser-on-Gender-completes-her-mandate.pdf> [<http://perma.cc/JRW7-JMMC>] [hereinafter WOMEN'S INITIATIVES FOR GENDER JUSTICE].

10. Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, publishes comprehensive Policy Paper on Sexual and Gender-Based Crimes (June 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1011&ln=en> [<http://perma.cc/ZE5V-8YZP>].

11. *Id.*

12. *Id.*

13. Bensouda 2016 Speech, *supra* note 2, at 4.

14. See CHAPPELL, *supra* note 5, at 103.

15. *Id.*

16. *Id.* at 104 (referring to research produced by Rosemary Grey).

17. *Id.* at 105.

18. *Id.*

these levels, sexual and gender-based charges were particularly vulnerable.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

The Policy Paper only guides the Office of the Prosecutor,<sup>22</sup> and therefore can only help to avoid the mistakes made by that Office in the past. However, the future impact of the Office's gender perspective and gender analysis is likely to be far-reaching. This is because some of the past problems were created by inadequate explanation and contextualization of the crimes by the Office to the judiciary.<sup>23</sup> The policy standardizes careful consideration of these crimes and has already led to improved explanations and contextualization, for example, in the case of Dominic Ongwen.<sup>24</sup> More thorough and considered explanations of the sexual and gender-based crimes by the Office of the Prosecutor are likely to translate into more sound consideration of these crimes by the judges. As well, there is the likelihood of wider impact among ICC member states and others, an aspect considered below. It is for this reason that the *Harvard Law Review* stated: "the Paper's development of a policy package that addresses

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19. *Id.* at 108.

20. CHAPPELL, *supra* note 5, at 109–10 (citing, *inter alia*, Solange Mouthaan, *The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities*, 11 INT'L CRIM. L. REV. 775 (2011)). See also the critiques outlined in *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, 797–800 [hereinafter *Recent Policy Paper*]; Olga Jurasz, *Gender-Based Crimes at the ICC: Where is the Future?*, 108 AM. SOC'Y INT'L L. 429, 432 (2015).

21. CHAPPELL, *supra* note 5, at 110, 117–19; Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 190, 202, 204–05, 302–12 (June 15, 2008), [https://www.icc-cpi.int/CourtRecords/CR2009\\_04528.pdf](https://www.icc-cpi.int/CourtRecords/CR2009_04528.pdf) [http://perma.cc/8JDY-4LRU].

22. The Policy makes it clear that it does not give rise to legal rights nor does it apply beyond the Office. See ICC OTP POLICY PAPER, *supra* note 1, ¶ 11.

23. See Valerie Oosterveld, *Prosecuting Gender-Based Persecution as an International Crime*, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 57, 75 n.99 (Anne-Marie de Brouwer et al. eds., 2013).

24. See, e.g., Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, ¶¶ 102–40, [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf) [http://perma.cc/3VKZ-TQ9F].

the structural, societal, and experiential import of its prosecutions is significant, and likely impactful, in itself.”<sup>25</sup>

## II. THE POLICY PAPER’S FULSOME UNDERSTANDING OF GENDER

One of the reasons the Policy Paper is impactful is because it adopts a fulsome understanding of gender through three means: a definition of the term “gender,” the adoption of a gender perspective in all of the Office’s work, and the inclusion of gender analysis at every stage of the Office’s efforts. In essence, the Policy Paper sets out a definition meant to assist staff members in their understanding of the complexities of gender, and then indicates that those complexities need to be applied to the work of the Office of the Prosecutor through a gender perspective and gender analysis.

Before examining these steps, it is important to note that the Office’s approach was meant to overcome a history in international criminal law of conflating “gender” with the terms “women,” “sex,” or “female.”<sup>26</sup> In the past, this collapsing of gender into biology has resulted in overly narrow approaches to the prosecution and adjudication of sexual and gender-based crimes.<sup>27</sup> As one example, the Prosecutor of the Special Court for Sierra Leone only charged sexual violence directed against women and girls in the indictments.<sup>28</sup> However, evidence emerged in three trials that men and boys were also subjected to sexual violence during the armed conflict in Sierra Leone.<sup>29</sup> The prosecution then attempted to have this additional evidence taken into account.<sup>30</sup> In two of those trials, the Trial Chambers decided that the restrictive language of the indictment, referring solely to “women and girls,” could not be considered to be subsequently corrected to include men and boys.<sup>31</sup> On the other hand, one

25. *Recent Policy Paper*, *supra* note 20, at 794.

