



Revision of Policy Paper on Sexual and Gender- Based Crimes
Submission by Legal Action Worldwide (LAW) to the Office of the Prosecutor
of the International Criminal Court

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Executive Summary

Legal Action Worldwide (LAW) is delighted to contribute to process of revising the Office of the Prosecutor’s Policy Paper on Sexual and Gender-Based Crimes (2014 Policy). The 2014 Policy made a vital contribution to the work of the Office of the Prosecutor and the reputation of the International Criminal Court as a custodian of international criminal law. It has further informed the work of national prosecutors and civil society organisations globally in the fight to end impunity for sexual and gender-based crimes.

Nevertheless, the significant steps forward in addressing sexual and gender-based crimes – at national and international levels – necessitate review and revision of the 2014 Policy. Continued and amplified discussion of sexual and gender-based crimes supported by the work of the Office of the Prosecutor have deepened legal understandings of “gender” and enhanced the approaches adopted by practitioners of international criminal law. Notably, a broader spectrum of conduct is now understood to fall within the sexual and gender-based crimes framework, and significant improvements have been made in supporting safe, gender-competent, trauma-informed victim participation in international justice proceedings.

This document highlights multiple areas where LAW feels the text of the 2014 Policy could be strengthened to better reflect contemporary understandings of gender and international criminal law. This input is based on LAW’s experience working closely with survivors of international crimes (in particular, sexual and gender-based crimes) to secure justice for their experiences – and its engagement with colleagues working across the field of international criminal law, including UN bodies and mandate holders, national courts and prosecutors, academics, national and international civil society organisations, and survivor groups. Many of these groups have developed tools which could contribute to an enhanced Policy Paper on Sexual and Gender-Based Crimes. These documents have been highlighted where relevant.

LAW’s input focuses on three key issues. **First, on enhancing trauma-informed participation by victims and survivors in ICC proceedings and activities.** LAW’s engagement with victims of international crimes in contexts affected by conflict around the world has underscored the vital role they play in securing justice and accountability; in their words: *Nothing for us, without us*. In better facilitating meaningful victim engagement with and participation in ICC proceedings, a number of important amendments should be made to the 2014 Policy. As a starting point, the policy must recognise the full spectrum of potential victims of sexual and gender-based crimes, including familial, inter-generational, and organisational victims. Informed consent must be better incorporated into the Policy to ensure that is embedded throughout the work of the Office of the Prosecutor. The importance of victim participation must be underscored and reinforced – both by strengthening content within the Policy on protection of victim-witnesses’ physical and psychological safety including through robust referral pathways and by improving victim participation in the very early stages of the work of the Office of the Prosecutor.

Second, on strengthening the approach to ‘Gender’ within the Policy with an improved intersectional and SOGIESC-competent lens. The 2014 Policy makes minimal reference to issues which are now central in discussions around gender, and sexual and gender-based crimes. At a thematic level, these include concepts like intersectionality, and the inclusion of those of diverse sexual orientation, gender identity or expression, or sexual characteristics (SOGIESC). Content, and terminology, related to these concepts must be strengthened for the Policy to speak to a contemporary understanding of gender. Additionally, it is important that the discussion around ‘gender’ is not solely be theoretical – it must be rooted in the day-to-day work of the Office of the Prosecutor. To this end, this section of LAW’s input also outlines

how content in the 2014 Policy could be improved to bring greater clarity and guidance to practitioners involved in undertaking gender analyses.

Third, by providing commentary on key criminal acts and new jurisprudence. There have been significant developments in the prosecution of sexual and gender-based crimes. Recent case law, both from the ICC and other fora, must be incorporated into the Policy to ensure that key lessons learned are effectively captured. The Policy should also incorporate other recent advancements within the ICC's policy framework – most notably, the December 2022 Policy Paper on the Crime of Gender Persecution. LAW's input also suggests strengthened analysis of the nexus between gender and the crime of genocide.

Introduction

The use of sexual and gender-based violence (SGBV) in armed conflict and in fragile contexts is increasingly well documented. Recent datasets indicate that between 20 and 30% of women and girls in conflict-affected settings experience sexual violence. In addition to the disproportionate impact on women and girls, there is increasing awareness that SGBV is also frequently perpetrated against men, boys, and those of diverse sexual orientation, gender identity or expression, or sexual characteristics (SOGIESC) of all ages. The nature, impact and motivations behind these forms of violence is closely linked to the context in which it occurs. Nevertheless, it is apparent that perpetrators across situations use SGBV to control, terrorise and humiliate individual victims and survivors, their families and communities.

SGBV is part of a wider pattern of conduct that reinforces harmful patriarchal norms and stereotypes that suppress and disenfranchise a significant portion of the global population. It should be recognised that non-violent criminal acts may have the same effect. Reflecting this, the broader categorisation of sexual and gender-based *crimes* will be used throughout this document.

International courts have had a number of important jurisprudential developments in addressing sexual and gender-based crimes in recent decades. The International Criminal Tribunals on Rwanda and the former Yugoslavia undertook critical steps in establishing key precedents around sexual and gender-based crimes, including the Prosecutor v Akayesu (ICTR), Prosecutor v Delic (ICTY), Prosecutor v Tadic (ICTY), Prosecutor v Mucic (ICTY) and Prosecutor v Furundzija. Subsequent international and hybrid criminal tribunals have also contributed to this important jurisprudential framework.

The inclusion of sexual and gender-based crimes within the text of the 1998 Rome Statute was a landmark achievement – as was the development in 2014 of the Office of the Prosecutor’s Policy Paper on Sexual and Gender-Based Crimes (2014 Policy). The latter has been instrumental in establishing an intersectional approach to sexual and gender-based crimes within the ICC framework and in outlining good practice in engaging with survivors of these crimes – both as victims and as witnesses in formal proceedings. The 2014 Policy’s clarification of the Rome Statute’s definition of gender as a social construction was particularly important. The Policy doubtlessly contributed, at least in part, to recent ICC successes at prosecuting sexual and gender-based crimes, such as The Prosecutor v Ntaganda and The Prosecutor v Ongwen.

The opportunity to provide input to the new version of this document is welcome. Ensuring that OTP policy is informed by up-to-date trauma-informed, intersectional best practice is critical to the ability of the institution to respond to its mandate. Engagement and liaison with civil society actors who regularly engage with victims and survivors of sexual and gender-based crimes and who have critical contextual knowledge is vital for the success of the revised policy.

LAW’s submission focusses on three key issues 1) enhancing trauma-informed participation by victims and survivors in ICC proceedings and activities; 2) Strengthening the approach to ‘Gender’ within the Policy with an improved intersectional and SOGIESC-competent lens and 3) legal analysis of key legal developments in ICC jurisprudence on SGBV, the crime against humanity of gender persecution, and the nexus of SGBV of genocide.

LAW’s suggestions draw from its own experience of providing legal services and representation to victims and survivors of international crimes in several fragile and conflict-

affected areas, including before the ICC. LAW's recommendations are also informed by regular consultations with the ICC's Office of the Prosecutor, as well as recent policy initiatives, most notably the ICC's Policy Papers on Children and the Crime of Gender Persecution, as well as the Gender Strategy and Implementation Plan of the International, Impartial and Investigative Mechanism on Syria (IIIM).

As a starting point, LAW highlights a number of key documents developed since the publication of the 2014 Policy. These include (but are not limited to): the Mukwege Foundation Handbook: Holistic Care for Survivors of Sexual Violence in Conflict;¹ the "Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence" (The Murad Code);² the UNITAD Trauma-Informed Investigations Field Guide;³ and the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict.⁴ The inclusion of key principles outlined in these documents, or indeed, specific reference to these documents, would strengthen the policy. While reference to these documents could be made *throughout* the 2014 Policy as needed, LAW highlights the start of section IV as an ideal location to make a specific reference.

1. Enhancing participation by victims and survivors in ICC proceedings and activities

In accordance with the Rome Statute, in particular Article 68, victims and survivors of international crimes (hereafter, 'victims'⁵) play an essential role in criminal justice proceedings. In outlining some key reasons for adopting a survivor-centred approach, this section proposes enhancing victims' trauma-informed participation in ICC proceedings and activities through: (i) a more expansive understanding of the definition of a victim of SGBV, (ii) making informed consent an explicit component of the new policy, and (iii) ensuring psychosocial referral pathways are competent to treat a victim's particularized needs based of their intersecting identities (e.g. age, gender, race, religion, SOGIESC); and (iv) improved victims' participation in earlier stages of ICC proceedings.

