

Submission for ICC Prosecutor’s Policy on Gender-Based Persecution

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Introduction

On 28 January 1946, the International Military Tribunal in Nuremberg heard testimony from Marie Claude Valliant-Couturier, a former French resistance member who had been detained at Auschwitz. She was examined by French Prosecutor Charles Dubost about the treatment of women by the SS.

VALLIANT-COUTURIER: At Auschwitz there was a brothel for the SS and also one for the male internees of the staff, who were called ‘Kapo.’ Moreover, when the SS needed servants, they came accompanied by the Oberaufseherin, that is, the woman commandant of the camp, to make a choice during the process of disinfection. They would point to a young girl, whom the Oberaufseherin would take out of the ranks. They would look her over and make jokes about her physique; and if she was pretty and they liked her, they would hire her as a maid with the consent of the Oberaufseherin, who would tell her that she was to obey them absolutely no matter what they asked of her.

DUBOST: Why did they go during disinfection?

VALLIANT-COUTURIER: Because during the disinfection the women were naked.

DUBOST: This system of demoralization and corruption-was it exceptional?

VALLIANT-COUTURIER: No, the system was identical in all the camps where I have been, and I have spoken to internees coming from camps where I myself had never been; it was the same thing everywhere. [...] I believe that Auschwitz was one of the harshest; but later I went to Ravensbruck, where there also was a house of ill fame and where recruiting was also carried out among the internees.

DUBOST: Then, according to you, everything was done to degrade those women in their own sight?

Valliant-Couturier: Yes.²

The next day Dubost questioned Dr Alfred Balachowsky, a former Buchenwald prisoner, about the pseudoscientific experiments at that camp. ‘There were, at Buchenwald, a number of homosexuals, that is to say, men who had been convicted by German tribunals for this vice’, stated Balachowsky, who had

¹ I acknowledge the intellectual input of colleagues with whom I have co-authored and conversed with on the topic of gender-based persecution, particularly Lisa Davis, Dorine Llanta, Jonathan O’Donohue, Valerie Oosterveld, Adrienne Ringin, Indira Rosenthal, and Ahonaa Roy. However, I do not speak on any other person or institution’s behalf in this submission, and any errors are my own.

² Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946 (‘Blue Series’), 28 January 1946, 212–213.

been forced to work in the laboratories where the experiments were performed. ‘These homosexuals were sent to concentration camps, especially to Buchenwald, and were mixed with the other prisoners. [...] They wore a pink triangle to distinguish them.’³

These two testimonies, which offer glimpses into gender-based violence against women and homosexual men respectively, were not unique. In the 1940s, both the Nuremberg Tribunal and Tokyo Tribunal heard extensive evidence of gendered targeting – of the rape of civilian women and girls by German and Japanese soldiers; of forced medical experiments on homosexual men, pregnant Jewish women, and other prisoners, of the torture and murder of men on the Thai-Burma railway, and so on.

In both tribunals, the gendered basis of these crimes was obscured by the legal framework, as it would also be in the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). Persecution on ‘political, racial and religious’ grounds could be charged,⁴ and there was also (in the ICTY and ICTR) the possibility of charging acts of genocide against a ‘national, ethnical, racial or religious group.’ But the legal framework made no reference to gender. Meanwhile, evidence of targeting based on gender and intersecting grounds continued to pour into the ICTY and ICTR, prompting numerous feminist scholars to lament the gender blindness of international criminal law.⁵ Examples included large-scale sexual crimes against women and girls in the former Yugoslavia and Rwanda, and the killing of over 7,000 men and boys in Srebrenica, to name a few.

It was in this context that the Women’s Caucus for Gender Justice and like-minded states pushed for explicit references to ‘gender’ and ‘gender violence’ in the 1998 Rome Statute, including in the crime against humanity of persecution.⁶ The Caucus stressed that gender-based persecution was not limited to sexual violence, or to female victims, and that it often intersected with persecution on other grounds, explaining:

Gender-based persecution is involved, for example, when young boys are either killed to prevent their becoming soldiers or coerced and humiliated into becoming killers. It is involved when women are coerced into domestic servitude or suffer grave violation of their fundamental rights because they

³ Ibid, 29 January 1946, 309.