26. *See, e.g.*, CHAPPELL, *supra* note 5, at 90.

27. *Id.*

28. Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶¶ 51–57 (Feb. 18, 2005), <http://www.rscsl.org/Documents/Decisions/AFRC/141/SCSL-04-16-PT-147.pdf> [<http://perma.cc/BS64-289Y>]; Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, ¶¶ 54–60 (Aug. 2, 2006), <http://rscsl.org/Documents/Decisions/RUF/617/SCSL-04-15-T-619.pdf> [<http://perma.cc/XGG6-9LEX>]; Prosecutor v. Taylor, Case No. SCSL-03-01, Amended Indictment, ¶¶ 14–17 (Mar. 16, 2006), <http://www.rscsl.org/Documents/Decisions/Taylor/074/SCSL-03-01-I-75.pdf> [<http://perma.cc/M6GB-TJBH>].

29. This is described in Valerie Oosterveld, *Gender and the Charles Taylor Case at the Special Court for Sierra Leone*, 19 WM. & MARY J. WOMEN & L. 7, 14 (2012).

30. *Id.*

31. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 124–34 (May 18, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf> [<http://perma.cc/Z5TD-WWVS>]; Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-T,

Trial Chamber found that the Prosecutor had provided enough clear, timely, and consistent notice of sexual violence crimes directed against men and boys to cure the defect in the indictment.<sup>32</sup> This example illustrates that an assumption that gender crimes are solely female crimes can have far-reaching effects on the crimes prosecuted in a given case.<sup>33</sup>

The Policy Paper attempts to avoid too-narrow understandings of gender by conceptualizing gender as a constructed norm, rather than a biological state. It does so by acknowledging “the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and [to] girls and boys.”<sup>34</sup> It therefore indicates that gender-based crimes include those crimes targeted at individuals or groups because of socially constructed norms of maleness and femaleness.<sup>35</sup> These crimes include sexual and non-sexual violations.<sup>36</sup> At the same time, it recognizes that some crimes may also be influenced by the victim’s biological sex—one example is forced pregnancy—and that targeting on the basis of sex can also amount to a gender-based crime.<sup>37</sup> This is because both sexual and gender-based crimes “may be motivated by underlying inequalities” and therefore norms on gender are often intertwined with societal attitudes on discrimination.<sup>38</sup> This multifaceted understanding of gender is in line with the approaches of other international organizations. For example, the United Nations High Commissioner for Refugees indicates that gender is socially constructed, and learned through the socialization process, relational and intersectional (with, for example, class, race, poverty level, ethnic group, and age).<sup>39</sup>

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Judgment, ¶¶ 92–95 (June 20, 2007), <http://rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> [<http://perma.cc/N887-9HFP>].

32. Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-T, Judgment, ¶¶ 1303–04, <http://www.rscsl.org/Documents/Decisions/RUF/1234/SCSL-04-15-T-1234-searchable.pdf> [<http://perma.cc/D3SH-92A3>].

33. Sexual and gender-based crimes directed against men and boys are often overlooked or not characterized as such. See Sandesh Sivakumaran, *Prosecuting Sexual Violence Against Men and Boys*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 79, 92–95 (Anne-Marie de Brouwer et al. eds., 2013); Valerie Oosterveld, *Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals*, 10 J. INT’L L. & INT’L REL. 107, 109 (2014).

34. ICC OTP POLICY PAPER, *supra* note 1, ¶ 15.

35. *Id.* ¶ 16.

36. *Id.*

37. *Id.* The reference to biological sex is consistent with a socially constructed view of gender because targeting on the basis of biological sex is usually intertwined with cultural, religious or societal discrimination on the basis of gender.