¹ Dr Denis Mukwege Foundation, *Handbook: Holistic Care for Survivors of Sexual Violence in Conflict* (2019). Available at: https://mukwegefoundation.org/wp-content/uploads/2019/07/Handbook-Care_for_SV_Survivors-ENG-screen.pdf (last accessed 26/6/23)

² The Murad Code Project, *Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence* (April 2022). Available at: https://static1.squarespace.com/static/5eba1018487928493de323e7/t/6255fdf29113fa3f4be3add5/1649802738451/220413_Murad_Code_EN.pdf (last accessed 26/6/23)

³ United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh, *Trauma-Informed Investigations Field Guide* (2021). Available at: https://www.unitad.un.org/sites/www.unitad.un.org/files/general/2104429-trauma-informed_investigations_field_guide_web_0.pdf (last accessed 26/6/23)

⁴ United Kingdom of Great Britain and Northern Ireland, Foreign Commonwealth and Development Office, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law Second Edition* (2017). Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf (last accessed 26/6/23)

⁵ LAW ordinarily uses the terminology of 'victims and survivors' -affording individuals affected by sexual and gender-based crime the opportunity to identify the 'label' they prefer based on their circumstances and experience. In this document, LAW uses 'victims' for simplicity and to reflect the terminology used within the Rome Statute and by the International Criminal Court.

a. The importance of an effective victim-centred approach

Implementing a successful survivor-centred (or victim-centred) approach is central to the ICC's success. A victim-centred approach seeks to empower individual victims by prioritising their needs, wishes and interests. This is achieved in practice by ensuring the victim has access to appropriate, gender-competent and trauma-informed services (including medical, psychosocial, legal services) and appropriate information to inform their decision-making. A victim-centred approach requires meaningful engagement to gather their views and to ensure their interests are embedded within decision-making and inform the development of strategy. In the context of criminal justice, a victim-centred approach is not intended to undermine or weaken fair trial rights (especially those rights upon which may be relied upon by defendants), but to ensure the effective participation of victims in proceedings.

In addition to providing critical witness testimony about their experiences, victims can deliver important background, contextual and linkage evidence to investigators, prosecutors and the Court. Medical evidence secured from victims, including DNA evidence, can play a role in strengthening the case against a defendant. In the context of sexual and gender-based crimes, the close proximity of the victim to the direct perpetrator may afford the opportunity to better understand their assailant's motivation and organisational policies underlying their conduct – potentially contributing evidence establishing the *mens rea* of an accused. Importantly, victims are uniquely able to set out the impact of criminal acts on their life. Such information may play a role informing prosecutorial decision-making pre-trial and sentencing, post-conviction, and reparations.

Victims also play an important role in generating support or 'buy-in' from communities affected by international crimes. Their support for proceedings can strengthen grassroots perceptions that the ICC is meaningfully engaging communities affected by international crimes, through the prosecution of specific instances or patterns of conduct recognisable to those communities.

Victim reinforcement of legitimacy of proceedings is vital for the success of international criminal justice. LAW's engagement with Rohingya victims in refugee camps in Cox's Bazar, Bangladesh, following their displacement from Myanmar during the 2017 'clearance operations', has revealed increasing frustration with the apparently slow progress made by the Office of the Prosecutor in the years since the opening an investigation in 2019. This frustration has been exacerbated by the accelerated progress in the form of public arrest warrants made in the Ukraine situation. Rohingya victims have expressed concern that their case has been forgotten, overlooked or deprioritised. Meaningful engagement by the Office of the Prosecutor with victims (both through LAW and independently) does assuage some of these concerns, albeit on a limited scale. Were this engagement scaled up, enthusiasm and support for the ICC process would doubtlessly be strengthened across the Rohingya population within the camps in Cox's Bazar, Bangladesh.

Additionally, LAW suggests the addition of a new section within the policy outlining the needs of victims, their participation in proceedings and the practical implementation of a victim-centred (survivor-centred) approach in the work of the Office of the Prosecutor. This would allow full consideration of this topic. The current structure of 2014 Policy – reflecting the text of the Rome Statute, then the structure of preliminary examination, investigation, trial and then external engagement – is piecemeal in addressing victim participation. Victims' involvement is secondary to the function of the process. While this structure allows for a targeted consideration of key issues relevant to witness/victim participation at a particular stage (e.g., the discussion around witness protection at section VI(c)), this approach means that

overarching themes and issues related to broader victim participation go unaddressed. LAW's suggested amendments and additions, outlined below, could be incorporated into a dedicated new section on victim participation. In lieu of this, LAW has suggested locations within the existing text of the Policy where amendments could be made.

b. Definition of a victim of sexual and gender-based crimes

The 2014 Policy does not clearly define the term “victim” in the context of sexual and gender-based crimes. This is a missed opportunity to explicitly include organisational victims, witnesses of SGBV, and family members of SGBV survivors who can also suffer substantial harm as a result.

The ICC Rules of Procedure and Evidence include both individual and organisational victims. Rule 85(a) defines a victim first as “...*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.*”⁶ These are classic SGBV victims and witnesses whose role should be highlighted in the updated policy. Rule 85(b) indicates that victims may also include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. In the context of SGBV, this can be relevant when a women's health clinic or an LGBTIQ+ community centre is attacked. The 2014 Policy does not set out the definition of either the individual or organisational victim. Incorporating these definitions into the new edition of the policy, along with commentary on how they should be interpreted in the context of sexual and gender-based crimes, would be of great benefit to those seeking to use the document crimes or provide legal services to victims.

In doing so, the new edition of the policy should highlight that ‘victims’ of sexual and gender based crimes are not only those who directly experience acts of sexual or gender-based violence (such as the acts outlined in Articles 7(g), 8(2)(b)(xxii), 8(2)(e)(vi) of the Rome Statute) (‘direct victims’)– but may also include witnesses of such attacks, especially family members of direct victims. Forcing someone to witness SGBV is an act of violence that can cause substantial mental harm.

Further, sexual and gender-based crimes may inflict inter-familial and inter-generational trauma; children born of rape should also be considered victims. It is crucial that the updated version of the policy highlights that not only those who have directly experienced sexual or gender-based crimes as described in the text of the Rome Statute who suffer harm because of these acts, but those who are affected by SGBV the familial or inter-generational level, as well as those organisational victims. Identification of victims within the definition used by the International Criminal Court will require a contextual analysis based on cultural and societal factors viewed from a grassroots level, undertaken on a case-by-case basis.

c. Informed consent of victims to participate in proceedings

Absent extraordinary circumstances, it is widely accepted that victims should not be compelled to participate in justice proceedings where they do not consent. Forcing a victim to participate through a summons or domesticated subpoena may result in their alienation from the Court or animosity towards proceedings, and lead to poor quality evidence. Moreover, forced participation may lead to re-traumatisation or other unintended harms for the victim (such as

⁶ ICC Rule of Procedure and Evidence 85(a).

reprisal) and is therefore inconsistent with a trauma-informed approach. Obtaining the consent of victims to participate in all stages of ICC proceedings is vital.

Moreover, for such consent to be genuine, victims must have access to relevant information about the nature of their participation, the consequences of their participations, risks they may face because of their participation (including disclosure of their identities to the accused) and steps that can be undertaken to mitigate those risks. This is referred to a 'informed consent.' It is important that that informed consent be discussed within the updated version of the Policy. It should incorporate by reference, for example, the definition of consent in the 2022 Eurojust / ICC OTP Guidelines for Civil Society Organisations documenting international crimes and human rights violations, that consent should be informed, contemporaneous, voluntary, and explicit.⁷ The text suggested below should be incorporated at an appropriate point within the new policy. One option would be for this to be incorporated proximate to paragraph 70 – however, as LAW has proposed above (page 7) participation of victims in ICC proceedings may be better addressed within its own dedicated section of the revised policy.

Consistent with the principle of being contemporaneous, the informed consent of victims engaging in ICC proceedings should be identified a live (non-static) and continuing issue, noting that it can be withdrawn at any time. The informed consent of an individual victim may change over time based on a wide range of factors, including factors not related to the case. Reflecting this, the Office of the Prosecutor should explicitly commit to continuously brief and obtain the consent of victims throughout the duration of their engagement with that individual. The Office of the Prosecutor should address any questions or concerns raised by victims to ensure that they have all information which could inform their engagement with the Office of the Prosecutor or the Court.

Informed consent of victims must not be assumed based on previous indication of consent, or consent to participate in a distinct part of the ICC proceedings. For example, where a victim has agreed to participate in provision of information to a preliminary examination, this cannot be taken as consent for their participation in subsequent aspects of an investigation.

The Office of the Prosecutor must inform victims about any risks (physical, psychological, reputational, legal, etc) related to engagement with ICC proceedings and measures taken to mitigate those risks. In particular, the Office of the Prosecutor must ensure that the full range of *security* risks are explained to victims engaging with the Office. This should include detail of physical security risks, risks to mental well-being in the near, medium, and long-term, as well as any contextual information that frames said risks.

Where the Office of the Prosecutor is unable to provide such information, or where it identifies that it may not have the most up-to-date or accurate information (e.g. about relevant physical risks), the Office of the Prosecutor should ensure that victims are able to obtain this information from another source – in practice, this may be done through coordination with civil society operating on the ground in the same location as the victim in question.