⁴ The Nuremberg Charter, ICTY Statute and ICTR Statute all recognise the crime against humanity of persecution on ‘political, racial and religious grounds’; the Tokyo Charter referred to ‘political or racial grounds’ only.

⁵ E.g. R. Copelon, ‘Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law’ (1994) 5 *Hastings Women’s Law Journal* 243 (‘Surfacing Gender’); C. Niarchos, ‘Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia’ (1995) 17(4) *Human Rights Quarterly* 629; K. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997) 393 (‘*War Crimes Against Women*’). For later analysis, see: D. Buss, ‘The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law’ (2007) 25 *Windsor Yearbook of Access to Justice* 3; C. Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press, 2013).

⁶ See: R. Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress, and Potential* (Cambridge University Press, 2019) 99–114.

are women, as well as then they are subjected to sexual and gender violence. Gender persecution may stand alone or be intertwined with other kinds of animus.⁷

The proposed reference to gender-based persecution led to a fierce debate at the 1998 Rome Conference, as detailed in Part 2.1 of this submission.⁸ But eventually, the delegates reached a compromise. ‘Gender’ was included as a ground of persecution in the Rome Statute, with a definitional clause stating:

For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.⁹

The ICC Office of the Prosecutor (OTP) has taken several initiatives to make use of this new the crime of persecution on ‘gender’ grounds. In its 2014 *Policy Paper on Sexual and Gender-Based Crimes* (henceforth ‘2014 Gender Policy’) the OTP stated that ‘the provision relating to persecution on the basis of gender — an innovation in the Statute — will be utilised to the fullest extent possible’.¹⁰ The Office has since sought and obtained charges of persecution on gender and intersecting grounds in three cases (*Al Hassan, Abd-al-Rahman and Said*), has identified evidence of gender-based persecution in at least two other situations (Nigeria and Afghanistan), and Prosecutor Khan has initiated a process to develop a policy on this crime, with the assistance of his Special Adviser on Gender Persecution, Professor Davis.

I offer this submission as part of that policy initiative, in response to Prosecutor Khan’s invitation for initial comments.¹¹ I do so with respect for the OTP’s strong internal expertise on this crime, and with appreciation of the opportunity to engage with the Office on this issue. I offer my views as an academic who has researched the crime of gender-based persecution for over a decade. Although some of this research has been collaborative, I do not speak on behalf of any co-authors or colleagues here.¹²

The submission has three parts. Part 1 outlines some ideas from beyond the ICC’s legal framework that might guide the OTP’s approach to defining the terms ‘sex’, ‘gender identity’ and ‘sexual orientation’. Part 2 comments on legal issues that may arise in the context of prosecuting of gender-based persecution. Part 3 considers the kinds of evidence may substantiate an intent to target victims on gender grounds.

⁷ Women’s Caucus for Gender Justice, ‘Gender Justice and the ICC’ (at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 July 1998) 18 <(on file)>.

⁸ C Steains, ‘Gender Issues’ in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357, 371–375; V Oosterveld, ‘The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* 55 (‘The Definition of Gender’); V Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ 16(4) *International Feminist Journal of Politics* 563 (‘Constructive Ambiguity’); L Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016) 44–47 (‘The Politics of Gender Justice’); Rosemary Grey et al, ‘Gender-Based Persecution as a Crime Against Humanity: The Road Ahead’ (2019) 17(5) *Journal of International Criminal Justice*.

⁹ Rome Statute, Art. 7(3).

¹⁰ ICC OTP, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014) [67] (‘Gender Policy’).