38. *Id.* ¶ 19.

39. U.N. HIGH COMM’R FOR REFUGEES, *HANDBOOK FOR THE PROTECTION OF WOMEN AND GIRLS* 12 (2008), <http://www.unhcr.org/en-us/4ad33d5a6.pdf> [<http://perma.cc/ZN8D-GTLM>].



The Policy Paper also recognizes that the staff in the Office of the Prosecutor need to adopt a gender perspective in order to usefully understand the role of gender and gendered experiences of individuals and communities involved in a particular crime scenario.<sup>40</sup> According to the policy, a gender perspective “requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people’s opportunities and interactions.”<sup>41</sup> In practical terms, past experience has shown that ensuring a gender perspective requires the members of the Office of the Prosecutor to have a cultural understanding of the region they are investigating and detailed knowledge of gender inequality and discrimination in a given society.<sup>42</sup>

Finally, the Policy Paper indicates that an understanding of gender as a socially constructed norm and a gender perspective on their own are not necessarily enough: both must be applied to gender analysis done by the Office of the Prosecutor. The Policy Paper defines gender analysis in two slightly different ways. First, it indicates that gender analysis examines “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.”<sup>43</sup> Second, it states that gender analysis “looks at the roles of females and males; the different patterns of involvement, behaviour, and activities that they have in economic, social, and legal systems; the constraints they face relative to one another; and available opportunities.”<sup>44</sup> For the Office of the Prosecutor, applying a gender analysis therefore “involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.”<sup>45</sup>

In sum, the Policy Paper prescribes a nuanced approach to defining gender which begins with an understanding of gender as socially constructed and involving roles, behaviours, activities and attributes assigned to maleness and femaleness in a given society. It then applies this definition to the work of the Office of the Prosecutor by providing, in a general sense, guidance on how staff can apply a gender perspective to the investigation of crimes and a gender analysis

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40. See ICC OTP POLICY PAPER, *supra* note 1, at 3.

41. *Id.*

42. See, e.g., Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 123, 132 (Anne-Marie de Brouwer et al. eds., 2013).

43. ICC OTP POLICY PAPER, *supra* note 1, ¶ 20.

44. *Id.* at 13 n.17.

45. *Id.* at 4.



to what is uncovered in those investigations through consideration of gendered assumptions, stereotypes, inequalities and forms of discrimination that may explain the crimes that have occurred. This multistep process is meant to ensure that past missteps in the ICC and other tribunals that viewed gender and gendered harms narrowly, and limited the analysis to, for example, rape, are not repeated.<sup>46</sup> This deeper approach to gender opens up the possibility of a more profound understanding within international criminal courts of the role gender plays in conflict and mass atrocity, as well as of the harms suffered due to gendered constructions of “maleness” and “femaleness,” with the potential result that sentencing and reparations can better capture these harms.

### III. THE POLICY PAPER CLARIFIES THE MEANING OF “GENDER”

The Rome Statute of the ICC contains a definition of the term “gender” in Article 7(3): “the two sexes, male and female, within the context of society.”<sup>47</sup> This definition was the result of extremely contentious negotiations and very different—indeed polarized—diplomatic positions.<sup>48</sup> On the one hand, a large number of states wished to have a definition that reflected the socially constructed and fluid nature of gender over time and location.<sup>49</sup> On the other hand, a conservative group of Catholic and Arab states wished to limit the understanding of gender to the roles ostensibly naturally flowing from biological sex in their societies, and also wished to exclude any consideration of sexual orientation as a gender consideration.<sup>50</sup> The result was a definition couched in what diplomats call “constructive ambiguity”: in other words, a definition that contained elements that were intentionally unclear and which had elements satisfying both sides.<sup>51</sup> For those states viewing gender as a relational and changing norm, the words “in the context of society” expressed the idea of social construction.<sup>52</sup> For those states characterizing gender

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46. *E.g.*, Carsten Stahn, *Justice Delivered or Justice Denied? The Legacy of the Katanga Judgment*, 12 J. OF INT'L CRIMINAL JUSTICE 809, 820–21 (2014).