In some contexts, it may be good practice for the Office of the Prosecutor to recommend that victims obtain independent legal representation to ensure that the victims' interests are adequately represented.

⁷ Eurojust & ICC OTP Guidelines for Civil Society Organisations documenting international crimes and human rights violations (2022), p. 8.

Moreover, the power imbalances inherent to interactions between the Office of the Prosecutor, or other representatives of the International Criminal Court, and victims and witnesses, should be identified and countered wherever possible. The Office of the Prosecutor should seek to ensure that victims and witnesses participate in any aspect of proceedings freely, voluntarily and with informed consent, and with cultural, gender, SOGIESC, and age-competent referral pathways for medical and psychosocial support.

Lastly, as indicated in its Guidelines on CSO documentation, the Office of the Prosecutor should ensure victims understand that they may withdraw their consent to engage with ICC proceedings at any time and for any reason, within the boundaries of the law.

d. Measures to protect the physical and psychological well-being of witnesses

In accordance with Article 68 of the Rome Statute, the 2014 Policy outlines measures to ensure the well-being of victims participating in investigations undertaken by the Office of the Prosecutor. Paragraphs 60-65 of the 2014 Policy require, for example, a screening process and continued psychosocial support during an interview. This section can be strengthened to be consistent with a trauma-informed approach through recognition that access to services may be required by a victim-witness **before, during, and/or after** an -interview, and that those services may need to be tailored to the specific needs of a particular victim.⁸ A resource which may be particularly instructive in this respect is the UNITAD Trauma Informed Investigations Field Guide, which provides guidance on psychosocial evaluation before, during and post-interview.⁹ LAW suggests the following paragraph be inserted at 66 to highlight the need for competent referral pathways available before, during, and after an investigative interview:

The Office recognises that victim-witnesses may require access to essential medical and psychosocial services before, during, and after an interview. Such needs may become apparent during screening, during the interview itself or subsequently. Prior to undertaking interviews with victims of sexual and gender-based crimes, the Office will identify relevant partners (including UN and civil society partners) or referral pathways who can provide such services to victims. In some cases, these services may extend beyond medical or psychosocial support. The Office will ensure that information about referral services is made available to victims and will support the victim in accessing those services where required. In establishing referral partnerships, the Office will ensure that services provided are trauma-informed and competent to address the victims' particularized needs, including specific needs based on factors such as their culture, gender, SOGIESC, and age. Where such services are unavailable or inadequate, the Office will support the establishment of such services, or the strengthening of existing services, including providing them remotely if possible, and if there is no competent available option safely accessible on the ground.

Within the 2014 Policy, Section VI(c) discusses measures to protect the safety and physical and psychological well-being of witnesses at the trial stage. LAW welcomes the inclusion of this content but has identified areas where the text could be adapted for clarity around the extent to which measures to protect victims must be trauma-informed and survivor-centred. To this end, LAW recommends that a new paragraph be added, after Paragraph 87, to highlight

⁸ Nicholas Leddy, Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity, *Journal of International Criminal Justice*, Volume 20, Issue 4, September 2022, Pages 911–942, at 937. Available at: <https://doi.org/10.1093/jicj/mqac039>

⁹ UNITAD, Trauma Informed Investigations Field Guide (A publication of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD) and the Human Rights in Trauma Mental Health Program at Stanford University) (2021)

the need for competent referral pathways to be made available before, during, and after testimony, stating as following:

The Office of the Prosecutor, in conjunction with OSU, PSU, GCU, POS, and VWU, will ensure that protection measures adopted are tailored as far as possible to the witness in question, recognising that an individual's unique circumstances and any trauma which they may experience or may have experienced in the past. The Office will prioritise protection of the witness from re-traumatisation, including from being interviewed or testifying. Protection measures will include access to relevant services or referral pathways, including psychosocial support, which are gender, SOGIESC, age, and culturally competent. Within this framework, the Office recognises that witnesses with multiple intersecting identities may require unique protection measures. Where relevant witness protection measures are unavailable, the Office will support the establishment of such services.

LAW also welcomes the 2014 Policy's inclusion of protective and special measures to protect vulnerable trial witnesses' identities from being disclosed to the public, in accordance with Rules 87 and 88 and Article 68(2) of the Rome Statute. More language could be added to specify the need for considering certain social factors that SGBV survivors face when identifying and applying for special or protective measures. As such, LAW recommends new language (in red) for paragraph 90:

90. In the case of witnesses who may face an increased risk of psychological harm and/or psychological or physical difficulties which may affect their well-being and ability to testify, the Office will request the Chamber to take special measures with a view to minimising the risk of re-traumatisation and facilitating their testimony. Such special measures may include the use of screens to prevent direct visual contact between the witness and the accused; the provision of evidence via videolink; and the presence of an accompanying support person or in-court assistant, such as a VWU support assistant, a psychologist, or outside expert during the testimony. Depending on the risk assessment of the witness, steps will be taken to inform the witness of available protection measures that may be requested from the Chamber, and the preference of the witness sought. **When eliciting SGBV survivors' preferences on testifying in public or in closed session, the Office will note compounding or aggravated social factors, including fear of public humiliation or social rejection, stigma, violence, ostracization, and reprisals that women, girls, men, boys, or LGBTIQ+ persons may face in the particular context.** In order to manage expectations, care will be taken to ensure that the witness understands and accepts that the ultimate decision lies with the Chamber, and that the protection measure preferred by the witness may not necessarily be granted. The Office will pay particular attention to the manner of questioning of a witness or victim, especially with regard to sexual and gender-based crimes. It will take all possible steps to prevent any harassment, intimidation, or retraumatisation.

It is important to address the topic of stigma within the context measures designed to protect the well-being of victims. Stigma associated with sexual and gender-based crimes and victimhood of these crimes is consistently identified as a cause of underreporting and a barrier to victim participation in justice processes. Stigma is identified as such in the current version of the policy. However, it is important to emphasise that stigma is not insurmountable – many victims of sexual and gender-based crimes are able to overcome stigma where adequate, gender-competent, trauma-informed, culturally nuanced and victim-centred support is in place. The IIM Gender Strategy notes, at 4.10:

“Past experience confirms that many victims/survivors are willing to come forward - whether as protected witnesses or publicly - to participate in justice process is when they feel adequately supported. Their courage and determination to overcome the pressures caused by stigma have already contributed to landmark convictions for international crimes...”

This description is also borne out in LAW’s experience: notably, victims of serious sexual and gender-based crimes, in contexts such as the Rohingya Crisis, Syria, and South Sudan, have been able to overcome stigma to contribute to justice initiatives (including ICC investigations) and even speak publicly about their experiences. It is important that the updated ICC policy reflect a more refined understanding of stigma.

e. Improved participation of victims in the early stages of investigations and proceedings.

The inclusion of victims of sexual and gender-based crimes is critical to broader community buy-in and support for the work of the Office of the Prosecutor and the legitimacy of the ICC. The earlier this can be secured, the better; early participation by victims in proceedings should be encouraged and supported by the Office of the Prosecutor, during the investigation planning stages even prior to the issuance of an arrest warrant. At the outset, OTP Staff should be encouraged to include a provision for investigating SGBC in every investigation plan, including crimes against all genders, children, and people of diverse SOGIESC. Local advocates, grassroots actors, and victims’ groups can be consulted in formulating these investigation plans when trying to locate such survivors – which can be challenging in closed or war-torn societies.

Victims can participate in the early stages of an investigation in other concrete ways. For example, victims can have their testimony taken before trial when unique investigative opportunities arise under Article 56 and their testimony might not be available at a trial that may be several years away. This tool can be particularly helpful for victims of SGBC who cannot testify at trial due to security risks, health complications, or risk of re-traumatization from testifying in front of the Accused even with special measures in place.

Victims’ views can also be considered under Rule 100(2) when considering whether pre-trial hearings can take place outside The Hague, and closer to survivor communities. Although such initiatives could generate substantially more positive victim engagement for all core crimes, this is especially important in for victims of sexual and gender-based crimes who are likely to face additional barriers to participation in ICC proceedings (such as stigma, or gender stereotypes preventing women or those of diverse SOGIESC from representing their community). Early initiatives to overcome such obstacles are more likely to bring about engagement by victims of sexual and gender-based crimes, and lead to a more fulsome evidence base, even if this takes more time.

A counter-argument against early engagement by victims in ICC proceedings could be that this generates expectations which ultimately may not come to fruition (i.e., an investigation does not automatically lead to a trial, nor to a conviction). However, this counter-argument is not borne out by victim engagement with the ICC to date. Victim expectations are raised as soon as the Office of the Prosecutor considers any situation (and indeed sometimes before it makes any consideration). Rather, early engagement between victims and the Office of the Prosecutor is an opportunity to mitigate expectations.

i) Case Study: Request for hearings to take place outside of the host country

On 4 August 2020, LAW and other groups representing Rohingya victims of the 2017 'clearance operations' requested that the Pre-Trial Chamber order a 'Registry assessment of potential venues for the holding of proceedings in a State other than the host State [the Netherlands] within reasonable physical proximity of the affected population,' in the context of the situation of Bangladesh/Myanmar. The driving intention of this request was to ensure future hearings would take place in Bangladesh, or somewhere closer to the Rohingya population, better facilitating their participation in proceedings.