¹¹ ICC, [‘Press Release: The Office of the Prosecutor launches public consultation on a new policy initiative to advance accountability for Gender Persecution under the Rome Statute’](#), 21 December 2021.

¹² I note that, from 8 June to 8 September 2015, I interned in the ICC OTP. The views expressed herein are my own views, which have been developed independently of the OTP.

1. Guiding ideas

The arguments made in this submission are informed by a vast body of feminist and queer scholarship that examines the nature of gender,¹³ and by conceptions of gender in the field of human rights law. This section briefly outlines some key ideas from this broader intellectual context, with particular attention to ideas that may be relevant to the ICC OTP's forthcoming policy on gender-based persecution.

In feminist and queer scholarship, 'gender' is generally understood to mean widely-held ideas about masculinity and femininity, with consequences for the distribution of power and opportunities between people classified as 'male', people classified as 'female', and people outside that binary. It is understood to intersect with other variables, such as race and caste, leading to further inequalities.

This conception of gender is embedded in the United Nations (UN) system,¹⁴ and as noted in Section 2.1 of this submission, received broad support during the Rome Statute negotiations. It is also consistent with the interpretation of the Rome Statute's definition of 'gender' articulated in the OTP's 2014 *Gender Policy*, which provides a firm foundation for the forthcoming policy on gender-based persecution.

The OTP's 2014 *Gender Policy* also makes sparing reference to the terms 'gender identity' and 'sexual orientation', albeit without defining either term. It is suggested that the forthcoming policy on gender-based persecution defines both terms, and does so in a way that is informed by feminist and queer scholarship and is consistent with international human rights law¹⁵ and international refugee law.¹⁶

In broad brushstrokes, that would involve defining 'gender identity' to mean a person's self-identification relative to socially-recognised gender categories, such as male, female, or non-binary (as distinct from 'sex', meaning a person's assigned status as male, female, or intersex, based on certain anatomical, genetic and hormonal characteristics).¹⁷ This distinction between 'sex' and 'gender identity' is well recognised in

¹³ A detailed literature review of feminist and queer scholarship is not feasible here. However, some influential works include: H Charlesworth and C Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) (*The Boundaries of International Law*); PV Sellers, 'Gender Strategy Is Not Luxury for International Courts' (2009) 17(2) *American University Journal of Gender, Social Policy & the Law* 301 ('Gender Strategy Is Not Luxury'); N Menon, *Seeing Like a Feminist* (Zubaan/Penguin Books, 2012); C MacKinnon, 'Creating International Law: Gender as Leading Edge' (2013) 36(1) *Harvard Journal of Law & Gender* 105 ('Creating International Law'); R Connell and R Pearce, *Gender in World Perspectives* (Polity Press, 3rd ed, 2015); Dianne Otto, *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2018); L Davis, 'Reimagining Justice for Gender Crimes at the Margins: New Legal Strategies for Prosecuting' (2018) 24(3) *William & Mary Journal of Women and the Law* 513; Ahonaa Roy, 'Introduction' in Ahonaa Roy (ed), *Gender, Sexuality, Decolonization: South Asia in the World Perspective* (Routledge, 2020) 1.

¹⁴ UN Special Advisor on Gender Issues, '[Gender Mainstreaming: Strategy for Promoting Gender Equality](#)', August 2001. That definition of 'gender' has been replicated verbatim (or near verbatim) by other UN agencies, e.g. UN Women, '[Concepts and Definitions](#)', World Health Organization, '[Gender and Health](#)'.

¹⁵ Grey et al (n 8) 966–968.

¹⁶ V Oosterveld, 'Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution' (2006) 17(49) *Duke Journal of Comparative & International Law* 49.