47. Rome Statute, Art. 7(3). This sentence is also followed by: “The term ‘gender’ does not indicate any meaning different from the above.”

48. Valerie Oosterveld, *Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court*, 16 INT'L FEMINIST J. POL. 563, 566–67 (2014) [hereinafter *Constructive Ambiguity*].

49. *Id.* at 566–76. See also Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 64 (2005) [hereinafter *Definition*].

50. *Constructive Ambiguity*, *supra* note 48, at 565–66.

51. *Id.* at 567–68.

52. *Id.* at 567.

as linked to biology, the phrase “the two sexes, male and female” gave them comfort.<sup>53</sup> That said, the fact that the biological reference is tempered by reference to the social context means that—under treaty interpretation rules—maleness and femaleness must be considered in light of social norms.<sup>54</sup> However, the exact meaning of this was left to the ICC prosecutor and judges to decide.<sup>55</sup> The result has been some confusion within—and outside of—the Court as to how to interpret Article 7(3).<sup>56</sup> As well, given the opacity of the Article 7(3) definition, it also appeared that there was a lack of engagement by the ICC with the definition.<sup>57</sup>

The Policy Paper directly and indirectly confronts the ambiguity of the Article 7(3) definition. It does so directly by interpreting “context of society” as acknowledging the social construction of gender and its link to “male and female” as referring to the accompanying roles, behaviours, activities, and attributes assigned to males and females.<sup>58</sup> The Policy Paper also indicates that, in accordance with Article 21(3) of the Rome Statute, it interprets and applies the definition of gender “in accordance with internationally recognised human rights” as they evolve over time, and “without any adverse distinction founded, *inter alia*, on gender or ‘other status.’”<sup>59</sup> This means that the Office considers how international human rights law addresses, for example, violence against women and gender inequality.<sup>60</sup> Thus, the definition in Article 7(3) cannot be used to justify violence or discrimination.

One of the most challenging aspects of the Rome Statute negotiations on the definition of gender related to the crime against humanity of persecution and, in particular, whether the term “gender” included reference to sexual orientation.<sup>61</sup> Many countries wanted to ensure that “gender” included sexual orientation, so that the ICC could address persecution of lesbian, gay and other individuals rising to the level of a crime against humanity.<sup>62</sup> However, conservative Catholic and Arab states were strongly against this interpretation of gender.<sup>63</sup> The Article 7(3) definition left this ambiguous, leaving

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53. *Id.*

54. *Cf.* Vienna Convention on the Law of Treaties, arts. 31–32, Jan. 27, 1969, 1155 U.N.T.S. 331.

55. *Constructive Ambiguity*, *supra* note 48, at 568.

56. *Id.* at 568–72.

57. *See id.* at 572.

58. ICC OTP POLICY PAPER, *supra* note 1, ¶ 15.

59. *Id.* ¶¶ 15, 26.

60. *See id.* ¶¶ 15–16 n.23–25.

61. *Constructive Ambiguity*, *supra* note 48, at 566; *Definition*, *supra* note 49, at 63, 72. If this were negotiated today, the discussions would likely revolve around LGBTQ+ issues.

62. *Constructive Ambiguity*, *supra* note 48, at 567.

63. *Id.*

it for the Court to decide.<sup>64</sup> The Office of the Prosecutor takes a convincing position on the correct interpretation of Article 7(3) by recognizing that international human rights law is evolving “to put an end to violence and discrimination on the basis of sexual orientation or gender identity.”<sup>65</sup> As well, it notes the recommendation of the Committee on the Elimination of Discrimination Against Women that discrimination against women be viewed as a totality, taking into account, among other factors, sexual orientation and gender identity.<sup>66</sup> It also states that this view is reflected in the ICC’s own jurisprudence, which indicates that, in applying Article 21(3) of the Rome Statute on human rights law, reparations shall be granted to victims without adverse distinction on the grounds of, *inter alia*, gender and sexual orientation.<sup>67</sup> Given the link between gender, sexual orientation and Article 21(3), the Policy Paper signals that the Office of the Prosecutor conducts its gender analysis with a view to understanding the intersections of factors such as gender and sexual orientation, among others.<sup>68</sup>