On 17 August 2020, the Office of the Prosecutor responded - arguing *against* having hearings outside the Netherlands prior to the identification of potential defendants. Nevertheless, on 20 August, the Pre-Trial Chamber ordered the Registry to prepare a report looking at the feasibility of the victims' request. On 21 September 2020, the Registry submitted its report setting out the steps it would need to take to accommodate some part of the proceedings taking place in Bangladesh in different scenarios - in its conclusion, the registry stated: "*The Registry stands ready to accommodate any of the proposed scenarios even if the operational aspects - in terms of time and resources - for some of them may be more challenging than for others.*"¹⁰ The Registry also noted that any arrangement would be subject to the agreement of Bangladesh. Five scenarios considered in the report were: (1) a Chamber or an appointed Single Judge conducts a judicial visit to a refugee camp in Cox's Bazar, Bangladesh; (2) a testimony via video-link under article 56 of the Rome Statute ("Article 56 Testimony") is organised with a witness being based in Bangladesh whilst the Chamber or a Single Judge remains in The Hague; (3) a Chamber or an appointed Single Judge explains a decision on victims' participation to the victims based in Bangladesh; (4) a full Confirmation of Charges hearing is held in Bangladesh; (5) the decision on the Confirmation of Charges hearing is rendered in Bangladesh ("Scenario 5").

While on 26 October 2020, the Pre-Trial Chamber ultimately decided to dismiss the request made by LAW and others, the Chamber noted: "*On the merits, the Chamber ... recognises the importance of bringing justice closer to the location of the alleged crimes as well as to the victims and witnesses.*" (Para 25). Further, while acknowledging (as indeed, the original request did) that is still too early in the process to order that hearings take place in Bangladesh, the Chamber held that it will "*keep the possibility of conducting certain procedural steps in situ under review.*" (Para 27).

Notably, the Chamber also upheld the right of victims to engage with and make requests of the Court at early stages in the ICC process in relation to the place of hearings (under Rule 100 of the Court's Rules of Procedure and Evidence). In its submissions, The Office of the Prosecutor suggested that, because no case against an individual defendant yet existed, victims could not request that the Court consider hearings outside The Netherlands - i.e., that victims (unlike the Court itself, or the Prosecution or Defence) cannot initiate this process. But the Chamber correctly rejected this argument: *As a preliminary matter, the Chamber notes that, whereas Rule 100(1) refers to 'a particular case', Rule 100(2) states plainly that the Chamber may recommend sitting away from the seat of the Court 'any time after the initiation of an investigation.'* On that basis the Chamber did not accept arguments from the Prosecutor, that the victims at this stage cannot "trigger" the exercise of the Chamber's *proprio motu* power to make a recommendation to change the seat of the Court.

¹⁰ ICC Registry's Observations on the Victims' Joint Request Concerning Hearings outside the host State (ICC-01/19-34) (21 September 2020). Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05354.PDF (Last accessed 26.6.23)

2. Strengthening the approach to ‘Gender’ within the Policy with an improved intersectional and SOGIESC-competent lens

The concept of gender is core to the effective understanding and implementation of the OTP’s updated policy. Although the 2014 Policy incorporates and discusses gender within the context of the implementation of Office of the Prosecutor’s mandate as it relates to sexual and gender-based crimes, it falls short of a holistic discussion of the topic of gender, thereby limiting the potential application of the policy, especially as the wider discourse around gender progresses. Although the 2014 Policy importantly includes an intersectional approach and an understanding of gender as a social construction, the language and terminology used throughout the policy should be updated to reflect contemporary, inclusive approaches to gender. In particular, the new OTP policy would benefit from more refined key terms, a more integrated gender analysis, more comprehensive LGBTIQ+ inclusion, and engaging with intersectionality more fully – particularly with respect to the crime against humanity of persecution.

a. Terminology

The existing section ‘Use of Key Terms’ should be updated as suggested below (changes in red). The changes suggested (in red) incorporate language used in ICC’s Policy Paper on the Crime of Gender Persecution and the Gender Strategy and Implementation Plan of the International, Impartial and Investigative Mechanism on Syria:

Gender: Under article 7(3) of the Rome Statute (“Statute”), “gender” is understood as the two sexes, male and female, within the context of society. 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.¹¹

Sex: “Sex” refers to the biological and physiological characteristics that define men and women.

Intersex: “Intersex” is an umbrella term used to describe a wide range of natural bodily variations in sex characteristics.

LGBTQI: Lesbian, gay, bisexual, transgender, queer and intersex identified persons. The plus sign represents people who identify with the broader LGBTQI community, but use other terms for self-identification. Those of diverse sexual orientation, gender identity or expression, and sexual characteristics (SOGIESC) may fall within the categorisation LGBTQI or be part of LGBTQI communities. Although the acronyms are intended to cover similar groups of people and are used interchangeably in some contexts, they are not the same and have distinct definitions.

Context of Society: Under article 7(3) of the Statute, “context of society” refers to the 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.

Gender-based crimes: “Gender-based crimes” are those committed against persons,

¹¹ Note that this text has been replicated from the ICC Office of the Prosecutor Policy Paper on the Crime of Gender Persecution (December 2022).

whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, ~~and~~ men and boys, ~~and those of diverse SOGIESC~~ because of their gender.

Sexual crimes: “Sexual crimes” that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes (“Elements”). In relation to “rape”, “enforced prostitution”, and “sexual violence”, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact — for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.

Gender perspective: “Gender perspective” requires an understanding of differences in status, power, roles, and needs between ~~males and females~~ men, women and those of diverse SOGIESC, and the impact of gender on people’s opportunities and interactions. This will enable the Office to gain a better understanding of the crimes, as well as the experiences of individuals and communities in a particular society.

The term “gender perspective” also entails: a) Understanding the ways in which socially constructed gender roles can cause an imbalance of power against women and girls; b) Being aware that gender-based discrimination also drives harms against people of diverse SOGIESC and can make their experiences invisible or poorly understood; and c) Ensuring that addressing gender constructions harming men and boys does not undermine efforts to address the systemic inequality and discrimination experienced by women and girls in all societies.

At other locations in the document where definitions are provided, the text should be updated to reflect the suggested changes outlined above. Examples of such paragraphs include paragraphs 15 and 16 – the suggested amendments for which are included at (c) below.

b. Strengthened gender analysis

The 2014 Policy requires the Office of the Prosecutor to undertake a gender analysis throughout its work (at preliminary examination, investigations, prosecutions (through charging, trial, sentencing) and in the overall implementation of its mandate, including through cooperation and institutional development. The revised version of the policy should add further clarity and direction in precisely how this gender analysis is implemented in all aspects of its mandate.

One option would be to introduce a new section within the policy that sets out in greater detail how a gender analysis should be conceived and implemented. This would allow for discussion of a) the critical thinking about gender required in such an analysis, as well as b) the practical steps that should be taken by the Office of the Prosecutor in embedding gender analysis into its work. This new section could provide a fuller description of the above ‘Key Terms’ section – as well as other relevant concepts. This section should clearly set out the Office’s understanding of gender, and its perception of sexual and gender-based crimes as part of wider patterns of criminality. Here, the Office could describe how the successful investigation and prosecution of SGBV can help provide more insight, for example, into an organisational plan or policy to attack a civilian population. This section could also outline where the Office perceives challenges in relation to its work on sexual and gender-based crimes, and how increased clarity (including through gender analyses) can help address these challenges. The practical component should describe clear steps for those involved in investigation to

undertake in the preparation and implementation of gender analyses, as well as how the analytical component of this should be delivered. Building upon this, it should also make clear how gender analyses will then be used to inform future investigation and prosecution. Although each gender analysis will be unique to the context being reviewed, key principles and guidelines (e.g., templates or checklists) for practitioners could be developed.

The Gender Strategy and Implementation Plan of the International, Impartial and Investigative Mechanism on Syria (IIIM Gender Strategy) provides detailed consideration of how gender analysis can be practically incorporated into the implementation of its mandate. For example, while the 2014 Policy underscores the importance of conducting gender analyses as *part* of its work, the IIIM Gender Strategy outlines a broader consideration of gender *throughout* the implementation of its mandate. An example of this is reference to the role of gender as a factor driving violence in the Syrian conflict, noting, at 4.5 of the IIIM Strategy:

“In ICL, gender discrimination has historically not been identified as a factor driving violence. The underlying causes of violence are often seen as stemming from factors other than gender such as race religion ethnicity and nationality as a result the cases prosecuted have masked a key factor underpinning violence in turn weakening pressure for change through accountability processes. The IIIM is committed to ensuring that any role played by gender is accurately reflected when examining the facts of a crime advances such as the recognition of persecution on the basis of gender within legal frameworks are assisting its work.”