¹⁷ There are differing views as to whether 'sex' is *also* a socially-constructed category. This question was the subject of Judith Butler's 1990 book *Gender Trouble*, which argued that the idea of 'gender', referring to the socially-constructed categories of 'masculine' and 'feminine', follows from a *pre-existing practice* of classifying people as biologically male or female.

the UN system,¹⁸ has been adopted in several jurisdictions,¹⁹ and is embedded in the 2006 ‘Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’.²⁰ Having untethered ‘sex’ and ‘gender identity’, it becomes possible to recognise people as ‘cisgender’ (meaning that their gender identity *aligns* with their assigned biological sex)²¹ or ‘transgender’ (meaning that their gender identity *deviates* from their assigned biological sex).

It would further entail defining ‘sexual orientation’ to mean a person’s sexual attractions and/or practices, relative to others. For example, an individual might favour sexual relations with persons of *one* particular sex or gender, or *no* particular sex or gender, or they might be asexual. Again, this would be consistent with the Yogyakarta Principles and with approaches in the UN system.²²

Persecution on the basis of gender identity and sexual orientation merits detailed attention in the OTP’s forthcoming policy on gender persecution, given the grave and global reach of this type of violence. The UN General Assembly and Human Rights Council have prohibited discrimination based on these grounds.²³ Yet due to entrenched prejudice in many cultures and legal systems, people whose sexual orientation or gender identity differs from the mainstream often face additional dangers, discrimination, and risks. This is so for people whose sexual orientation is (or is perceived to be) not heterosexual; and people whose gender identity does not conform to the dominant ideals.²⁴

The concepts of ‘sexual orientation’ and ‘gender identity’ are sometimes said to be distinct. For example, guidance published in 2018 the UN Office of the High Commissioner for Human Rights states: ‘[s]exual orientation *is not related* to gender identity’.²⁵ Such statements can be useful, insofar as they challenge inaccurate assumptions (such as the assumption that all homosexual men are effeminate). However, to

¹⁸ E.g. UN Office of the High Commissioner for Human Rights, ‘[Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice](#)’ (2018).

¹⁹ In Australia, for example, federal legislation outlaws discrimination on numerous grounds including ‘sex’ and ‘gender identity’, with the latter defined to mean ‘the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth.’ *Sex Discrimination Act 1984 (Cth)*, amended 2013, s 4.

²⁰ The Yogyakarta Principles are non-binding principles developed by human rights experts with a view to guiding the development of international law. They define ‘gender identity’ as ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.’

²¹ From the Latin ‘*vis*’ meaning ‘on the same side as’.

²² E.g. UN Office of the High Commissioner for Human Rights, ‘[Integrating a Gender Perspective into Human Rights Investigations: Guidance and Practice](#)’ (2018), 8. See also the Yogyakarta Principles, ‘Sexual orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’

²³ Since 2003, the UN General Assembly has repeatedly called attention to the killings of persons because of their sexual orientation or gender identity through its resolutions on extrajudicial, summary or arbitrary execution. For a list of relevant resolutions by the UN General Assembly and Human Rights Council, see: <https://www.ohchr.org/EN/Issues/LGBTI/Pages/UNResolutions.aspx>

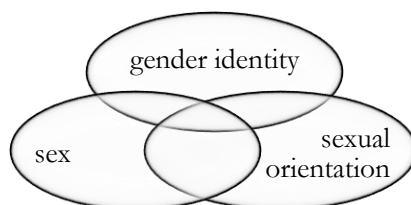
²⁴ See, for example: Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and violence against individuals based on their sexual orientation and gender identity, A/HRC/29/23, 4 May 2015.

²⁵ UN Office of the High Commissioner for Human Rights, ‘[LGBTI Equality: Frequently Asked Questions](#)’ (2018), 1 (emphasis added).

describe sexual orientation and gender identity are entirely unrelated is somewhat simplistic. Throughout the world, there are many different perspectives on the relationship between sex, sexual orientation and gender identity, and many gender categories, each with their history, vocabulary, and connotations.