In sum, the Policy Paper has successfully tackled the issue of how to interpret Article 7(3) of the Rome Statute. It has done so by confirming that the definition refers to socially constructed norms of femaleness and maleness, norms which often have an impact on the treatment of men and women during armed conflict and mass atrocity. In doing so, it has provided clarity. This clarity seems to have empowered the Office of the Prosecutor, as it now engages directly on the question of gender in cases such as *Prosecutor v. Ongwen* and in public statements.<sup>69</sup> This clarity also seems to have quelled at least some of the uncertainty outside of the Court on how to interpret Article 7(3), particularly on the question of whether the definition includes social construction.<sup>70</sup>

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64. *Id.* at 568.

65. ICC OTP POLICY PAPER, *supra* note 1, ¶¶ 15–16 n.23.

66. *Id.* at 16 n.25.

67. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2904, Decision on establishing the principles and procedures to be applied to reparations, ¶ 191 (Aug. 7, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_07872.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF) [<http://perma.cc/J8SB-4VTC>].

68. ICC OTP POLICY PAPER, *supra* note 1, ¶ 27.

69. *See Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, ¶¶ 86–101, [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf) [<http://perma.cc/3VKZ-TQ9F>]. *See also* Bensouda 2016 Speech, *supra* note 2, at 3.

70. There may also be more certainty on the inclusion of sexual orientation within considerations of gender as a result of ICC OTP Policy Paper. *See* ICC OTP POLICY PAPER, *supra* note 1, ¶ 27 n.25. On the issue of certainty versus ambiguity, *see* Charles Barrera Moore, Note, *Embracing Ambiguity and Adopting Propriety: Using Comparative Law To Explore Avenues for Protecting the LGBT Population Under Article 7 of the Rome Statute of the International Criminal Court*, 101 MINN. L. REV. 1287, 1289 (2017).

#### IV. THE POLICY PAPER PROVIDES A GENDER-SENSITIVE FRAMEWORK FOR JUSTICE

The Policy Paper helps to advance international criminal law by creating a gender-sensitive framework within which the Office of the Prosecutor undertakes its work. This framework promotes predictability and transparency in how the Office applies a gender perspective and undertakes gender analysis by setting out the issues it considers at each step.<sup>71</sup>

As described above, the Office employs a wide understanding of gender-based crimes as those violations “committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.”<sup>72</sup> It then interprets and applies this approach to the substantive law on genocide, crimes against humanity and war crimes, as well as the Rome Statute’s overarching Article 21(3) on applicable law.<sup>73</sup> For example, it notes that the serious bodily or mental harm and social stigma associated with sexual violence committed against targeted groups may, “depending on the evidence, be an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide.”<sup>74</sup> In another example, the Policy Paper recognizes that seemingly “gender-neutral” war crimes, such as intentionally directing attacks against the civilian population, torture, mutilation, outrages upon personal dignity and the recruitment of child soldiers, may contain sexual or gender elements.<sup>75</sup> In this vein, it indicates that gender-based crimes are not limited to sexual violence and gender-based persecution because all crimes under the ICC’s jurisdiction are potentially gendered in nature.<sup>76</sup>

The Policy Paper also outlines how it conducts its preliminary examinations, investigations, prosecutions (including charging, witness protection, presentation of evidence, and proposing sentences and reparations), effective cooperation with states, external relations, and internal development.<sup>77</sup> For example, the Office concurrently investigates sexual and gender-based crimes and other crimes.<sup>78</sup> This makes sense, as sexual and gender-based crimes are often intertwined with other types of violations, and such an approach efficiently

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71. ICC OTP POLICY PAPER, *supra* note 1, ¶¶ 12, 14–122.

72. *Id.* ¶ 16.

73. *Id.* ¶¶ 14–36.

74. *Id.* ¶ 31.

75. *Id.* ¶ 35.

76. *Id.* ¶¶ 20, 59.