Similar thinking can be applied to all of the contexts currently under consideration by the ICC – from those at preliminary examination stage, through to existing trials. The incorporation of deep gender analyses into the new Policy would engender a more holistic approach to gender analyses undertaken by the Office of the Prosecutor.

The IIIM Strategy goes further than the current ICC Policy on sexual and gender-based crimes in detailing how a proactive and integrated approaches to gender can be embedded within the implementation of the IIIM mandate, rather than incorporated as a distinct component (see IIIM Gender Strategy section 4.7-4.9). Along these lines, it is critical that core investigative and prosecution staff have training and experience in SGBV – that this expertise is on every team – rather than siloed to the Gender and Children Unit.

c. LGBTIQ+ Inclusion

The new Policy would benefit from a more comprehensive approach towards LGBTIQ+ survivors. Despite being targeted with structural or organised violence in many ICC situation countries, LGBTIQ+ survivors have historically been marginalized from international criminal justice processes.

Although this unfortunate trend continues today, one positive development in this regard was the 2019 the ICC Pre-Trial Chamber finding that sexual violence against women, girls, men, boys, as well as transgender, intersex, and third-gender persons was committed in the context of the Myanmar military’s 2017 “clearance operations” against the Rohingya, and thus formed part of the underlying attack of the civilian population which caused them to flee and be

deported from Myanmar to Bangladesh.¹² The new policy would do well to acknowledge this groundbreaking decision.

As in this Myanmar / Bangladesh example, inclusion of LGBTIQ+ survivors is important to a comprehensive gender analysis in that it can reveal a broader and more accurate picture of the civilian population being targeted, the intent and motive of direct perpetrators, the underlying discriminatory policies of organisations or armed groups, and thus, a broader spectrum of criminality. Throughout the revised policy, there must be increased reference to, and inclusion of, individuals and communities of diverse SOGIESC, and LGBTIQ+ communities. The existing version almost entirely excludes reference to these groups – risking their meaningful inclusion in consideration of sexual and gender-based crimes.

As a starting point, inclusive terminology should be used throughout the text of the document. For example, where drawing distinction between genders or sexes, those of diverse SOGIESC should be incorporated into text. For example, paragraph 4, should be amended as follows (changes in red):

4. The Office pays particular attention to the commission of sexual and gender-based crimes at all stages of its work: preliminary examination, investigation, and prosecution. Within the scope of its mandate, the Office will apply a gender analysis to all crimes within its jurisdiction, examining how those crimes are related to inequalities between women and men, ~~and~~ girls and boys, ~~and those of diverse SOGIESC~~, and the power relationships and other dynamics which shape gender roles in a specific context. In addition to general challenges to investigations conducted by the Office, such as security issues related to investigations in situations of ongoing conflict, and a lack of cooperation, the investigation of sexual and gender-based crimes presents its own specific challenges. These include the under- or non- reporting owing to societal, cultural, or religious factors; stigma for victims; 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. The Office will pay particular attention to these crimes from the earliest stages in order to address such challenges. The establishment of contacts and networks within the community will be prioritised to the extent possible to support the operational activities of the Office, particularly with regard to augmenting its access to information and evidence.

Where language lists separate genders or sexes, this should be replaced with language including those of diverse SOGIESC, so as not to exclude victims who, for example are intersex, third-gender, transgender, or who simply do not identify as male or female. For example, in paragraph 14 should be amended as follows (changes in red):

14. The Office also recognises the crucial role that civil society plays in preventing and addressing sexual and gender-based crimes. The Office will seek to support and strengthen cooperation with these organisations, particularly those which have experience in documenting sexual and gender-based crimes and working with victims of these crimes. The Office will enhance its institutional capacity to investigate and prosecute sexual and gender-based crimes with the assistance of its Gender and Children Unit (“GCU”) and the Special Gender Adviser to the Prosecutor. The Office

¹² Decision Pursuant to Art. 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), Pre-Trial Chamber III, 14 November 2019, §§ 84–86, 104-108. See also, Leddy *supra* note 8 at 931-933.

recognises the need to strengthen its in-house expertise on sexual and gender-based crimes relating to ~~women and girls, and men and boys~~ **women, girls, men, boys, and persons of diverse SOGIESC**", both in conflict and non-conflict situations. It will continue to recruit persons with the required expertise and experience in this field.

Where definitions are provided at other locations within the document, these should be updated to reflect the changes made above. For example, paragraphs 15 and 16 should be amended as follows (changes in red):

15. Article 7(3) of the Statute defines "gender" as referring to "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to ~~women and men, and girls and boys~~ **individuals based on their gender**. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3).

16. The Office considers gender-based crimes as those committed against persons, **whether male or female, or of diverse SOGIESC**, because of their sex and/or socially constructed gender roles. 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~~ **any individual**, because of their gender, such as persecution on the grounds of gender.

The inclusion of LGBTQI communities and those of diverse SOGIESC should be embedded throughout the revised policy. While a contemporary definition of 'gender' includes these groups, there are sections of the text where specific reference to LGBTQI communities and those of diverse SOGIESC would be important in emphasizing how these groups may factor into a full gender analysis. Examples of such locations in the text include paragraphs 21, 39, 41, 56-58 and 67, which should be amended as follows (changes in red) to enhance the OTP's inclusive and trauma-informed approach on witness identification and protection, as well as in other areas including intermediaries, investigations, and complementarity:

21. The Office will strengthen the concrete steps it has taken to enhance the integration of a gender perspective and expertise into all aspects of its operations: during preliminary examinations; in the development of case hypotheses and investigation and prosecution strategies; in the analysis of crime patterns; in the screening, selection, interview, and testimony of witnesses; at the sentencing and reparation stages; and in its submissions on appeal and witness protection, including after the conclusion of proceedings. The Office will also increase its efforts to ensure that staff have the skills, knowledge, and sensitivity necessary to fulfil their functions and the mandate of the Office in relation to sexual and gender-based crimes. In particular, the Office will ensure that staff possess the required operational skills in applying a gender analysis to the work of the Office, sound knowledge of the statutory provisions regarding sexual and gender-based crimes, and well-developed skills regarding the possible effects of trauma in relation to these crimes, **including particularized harm experienced by women, girls, men, boys, and persons of diverse SOGIESC**.

39. During the process of the preliminary examination of a situation, the Office analyses information on crimes potentially falling within its jurisdiction. In so doing, the Office will also examine the general context within which the alleged sexual and gender-based crimes have occurred, and assess the existence of local institutions and expertise,

international organisations, non-governmental organisations, and other entities available as potential sources of information and/or of support for victims. Such an assessment will support any investigation that may be opened at a later stage. Due to frequent and multiple barriers to reporting, the Office will endeavor to make actual or possible perpetration of sexual and gender-based violence against women, girls, men, boys, and LGBTIQ+ persons an explicit component of preliminary examinations – even where the first publicized documentation only mentions women and girls.¹³

41. The absence of genuine national proceedings will be assessed by the Office in light of such indicators as are listed in the Office's Preliminary Examination Policy Paper. Barriers to genuine proceedings, which the Office will consider in its admissibility assessment, might include: discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes, such as inadequate domestic law criminalising conduct proscribed under the Statute; the existence of amnesties or immunity laws and statutes of limitation, and the absence of protective measures for victims of sexual violence, and domestic laws that criminalize persons of diverse SOGIESC thereby preventing them from reporting crimes or participating in investigations. Other indicators of an absence of genuine proceedings may be the lack of political will, including official attitudes of trivialisation and minimisation or denial of these crimes; manifestly insufficient steps in the investigation and prosecution of sexual and gender-based crimes, and the deliberate focus of proceedings on low-level perpetrators, despite evidence against those who may bear greater responsibility. Within such assessments, the Office will have particular regard for attitudes towards groups disproportionately affected by sexual and gender-based crimes, including women, children, LGBTIQ communities and those of diverse SOGIESC, and the treatment of these groups within national justice processes and domestic criminal codes.

49. The Office will, with due diligence, undertake investigations into sexual and gender-based crimes concurrently with its investigations into other crimes. This will ensure the efficient utilisation of resources, and provide an opportunity for a thorough investigation of sexual and gender-based crimes. This will also ensure sufficient time for the collection and analysis of evidence, strategic planning, and ongoing decision-making, including the identification and selection of witnesses. When identifying victims and witnesses, the Office endeavours to take a neutral approach to the gender and sexual orientation of who can be a victim or survivor. While noting the historic and disproportionate use of sexual and gender-based violence against women and girls, the Office seeks to prioritize sexual and gender-based violence against all genders and sexual orientations.