For example, in India, legally recognised gender categories include male and female, as well as *hijra*, *kinner*, *aravani* and *jogta*. Those terms can communicate something about ‘gender identity’ (that the person does not identify as exclusively male or female), but they can also mean something about ‘sexual orientation’ (that the person participates in sexual activity that is non-heterosexual), and/or ‘sex’ (that the person is intersex, or has changed aspects of their biological sex since birth).²⁶ In the Pacific Islands, widely recognised gender categories include *mābū*, *fa’afafine*, and *fakaleitī*, as termed in Hawai’ian, Samoan and Tongan, respectively. These terms blur the lines between gender identity and sexual orientation, in the sense of relating to the person’s line of work, self-presentation, speech patterns and body language, as well as their sexual practices, attractions, and relationships.²⁷

In light of these and other examples,²⁸ it seems more accurate to define gender identity and sexual orientation as *related concepts*, with the caveat that persons of a particular gender identity will not all have same sexual orientation as one another. It is suggested that the OTP’s policy on gender-based persecution reflects this approach, by acknowledging that there are many perspectives on the relationship between sex, sexual orientation, and gender, and many different cultural expressions of gender, rather than defining these as three distinct and universally-recognised categories. This may be relevant in relation to crimes allegedly committed against *hijra* people in the Bangladesh/Myanmar situation, for example.²⁹



By taking this approach, the policy could more accurately represent the experience of gender non-conforming people throughout the world, and resist what social anthropologist Ahonaa Roy has described as ‘the mapping of the global North gender and sexuality theorizations onto the global South.’³⁰

²⁶ *The Transgender Persons (Protection of Rights) Act (India), 2019* (40/2019), s 2(k). See also Arpita Phukan Biswas, ‘The Iconography of Hindu(Ized) Hijras’ in Ahonaa Roy (ed), *Gender, Sexuality, Decolonization South Asia in the World Perspective* (Routledge, 2020) 84; Matthew Stief, ‘The Sexual Orientation and Gender Presentation of Hijra, Kothi, and Panthi in Mumbai, India’ 47(2017) *Archives of Sexual Behaviour* 73.

²⁷ Kalissa Alexeyeff and Niko Besnier (eds), *Gender on the Edge: Transgender, Gay, and Other Pacific Islanders* (Hong Kong University Press, 2014).

²⁸ E.g. S. Graham Davies, *Challenging Gender Norms: Five Genders among Bugis in Indonesia* (Thompson Wadsworth, 2007); Q. Driskill, *Asegi Stories: Cherokee Queer and Two-Spirit Memory* (University of Arizona Press, 2016); D. Vinh, V. Menh and R. Norris, *Research Report on Opinions, Attitudes and Behavior toward the LGBT Population in Cambodia* (Rainbow Community Kampuchea, 2015).

²⁹ ICC, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/ Republic of the Union of Myanmar](#), 14 November 2019, [86].

³⁰ Roy (n 13) 1.

2. Legal considerations

2.1 'Gender' as defined in the Rome Statute

Article 7(3) of the Rome Statute states:

For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

As the OTP and Special Adviser will be aware, there is some debate as to the meaning of this provision. Several authors argue that Article 7(3), if interpreted using the general principles of treaty interpretation and the specific interpretive principles found in Articles 21 of the Rome Statute, necessitates a social concept of gender.³¹ Others have understood it as equating gender with biological sex, seemingly focusing on the reference to the 'two sexes, male and female', and not on the qualifier 'within the context of society'.³² The difficult drafting history of Article 7(3) helps explain how this debate came about.