77. ICC OTP POLICY PAPER, *supra* note 1, ¶¶ 38–122.

78. *Id.* ¶ 49.

allows the Prosecutor to contextualize the gendered crimes.<sup>79</sup> As another example, during investigations, potential victims of or witnesses to sexual and gender-based violence are subject to preliminary psychosocial and security assessments and screenings.<sup>80</sup> A psychosocial expert considers the welfare of the victim or witness, “and their ability both to undergo an interview process and testify without undue personal or psychological harm.”<sup>81</sup>

The Policy Paper also identifies the challenges inherent in investigations involving gendered forms of genocide, crimes against humanity and war crimes.<sup>82</sup> The challenges are both general, such as undertaking investigations in the midst of ongoing conflict and lack of cooperation by states and others, and specific to gender-based crimes.<sup>83</sup> The latter difficulties include:

[T]he under- or non-reporting of sexual violence owing to societal, cultural, or religious factors; stigma for victims of sexual and gender-based crimes; 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.<sup>84</sup>

The Policy Paper helpfully indicates the means by which the Office of the Prosecutor counters these problems.<sup>85</sup> From the earliest stages, the Office actively pays attention to whether sexual and gender-based crimes are likely to have occurred, through witness statements, forensic evidence, documentary evidence, and circumstantial indicia.<sup>86</sup> The Office also uses relevant techniques, such as conflict mapping, statistical analysis and databases designed to identify relevant patterns of crime and organizational structures.<sup>87</sup> The Office follows an in-depth approach to open-ended investigations and, where necessary, is committed to building up cases from low- to mid- to high-ranking perpetrators in order to overcome the clear challenge of linking perpetrator crimes to individuals at the highest levels.<sup>88</sup>

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79. *Id.* ¶ 59. See also Laurel Baig et al., *Contextualizing Sexual Violence: Selection of Crimes*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 172, 172 (Serge Brammertz and Michelle Jarvis eds., 2016).

80. ICC OTP POLICY PAPER, *supra* note 1, ¶ 61.

81. *Id.*

82. *Id.* ¶¶ 30–37.

83. *Id.* ¶ 50.

84. *Id.*

85. *Id.* ¶ 51.

86. ICC OTP POLICY PAPER, *supra* note 1, ¶ 51.

87. *Id.*

88. *Id.* ¶ 52. This linkage issue has been one of the most challenging, with judgments in certain international cases appearing to require a higher level of proof of the linkage

In effect, the Policy Paper is a guidepost for decisions taken within the Office of the Prosecutor, to ensure that the Office's decisions are continuously mindful of gender and of the need to overcome challenges to gender-sensitive investigations and prosecutions. However, this framework is not only useful to the Office of the Prosecutor. The Prosecutor of the ICC has repeatedly expressed her hope that the Policy Paper will provide helpful guidance to national jurisdictions and other actors wishing to address sexual and gender-based crimes through effective investigations and prosecutions.<sup>89</sup> Given its detail on how to apply a gender perspective and how to undertake gender analysis of serious international crimes, she feels that it "may facilitate the harmonisation . . . of other actors (States, including national judicial authorities, international institutions, conflict managers and mediators, non-governmental organisations and advocacy groups) with the [ICC's] legal framework."<sup>90</sup>

Indeed, the Policy Paper is a noteworthy addition to international guidance to states and others on how to sensitively prosecute sexual and gender-based crimes.<sup>91</sup> Many, if not most, states can benefit from this framework, given their domestic difficulties in ensuring justice for survivors of "everyday" sexual assault, and their relative lack of experience in prosecuting sexual and gender-based genocide, crimes against humanity and war crimes. Additionally, this Policy Paper is useful for other international and regional justice mechanisms,

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than for other non-gender-based crimes. See Barbara Goy et al., *Contextualizing Sexual Violence and Linking it to Senior Officials: Modes of Liability*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY 220, 245 (Serge Brammertz and Michelle Jarvis eds., 2016).