56. The Office will identify individuals who may be selected as intermediaries in order to support the conduct of effective investigations. All such intermediaries who are likely to engage with victims and witnesses of sexual and gender-based crimes will be specifically briefed to ensure that they have an understanding of the possible effects of trauma in relation to both these particular crimes and to the investigative process. Where intermediaries are likely to engage with those of diverse SOGIESC, additional consideration or training may be procured by The Office in order to ensure engagement with those individuals is undertaken sensitively and appropriately. The Office will continuously monitor and evaluate the performance of intermediaries. Where the performance of intermediaries is unsatisfactory, or where the integrity of

¹³ Leddy, *supra* note 8, at 934.

intermediaries is called into question, the team will immediately reconsider their continued engagement, and take any other necessary action, as appropriate. The selection, tasking, and supervision of intermediaries are regulated in detail in the Operations Manual.

57. Staff will receive briefings on relevant laws, cultural issues, traditional and religious practices, and other considerations relevant to the investigation. In the course of preparations for missions, relevant staff are required to familiarise themselves with local laws, traditions, customs, and cultural issues, including the status of men, women and those of diverse SOGIESC within this context, and any other factors that may impact on the investigation mission and the interview process. Local laws can prevent some victims from cooperating where (1) sexual violence is defined in such a way that only women or girls can be considered victims, and (2) where laws criminalizing LGBTIQ+ identities or conduct effectively exposes victims to domestic criminal prosecution for coming forward.¹⁴ Considerations will be taken to ensure the safety and well-being of both staff and witnesses of diverse SOGIESC in countries that criminalize them, including providing this information in threat or risk assessments for mission planning purposes.

58. The interview team and interpreters will undertake specific preparation in relation to the interview process. This may include familiarisation with euphemisms and other verbal and non-verbal communication which may be used by witnesses to refer to acts of sexual violence within the specific context of the investigation. They will also receive briefings and glossaries in order to familiarise themselves with the appropriate and accurate terms to describe acts of sexual violence and parts of the body. Such guidance should cover terminologies and practices specific to LGBTIQ+ communities within the context in question. The interview team will verify, and be sensitive to, the witness's preference regarding the gender and other profile factors of interpreters and interviewers.

67. As noted above at paragraph 33, the provision relating to persecution on the basis of gender — an innovation in the Statute — will be utilised to the fullest extent possible. The investigation will take into consideration various indicia, including discriminatory policies, violent acts selectively targeting a particular gender or persons of diverse SOGIESC, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect's background, and prior conduct that are indicative of relevant intent and adverse gender biases in the response of suspected groups or authorities to the crimes.

It should be noted that the 2022 ICC OTP Policy Paper on the Crime of Gender Persecution has already incorporated language which better includes LGBTIQ+ persons and those of diverse SOGIESC. For example, paragraph 77 of the 2022 Gender Persecution Policy should be considered in revising paragraph 58 of the 2014 Policy:

77. "When interacting with victims or witnesses, the interview team will address them with their preferred gender pronouns and employ gender and culturally sensitive language. The team will assess relevant profile factors of interpreters and interviewers, avoiding any stereotypes. The interview team and interpreters will undertake specific preparations for the interview process when engaging with victims or witnesses including those who identify as LGBTIQ+ persons. This may include familiarisation with

¹⁴ Leddy *supra* note 8 at 935.

euphemisms and other verbal, non-verbal or age-specific communication which may be used by interviewees to refer to acts of gender discrimination within the specific context of the investigation. They will also receive briefings and glossaries in order to familiarise themselves with the appropriate and accurate terms to describe acts of gender discrimination, violence and harms. The interview team will assess the witness's preference regarding the gender and other profile factors of interpreters and interviewers, avoiding any stereotypes.”

Incorporation of LGBTQI+ communities and those of diverse SOGIESC into the text of the policy is one important step. However, it is critical that the understanding of ‘gender’ throughout the policy be understood as including these groups. This is to say that where the Office of the Prosecutor implements the revised policy, that these groups be considered and appropriately included in practice. For example, where staff training on sexual and gender-based crimes is delivered (referenced throughout, but notably at section VIII(b)), this must include training on LGBTQI+ groups and those of diverse SOGIESC for a more informed investigation planning and interviewing process, as various sources confirm this status can be a risk factor for heightened vulnerability.¹⁵ The need for specialized training to avoid re-traumatization of this minority group is paramount – for example, to prevent conscious and unconscious biases from impacting questioning or interpretation of information provided, and to treat diverse survivors with dignity and respect with words and in a language they understand.¹⁶ The 2022 Gender Persecution Policy uses language which could be adapted. For example, at 74:

“Staff will receive briefings and be required to proactively familiarise themselves with local traditions, religious practices, customs, and cultural issues, including the status of women, girls, men, boys, and LGBTQI+ persons within this context.”

Underreporting of crimes remains one of the main challenges in conducting evidence-based needs assessments and providing gender-competent facilities and services. Victims of diverse SOGIESC fear the social consequences of reporting, which can range from stigma and re-traumatization to alienation from one's family, or even being killed. They may also fear legal repercussions due to anti-LGBTQI+ laws, up to and including life imprisonment and the death penalty. Some of the 66 countries that criminalize diverse sexual orientations and gender identities are countries in which the OTP has open investigations.¹⁷ These include: Uganda,¹⁸ Darfur,¹⁹ Kenya,²⁰ Libya,²¹ Burundi,²² Palestine,²³ Bangladesh,²⁴ Myanmar,²⁵ and Afghanistan.²⁶ Even in contexts where same-sex relations are not formally criminalised, it may still be the case that those of diverse SOGIESC face persecution or discrimination within the formal legal

¹⁵ ICRC Commentary to Geneva Conventions (III), art. 14 (2020); Mendez Principles on Effective Interviewing for Investigations and Information Gathering (May 2021), paras. 135, 140-142; UNITAD Field Guide to Trauma-Informed Investigations, at 53-54; Draft Murad Code, item 1.2.

¹⁶ Leddy *supra* note 8, at 938-939. <https://doi.org/10.1093/jicj/mqac039>

¹⁷ Human Dignity Trust website: <https://www.humandignitytrust.org/> (last accessed 26.6.23)

¹⁸ Notably, Anti-Homosexuality Act 2023.

¹⁹ Sudanese Penal Code 1991, sections 148, 151

²⁰ Kenyan Penal Code 1930, sections 162, 163, 165.

²¹ Libyan Penal Code 1973, sections 407, 408.

²² Burundi Penal Code 2009, Article 567 Same-Sex Sexual Relations

²³ British Mandate Criminal Code Ordinance 1936, Section 152(2) Sexual Acts Between Men

²⁴ Bangladesh Penal Code 1860, Section 377 Unnatural Offences – although the provision is not regularly enforced, the arrests of lesbian women and transgender women were reported in 2020.

²⁵ Myanmar Penal Code 1860, Section 377 Carnal Intercourse Against the Order of Nature

²⁶ Afghanistan Penal Code 2017, multiple provisions, including sections, 645,646, 649, 650, and local interpretation of Sharia through Article 130 of the country's Constitution.

system, or from non-state actors. The Policy must give careful consideration to what this means for the safety and protection of witnesses, as well as cooperation and external relations.

The heightened risk to LGBTQI+ individuals will increase the stress of participation in ICC proceedings and place them at greater risk of re-traumatization. While part of managing the stress caused by the process is ensuring that gender competent referral pathways exist to targeted psychosocial services for LGBTQI+ victims, there are also specific measures that must be taken to reduce the risk to LGBTQI+ victims and enable their participation. The Policy should enable confidential participation in investigations and trials where outing LGBTQI+ victims may put them in danger. This includes the need for confidential interview locations sufficiently removed from the community. The Office should also consult with local LGBTQI+ rights organisations and service providers, if in existence, to help manage the risks to LGBTQI+ youth and develop protocols that ensure confidentiality.

The OTP's duty of care to LGBTQI+ victims extends further than the interview process and should be inscribed into every aspect of the Office's mandate. Special consideration should be given to the situation of LGBTQI+ victims as regards:

- **Safe Houses:** Close cooperation between OTP and Victim Participation and Reparations Section is needed to ensure that protective measures are in place that are commensurate with the grave risk to LGBTQI+ victims, including removal to safe houses in case of imminent harm or threat of harm.
- **In-court special measures:** When called upon to testify in court, there should be a presumption that LGBTQI+ victims are entitled to give testimony as part of in camera proceedings, unless victims wish otherwise. Special measures such as the use of in camera proceedings protect LGBTQI+ victims from harm while also preserving their autonomy in deciding whether, how and when to come out.
- **ICC Protection Program:** The Policy should recognise the heightened risk to victims of diverse SOGIESC when participating in ICC proceedings, noting that LGBTQI+ discrimination and targeting are grounds for consideration of exceptional protection measures, including relocation and resettlement under the ICC Protection Program. Support to LGBTQI+ victims and witnesses through the ICC Protection Program should be available, in particular, when they reside in countries where anti-LGBTQI+ laws put them at risk of imprisonment or the death penalty.