During the Rome Statute negotiations, many states insisted on a social conception of gender, in accordance with the prevailing understanding in feminist scholarship, and the practice of the UN system. According to Cate Steains, a member of the Australian delegation at Rome, these states argued that:

[T]he term 'gender' in the Statute must represent an accurate reflection of the current state of international law, and therefore needed to capture sociological aspects rather than mere biological differences. They pointed out that for the preceding decade the United Nations system had consistently used the term 'gender', rather than 'sex', in recognition of the fact that 'gender' encompassed biological *and* sociological aspects where 'sex' referred only to the biological distinctions between men and women. This group of countries, accordingly, argued in favor of a broad definition of gender capable of being interpreted to include the socially constructed roles of men and women.³³

A smaller bloc of states preferred to equate 'gender' with biological sex (specifically, with the sex categories of 'male' and 'female').³⁴ These states made little pretence about the reason for their position. There was apparently some reference to the difficulties translating 'gender' into other languages (notably, this concern was not raised in respect of other grounds, such as 'race' or 'ethnicity').³⁵ But the primary reason was ideological: a small but vocal minority of states were anxious that criminalising persecution on 'gender' grounds might require them to respect the rights of gender minorities (e.g. homosexual people),

³¹ E.g. Grey et al (n 8); Oosterveld, 'The Definition of Gender' (n 8); Davis (n 13) 536–544.

³² For a detailed analysis of relevant scholarship, see: Oosterveld, 'Constructive Ambiguity' (n 8).

³³ Steains (n 8), 373.

³⁴ The fact that this bloc was smaller is noted by Oosterveld in 'Constructive Ambiguity' (n 8), 566.

³⁵ Ibid.

which they were unwilling to do. They therefore sought to limit the Rome Statute’s definition of ‘gender’ to the sex categories of ‘male’ and ‘female’, with no mention of the social aspect.³⁶

Faced with this impasse, in the final days of the Conference, the Chair of the Working Group on Applicable Law tasked the delegates of two ‘pro-gender’ states (Canada and Chile) and two opposing states (Qatar and Saudi Arabia) with finding a compromise.³⁷ The definition found in Article 7(3) is the compromise that they reached. As Steains observes, ‘[e]ventually, the need for the definition to incorporate a reference to the “sociological” dimension of the term ‘gender’ was accepted.’³⁸

Oosterveld, who was part of the Canadian delegation, recalls that the words ‘the two sexes, male and female’ satisfied the smaller bloc, while the words ‘within the context of society’ satisfied the larger bloc who understood gender in social terms.³⁹ She has further recalled that definition was achieved using the negotiating tactic of ‘constructive ambiguity’, in which diplomats ‘adopt indefinite language to seemingly resolve disparate points of view’.⁴⁰ The task then falls to the Court to interpret that language in its judicial decisions.

The OTP has provided guidance in this respect in its 2014 *Gender Policy*, which states that Article 7(3) ‘acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.’ The ICC’s early jurisprudence on gender-based persecution accords with this approach. No Chamber has held that Article 7(3) defines ‘gender’ as a biological trait, and at least one has expressly interpreted Article 7(3) as referring to the social aspect of gender. That was Pre-Trial Chamber II the *Abd-al-Rahman* case, from the situation in Darfur. In its 2021 decision, that Pre-Trial Chamber confirmed a charge of persecution based on evidence that *janjaweed* aligned with the government of Sudan:

Targeted Fur males in Mukjar perceived as belonging to, or being associated with, or supporting the rebel armed groups. They targeted them on political, ethnic and gender grounds. The victims’ Fur ethnicity, *combined with the socially constructed gender role presuming males to be fighters*, underpinned the perpetrators’ perception of them as rebels or rebel sympathisers.⁴¹

I suggest that the interpretation of ‘gender’ advanced in the OTP’s 2014 Gender Policy, and followed in the *Abd-al-Rahman* confirmation decision, is correct. It is the only interpretation that gives effect to the terms ‘male and female, *within the context of society*’ within Article 7(3) of the Rome Statute. It is also consistent with the drafting history of the provision, and it accords with the prevailing interpretation of

³⁶ Oosterveld, ‘Constructive Ambiguity’ (n 8) 566. See also Steains (n 8), 372-375.

³⁷ Oosterveld, ‘Constructive Ambiguity’ (n 8), 567.

³⁸ Steains (n 8), 374.