89. ICC OTP POLICY PAPER, *supra* note 1, ¶¶ 8–9, 12; see also Bensouda 2016 Speech, *supra* note 2, at 7.

90. ICC OTP POLICY PAPER, *supra* note 1, ¶ 12.

91. See, e.g., SERGE BRAMMERTZ AND MICHELLE JARVIS eds., PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (2016); INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, PROSECUTION OF SEXUAL VIOLENCE: BEST PRACTICES MANUAL FOR THE INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE CRIMES IN POST-CONFLICT REGIONS: LESSONS LEARNED FROM THE OFFICE OF THE PROSECUTOR FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2014), [http://www.unictr.org/sites/unictr.org/files/legal-library/140130\\_prosecution\\_of\\_sexual\\_violence.pdf](http://www.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf) [<http://perma.cc/JU6W-HH5T>]; UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BASIC STANDARDS OF BEST PRACTICE ON THE DOCUMENTATION OF SEXUAL VIOLENCE AS A CRIME UNDER INTERNATIONAL LAW (2014), [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/319054/PSVI\\_protocol\\_web.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf) [<http://perma.cc/GQ8U-UE8W>]; CASE MATRIX NETWORK, LEGAL REQUIREMENTS: SEXUAL AND GENDER-BASED CRIMES (June 2017), <http://www.legal-tools.org/doc/c1c17c/pdf> [<http://perma.cc/UX4J-2VL3>]; and CASE MATRIX NETWORK, MEANS OF PROOF: SEXUAL AND GENDER-BASED VIOLENCE CRIMES (2017), <http://www.legal-tools.org/doc/e06a52/pdf> [<http://perma.cc/4WAR-MPF8>].



such as the International, Impartial and Independent Mechanism, established to assist in the investigation and prosecution of crimes committed during the Syrian armed conflict.<sup>92</sup>

### CONCLUSION

This Essay has outlined three ways in which the ICC Office of the Prosecutor's Policy Paper on Sexual and Gender-Based Violence is helping to push international criminal law forward to a more complex and inclusive understanding of sexual and gender-based crimes. First, it proposes a valuable mode of understanding, examining and analyzing gender which, when applied, avoids the conflation of gender into narrow categories such as "women." Second, it convincingly clarifies how Article 7(3) of the Rome Statute, containing the definition of the term "gender," is to be comprehended in order to apply the various gender provisions in the Statute. This helps to undo years of confusion and has encouraged the Office to refer to gender far more today than in the past. Third, the Policy Paper sets both an internal and an international example of how to undertake gender-sensitive investigations and prosecutions at every step in the justice process. In doing so, it opens up new opportunities for domestic prosecutions and the exercise of gender-competent complementarity.<sup>93</sup>

However, the adoption of the policy is not a magic remedy for the past mistakes of the Office of the Prosecutor. As the Prosecutor's Special Advisor on Gender, Brigid Inder, noted:

[T]here is still much more to be done to enhance the institutional capacity of the [Office of the Prosecutor] to implement the Policy, including: strengthening the presentation of evidence of sexual and gender-based crimes; identifying gender aspects within non-sexual violence crimes and the context within which these crimes occur; persuasively arguing individual criminal liability for sexual and gender-based crimes beyond direct perpetrators of these crimes; and always being attentive to gender issues in every case and every policy.<sup>94</sup>

In order for the Policy Paper to have the intended long-term impact of transforming the Office of the Prosecutor's approach to sexual

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92. See G.A. Res. 71/248 (Dec. 21, 2016).

93. See CHAPPELL, *supra* note 5, at 160. Under the doctrine of complementarity, states have primary responsibility for investigating and prosecuting the crimes listed in the Rome Statute.

94. WOMEN'S INITIATIVES FOR GENDER JUSTICE, *supra* note 9.



and gender-based crimes, the Office must be committed to continuous training of staff on implementation of the policy, ongoing monitoring of the policy's application, and hiring of gender experts as staff leave the Office. As well, the significant contributions of Inder to the Policy Paper indicate that the Special Gender Advisor role should continue to be steadily maintained as an extra viewpoint on gender issues, even as the Office staff becomes increasingly competent in gender analysis. In closing, the influence of the Policy Paper has been positive and is potentially game-changing for international criminal justice.