Further, it should be recognised that discussion around diversity, equity, and inclusion does not end with LGBTQI+ groups and those of diverse SOGIESC. It may be appropriate to adapt the text of the policy to ensure a range of inalienable characteristics, such as age, disability, nationality, race, religion, are meaningfully accommodated. The topic of intersectionality is discussed at (d) below.

In addition to the suggested amendments above, review and amendment of other relevant ICC policies and manuals may be required to meaningful change. This would include, for example, the ICC Operations Manual.

d. Intersectionality

The new policy would benefit from engaging intersectionality more fully. The current version of the policy refers to intersectionality only once, at paragraph 27, noting that the Office of the Prosecutor will:

“Understand 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;”

A fuller discussion of intersectionality would improve the inclusiveness and usefulness of the policy by i) more accurately identifying structural drivers of organised violence and ii) by describing how the OTP’s intersectional gender analyses can be developed and undertaken - and thus become a model for other international and domestic practitioners.

i) Accuracy in Identifying and Charging Structural Drivers of Violence

A full consideration of intersectionality could be undertaken as part of a distinct section of the policy discussing the concept of gender (suggested above) and its relationship with the Rome Statute and the implementation of the mandate of the Office of the Prosecutor. This section could describe the relevance of intersectionality to identifying structural drivers of violence, including sexual and gender-based crimes, the impact of intersectional factors on victim experiences of crime, and perpetrators’ targeting of individuals on intersecting grounds to achieve political or military objectives.

Examples can be provided from the numerous cases in which the OTP has investigated or prosecuted the crime against humanity of persecution on various intersecting bases such as “ethnicity and/or religion”,²⁷ on political, ethnic, national, and religious grounds,²⁸ on “political, ethnic, and/or religious grounds”,²⁹ or “religious and/or gender grounds”.³⁰ For example, in the context of the Rohingya Crisis, targeted use of sexual violence against Rohingya women, leveraged both religious sensibilities and deeply entrenched gender roles and stereotypes to maximise damage against the Rohingya community as a whole. Girls and young women of child-bearing age were especially targeted for sexual violence. The intersecting identities of Rohingya women were thereby utilised to implement a state or organisational policy to attack the Rohingya civilian population. Similarly, while the *Al Hassan* case was an example of persecution charged on religious and/or gender grounds, the Pre-Trial Chamber also noted that persecution may have been motivated by skin colour, noting the targeting of dark-skinned women in Mali. Moreover, the current crisis in Afghanistan demonstrates the Taliban persecuting civilians on intersecting gender and political grounds.

The ICC OTP Policy on the Crime of Gender Persecution used language at 55 (during discussion of the elements of the crime of gender persecution) which could be adapted in discussing intersectionality as it relates to all sexual and gender-based crimes:

“Perpetrators may also commit a persecutory act based on multiple or intersecting grounds of persecution. Gender persecution may, and frequently does, intersect with and constitute multiple forms of persecution based on political, racial, national, ethnic, cultural, religious or other grounds that are universally recognised as impermissible under international law.”

ii) Development and implementation of intersectional gender analysis

²⁷ Decision Authorizing Investigation into the Situation in Bangladesh/Myanmar (ICC-01/1927), §110.

²⁸ Decision on the Confirmation of Charges, Gbagbo (ICC-02/11-01/11-656-Red), Pre-Trial Chamber I, 12 June 2014, §§ 204–205 and at 130; Decision on the Confirmation of Charges, Ble Goude (ICC-02/11-02/11-186), Pre-Trial Chamber I, 11 December 2014, §§ 122–123, and at 89.

²⁹ Corrected Version of Public Redacted Version of the Decision on the Confirmation of Charges, Yekatom and Ngaissona (ICC-01/14-01/18-403-Red-Corr), Pre-Trial Chamber II, 14 May 2020, at 102, 106.

³⁰ Rectificatif a’la Decision relative a la confirmation des charges, Al Hassan (ICC-01/12-01/18461-Corr-Red), Pre-Trial Chamber I, 13 November 2019, § 707.

The IIIM Strategy outlines relevant steps in undertaking an intersectional analysis. Similar content, tailored to the work of the Office of the Prosecutor should be incorporated into the revised policy. The IIIM Strategy notes, at 3C:

“The primary purpose of an intersectional analysis is to address the harms experienced at the overlap that might otherwise be overlooked... Failing to adopt an intersectional lens when addressing violence and harm can significantly reduce the possibility of effective and inclusive justice. It also means that victims/ survivors are not adequately or appropriately supported and protected. Adolescent girls, unmarried or divorced women, male victims/ survivors of sexual violence, persons with disabilities, and persons of diverse SOGI are among those who may have complex security and support needs on multiple intersectional factors.”

The same section describes considerations for incorporating an intersectional lens into its work, including through engagement of grassroots actors to improve dialogue with women and girls from affected communities, and to obtain unique insight into intra-communal dynamics and intersectional experiences. Similar reflections should be incorporated into the revised ICC policy. The ICC OTP Gender Persecution Policy offers language which could be utilised or adapted in this respect (at 19):

The Office will also pursue an intersectional approach to discrimination to fully reflect the inter-relationship between gender, age and other aspects of an individual’s identity or circumstances (such as race, ethnicity or social origin, Indigenous status, language, religion or belief, political or other opinion, nationality, culture, wealth, birth, health or other status, disability status, statelessness, status as a refugee or migrant, among other grounds), which may increase their vulnerability to persecution or other crimes, and to assist in planning of the Office’s operational activities.

3. Commentary on key criminal acts and new jurisprudence

The International Criminal Court plays a central role in the development of international criminal law. Key advancements have been made in sexual and gender-based crimes through the Court’s jurisprudence. The updated policy on sexual and gender-based crimes should incorporate recent case law, ensuring that these important developments are used to inform the OTP’s broader policy framework, and that of other prosecutorial or investigative bodies that look to the OTP as an example to follow. Additionally, the revised policy paper must engage with thinking around gendered crimes from beyond the case law of the Court – including thinking from within the Office of the Prosecutor and further afield.

a. Key Cases since 2014

i) ***The Prosecutor v. Jean-Pierre Bemba Gombo***

The Bemba case was an important landmark in the prosecution of the law around sexual and gender-based crimes. That the conviction of Bemba was overturned at appeal is all the more reason to discuss this case within the revised policy. A great deal of reflection and discussion has taken place since the 2018 appeals decision was issued, including around the rules of evidence and the role of command responsibility. It is accepted that a full discussion of these topics may fall outside the scope of the policy paper on sexual and gender-based crimes. However, it may be relevant to consider the analysis of the case in relation to the need for clarity and precision in charging sexual and gender-based crimes, insofar as this relates to the

steps to be undertaken by the Office of the Prosecutor. This is particularly borne out by paragraphs 98-119 of the Appeals judgment – the Prosecutor’s reliance on vague charges beyond the scope of confirmed charges was one factor in the acquittal of Bemba. The appeals chamber ruled that the Trial Chamber had erred when it convicted Mr Bemba of a number of acts, including five acts of rape, “which did not fall within the “facts and circumstances described in the charges” in terms of article 74 (2) of the Statute.”³¹ The Appeals Chamber held that a formal amendment of charges should have occurred were these charges to be brought). The revised policy paper should outline a strategy for the Office to pursue where there is a need to amend confirmed charges to accommodate newly identified sexual and gender-based crimes perpetrated by an accused, through use of Article 61(9) of the Rome Statute. In doing so, this section should recognise the complex nature of armed conflict and the challenges inherent in investigating and prosecuting sexual and gender-based crimes. The Office could set out circumstances in which it will seek to formally amend charges to incorporate additional conduct and steps that will be undertaken where it is too late for charges to be amended – both in terms of engagement with ongoing proceedings (i.e. how this information relates to the case at hand), and engagement with victims (i.e. how the Office will engage with/ recognise the individual victims of these crimes), or find other ways to include them in the trial (for example, as witnesses of contextual elements, and/or of the attack on the civilian population).

ii) *The Prosecutor v. Bosco Ntaganda*

It is critical for the revised policy to reflect on the success of the Ntaganda case and on key issues raised within the appeal judgment. In addition to being the first successful ICC conviction for sexual and gender-based crimes, Ntaganda established important precedents. Notable amongst these was the finding that crimes perpetrated against victims on the same side of a conflict as the perpetrator (in particular, young girls who were part of his armed group) could still amount to war crimes and crimes against humanity. This is relevant as it highlights a broader spectrum of gendered criminal conduct, which may otherwise be overlooked when considering sexual and gender-based crimes. This is especially important in considering the ICC’s role in the development of wider international criminal law, and its function as a complimentary body to national criminal courts.