³⁹ Oosterveld, ‘Constructive Ambiguity’ (n 8), 567.

⁴⁰ *Ibid*, 564.

⁴¹ ICC, *Abd-al-Rahman*, [Confirmation of Charges Decision](#), 23 November 2021, [80] (emphasis added).

‘gender’ by courts and treaty bodies enforcing international and regional human rights law, which is relevant under Articles 21(1)(b) and 21(3) of the Rome Statute.⁴²

2.2. Identifying the target group

The Elements of Crimes states that, besides the contextual element for crimes against humanity, there are four specific elements for the crime of persecution.

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.

Thus, the crime of gender-based persecution requires proof of persecution *on gender grounds*, as distinct from *against gender groups*. There is no need to identify a targeted ‘gender group’, in the sense of a group whose members all shared a common gender identity, that distinguished them from the perpetrators.⁴³ For example, as has been argued elsewhere:

[T]he identifiable group could be proponents of girls’ education, including men, as well as women. If this group was targeted due to a belief that only boys should be educated, such targeting could conceivably constitute persecution on gender grounds.⁴⁴

It is irrelevant if the victim(s) of persecution were not actually members of the relevant group or collectivity; what matters is that the perpetrator believed them to be part of that group.⁴⁵

2.3. Persecution ‘based on’ gender grounds

To satisfy the third element, the prosecution must establish that the perpetrators ‘targeted’ members of the relevant group or collectivity (in the sense of depriving such persons of fundamental rights, contrary to international law) ‘based on’ gender grounds. This element of gender-based targeting raises several issues for consideration in the forthcoming policy.

First, what does it mean to target the victims ‘based on’ gender grounds? In line with above analysis of the term ‘gender’, it is suggested that this means the perpetrator’s belief about what it means to be ‘male and female, within the context of society’ was one of the reasons that they targeted particular victims for

⁴² Grey et al (n 8).

⁴³ See Grey et al (n 8), 969-970.

⁴⁴ Ibid, 970.

⁴⁵ See: ICTY, *Krnjelac*, [Appeal Judgment](#), 17 September 2003, [185].

particular crimes. For example, when it appears that perpetrators have attacked schools attended by female students, based on their belief that women and girls should not receive a formal education, it is appropriate to consider charging that conduct as gender-based persecution among other crimes.⁴⁶

Second, does targeting on the basis of sexual orientation and/or gender identity amount to gender-based persecution under the Rome Statute? An affirmative answer to this question is justified. If Article 7(3) is understood in the way proposed above, then persecution on ‘gender’ grounds must include cases in which a perpetrator targets people for particular crimes because those people’s (real or imputed) sexual orientation and/or gender identity is inconsistent with the perpetrator beliefs about what is ‘correct’ for males and for females, respectively.

An example would be killing a man based on a belief that his appearance is too feminine for a male person, or a belief that his sexual relationships with other men are inappropriate for a male person.⁴⁷ The argument here is not that persecution on the basis of sexual orientation and/or gender identity is *analogous* to persecution on the basis of ‘gender’ [indeed, that argument would run afoul of Article 22(2)]. The argument is that persecution on the basis of sexual orientation and/or gender identity *is* persecution on the basis of ‘gender’, as defined in Article 7(3)

Should the Office choose to make this argument, it need not disregard the drafting history of the Rome Statute, which indicates that certain states had *hoped* that the compromise wording in Article 7(3) would preclude the ICC from prosecuting persecution on the basis of sexual orientation and/or gender identity. The hope of this small bloc is not binding on the Court. The Court’s role is to interpret the words that were *actually* included in the Statute, in line with the interpretive principles set forth in Article 21(3).⁴⁸

Third, does persecution by reason of (perceived or real) intersex status fall within the Rome Statute’s definition of persecution on ‘gender’ grounds?⁴⁹ This question received little attention during the Rome Statute negotiations. In their proposals for the definition of ‘gender’, states on both sides of the debate depicted sex as a binary category (‘male and female’ or ‘men and women’),⁵⁰ and this view is reflected in the wording of Article 7(3). It is suggested that the OTP consider this issue of intersex persecution further in its forthcoming policy, noting that Article 7(1)(h) refers to persecution on ‘political, racial,

⁴⁶ See Grey et al (n 8), 969.