iii) *The Prosecutor v Dominic Ongwen*

The conviction of Dominic Ongwen marks another important landmark in ICC caselaw on sexual and gender-based crimes. Ongwen was the first to be successfully convicted by the ICC for forced pregnancy and forced marriage. Charges 50 and 61 related to crime of forced marriage, an inhumane act of a character similar to the acts set out in Article 7(1) (a)-(j), as a crime against humanity. The successful conviction of these acts provides a template for how other sexual and gender-based crimes not enumerated within the text of the Rome Statute could be prosecuted through the use of the charge of an “other inhumane act” – a crime against humanity requiring the causing of great suffering or serious physical or mental injury. Referring to the Ongwen precedent, the revised policy should encourage creative and strategic thinking by prosecutors in making charging decisions.

b. Gender Persecution

In December 2022, the Office of the Prosecutor issued its Policy on the Crime of Gender Persecution. LAW is supportive of the strategy and would support its content into the revised

³¹ Prosecutor v Bemba (Appeals Judgment at 116)

policy on sexual and gender-based crimes. Appropriate reference should be made to the Policy on the Crime of Gender Persecution throughout the revised policy. In discussing Gender Persecution, and given the OTP's monitoring of the situation in Colombia for purposes of complementarity, it would also be appropriate to make reference to Case 005 of the Colombian *Jurisdicción Especial para la Paz*. In that case, the Chamber confirmed that the crime against humanity of gender persecution includes targeting persons on the basis of sexual orientation and gender identity.³²

c. Genocide

References to the crime of genocide within the 2014 Policy are limited. The Policy notes, at 31:

In view of the serious bodily or mental harm (and potential social stigma) associated with rape and other forms of sexual violence amongst targeted groups, such acts can cause significant and irreversible harm to individual victims and to their communities. The Office position is that acts of rape and other forms of sexual violence 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.

This framing restricts the understanding of how gender and the crime of genocide interact. Gender can play a role in all five of the physical acts of genocide. The use of sexual and gender-based crimes can be used in determining genocidal intent.

i) ***Gender and the physical acts of genocide***

Genocide is defined at Article 6 of the Rome Statute as:

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

Although many sexual and gender-based crimes, such as rape and other forms of sexual violence, will very clearly meet the definition of (b) Causing serious bodily or mental harm to members of the group,³³ such acts can also amount to the other enumerated genocidal acts:

(a) Sexual and gender-based violence can be used to as a means of killing an individual. This was seen, for example, in the context of the Rwandan Genocide; the ICTR held “Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself”.³⁴

³² Case No. 05, Acreditacion de las victimas CA-01, CA-02, CA-03, CA-04 y CA-05, Jurisdiccion Especial para la Paz, 14 April 2021 § 18.3; See also Leddy *supra* note 8 at 925-927.

³³ See, for example, *The Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 *The Prosecutor v. Alfred Musema (Judgement and Sentence)*, ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Judgement and Sentence)*, ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999

³⁴ *The Prosecutor v Akayesu*, International Criminal Tribunal for Rwanda (1998) at 732.

(c) The impact of sexual and gender-based violence may inflict on survivors conditions of life calculated to bring about its physical destruction in whole or in part. This is especially apparent in contexts where targeted sexual violence has been used at scale against multiple victims, inflicting significant trauma against the entire group. This was confirmed in the International Court of Justice case between Croatia and Serbia on the application of the Convention on the Prevention and Punishment of the Crime of Genocide.³⁵ In the ICTR case of Kayishema, the Trial Chamber held that rape amounted to a method of destruction which does not “*lead immediately to the death of members of the group.*”³⁶ In some contexts, sexual and gender-based violence is a factor leading to displacement, resulting in affected groups residing in dangerous or damaging conditions. Systematic expulsion from homes has consistently been identified within caselaw as an example of one of the physical acts of genocide falling within (c). In the case of Stakic, the ICTY noted that (c) also includes “*the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion.*”³⁷ The United Nations Independent International Fact-Finding Mission on Myanmar recognised both that “*State-sanctioned oppression and persecution and the repeated cycles of mass violence have forced unprecedented levels of Rohingya to flee Myanmar...The Rohingya have been pushed into these conditions through repeated cycles of forced displacement, causing grave and long-term disadvantage to their ability to lead a normal and constructive life, and contributing to their destruction as a group.*”³⁸ Sexual and gender-based violence perpetrated against the Rohingya is consistently identified as part of the pattern of persecution leading to this displacement.

(d) Sexual and gender-based violence may have the result of preventing births within a group. In some contexts, sexualised violence may be so severe that the reproductive capacity of the victim is destroyed due to physical injury or mutilation. Sexualised violence may also have the psychological impact preventing births – the victim’s relationship with sexual intercourse is damaged by their experience of violence to such an extent that they are no longer able to participate in sexual activities. In contexts where marriage is closely linked to sexual intercourse and reproduction, sexual and gender-based violence is also likely to have a societal impact: victims of sexual and gender-based violence may face increased difficulties in marrying (thereby preventing them from having children), or, where a victim is already married, sexual and gender-based violence may result in their rejection by their spouse.

(e) The forcible transfer of children is highly gendered – especially in contexts where gender roles are deeply entrenched. The removal of the child will significantly impact the parents, whose self-perception (and even gender identity) may be closely interwoven with their status and function as a parent, and will inherently impact the child, whose understanding of fundamental concepts such as family, security and, indeed, gender, is likely to be interwoven with their relationship with their parents. Examples of the gendered impact of forcible transfer of children can be seen in the context of the forced removal of Yazidi children by ISIS; Girls aged nine and older were taken as sex

³⁵ Republic of Croatia v. Republic of Serbia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Judgment, 3 February 2015

³⁶ Prosecutor v. Kayishema et al., ICTR Trial Judgment, 21 May 1999 (“Kayishema Trial Judgment”) para. 116

³⁷ ICTY The Prosecutor v Stakic, Trial Judgment (2003) at 517.

³⁸ UN Independent International Fact-finding Mission on Myanmar, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar* (A/HRC/39/CRP.2) (17 September 2018) at 1404.

slaves, while Yazidi boys over seven were taken to training basis, converted to Islam and trained to fight.³⁹

The medium and long-term impacts of sexual and gender-based crimes should also be considered through the lens of genocide. Even where physical wounds heal, the psychological impact of sexual and gender-based crimes may have a lasting impact on reproductive capacity or family planning (e.g., where a victim of sexual violence chooses not to have children because of their experience, irrespective of their physical or mental capacity to do so). Moreover, crimes/ acts of violence not defined as sexual or gender-based, may have a gendered impact which is not immediately apparent in the short-term.

ii) Sexual and gender-based crimes as evidence of genocidal intent

In addition to being a physical act of genocide, the use of sexual and gender-based violence may indicate genocidal intent (*dolus specialis*). Sexual and gender-based violence has no justifiable military purpose – it cannot contribute to military objectives and inherently falls outside the parameters of what is legally permissible. Its use inherently points to criminal intent. In contexts where sexual violence is used systematically against a targeted group, rather than sporadically or opportunistically, (i.e., a pre-conceived *modus operandi*) this can suggest that the intent of the perpetrator is to destroy that group in whole or in part. In such contexts, the perpetrator *must* be aware of the impact of sexual violence on individual victims and their community (both physical and psychological) and understand that in perpetrating such acts, they contribute to the destruction of that community.⁴⁰ It should also be noted that sexual and gender-based violence disproportionately impacts women and girls, who play a critical role in reproduction– that is to say the perceived continuation of a community is closely linked to the perceived ability of women and girls to reproduce. In this respect, systemic sexual and gender-based violence can clearly be framed as an attack on the continued existence of the victim community.

³⁹ Independent International Commission of Inquiry on the Syrian Arab Republic “They came to destroy”: ISIS Crimes Against the Yazidis* (A/HRC/32/CRP.2) (15 June 2016)

⁴⁰ Ibid, See also, Prosecutor v Akayesu (Trial Judgment) at 731.

About LAW

LAW is an independent, non-profit organisation comprised of human rights lawyers and jurists who specialise in providing legal information, assistance, and representation in fragile and conflict-affected areas. LAW has represented thousands of victims globally and currently support survivors in South Sudan, Somalia, Ethiopia, Uganda, Bangladesh/Myanmar, Sri Lanka, Lebanon, Syria and occupied Palestine. LAW works with diverse constituencies of stakeholders, first and foremost survivors, including survivors' groups that have come together to collectively seek justice and accountability. Our areas of collaboration and partnerships include strategic litigation, clients' representation, legal aid and assistance, capacity-building and technical advice, and research and advocacy. LAW works with, represents, and advocates on behalf of survivors of sexual and gender-based crimes around the world, including men, women, children and those of diverse SOGIESC of all ages. LAW supports survivors to engage and participate in truth seeking investigations and justice processes. We also build and disseminate the evidence on how conflict and fragility settings affect women and girls, men and boys, LGBTQI+ people, and barriers to them accessing support and services, as well as legal assistance and representation.