⁴⁷ Ibid.

⁴⁸ In this respect, it is important to note a misleading statement in Steain’s chapter on the negotiating history. The chapter states: ‘Although many delegates felt that the second sentence [of Article 7(3)] was superfluous, it was ultimately included to forestall any implication that the issue of sexual orientation could be raised in connection with Article 7(3).’ Steains has confirmed that the editor inserted this statement without her consent, that if given the chance, she would have ‘repudiated this sentence in the strongest of terms as being a deeply biased view of the debate and factually incorrect.’ In fact, Steains had written: ‘[t]he indisputable fact of the matter is that during the negotiations in Rome there was *no consensus* as to whether or not the definition of gender should include sexual orientation.’ Oosterveld, ‘Constructive Ambiguity’ (n 8), 570 (emphasis original).

⁴⁹ ‘Intersex’, in this sense, refers to ‘sex’ rather than ‘gender identity’. It means having physical attributes that are not deemed to be exclusively male or exclusively female.

⁵⁰ E.g. Oosterveld, ‘The Definition of Gender’ (n 8) 63-65; Oosterveld, ‘Constructive Ambiguity’ (n 8), 566-567; Steains (n 8), 371-375.

national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law’.

Fourth, can persecution be committed on intersecting gender and other grounds? The answer is unambiguously yes. Beliefs about gender need not be the sole reason that the perpetrator(s) targeted the victim(s) in a particular manner. Rather, persecution can occur on multiple grounds. This was recognised by the Women’s Caucus during the Rome Statute negotiations (see Introduction). It is also consistent with ICC jurisprudence, for example in the *Ntaganda* case, the Trial Chamber noted in relation to persecution that ‘one such ground will suffice, although a combination of more than one may equally form the basis for the discrimination.’⁵¹

This point about persecution on intersecting grounds has implications for how a charge of gender-based persecution is expressed. In certain cases, it may be possible to identify the targeted group by reference to certain shared characteristics, and then argue that individuals within this group faced persecution on different grounds (e.g. certain victims in this group faced persecution on intersecting gender and ethnic grounds, whereas others faced persecution solely on ethnic grounds).

The ICC OTP has already begun to frame charges in this way already. An example can be seen in the *Al Hassan* case, from the situation in Mali. In Count 13, it has alleged firstly that members of the Islamist groups *Ansar Dine* and *Al-Qaida au Maghreb Islamique* (AQIM) targeted civilians in Timbuktu and surrounds whom they perceived as not adhering to their religious vision on religious grounds; and secondly, that they targeted women and girls within that civilian population on gender grounds (including by subjecting them to sexual violence and forced marriage, and by forbidding them from restricting their freedom of movement and freedom of assembly, subjecting them to a strict dress code, and severely punishing women for perceived infractions of these rules).⁵² Thus, the women and girls are alleged to have experienced persecution on both religious *and* gender grounds.⁵³

The issue of persecution on intersecting and gender grounds is one that merits explicit consideration in the OTP’s forthcoming policy on gender persecution.

3. Evidentiary considerations

For a charge of persecution under Article 7(1)(h), the prosecution must establish that the targeting was ‘based on’ certain grounds, meaning that the targeting was committed with a discriminatory intent.⁵⁴

⁵¹ ICC, *Ntaganda*, [Trial Judgment](#), 8 July 2019, [1009].

⁵² ICC, *Al Hassan*, [Version publique expurgée de la ‘Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud’](#), 2 July 2019, [882]-[974].

⁵³ See in particular: *Ibid*, [945]-[948], [1092].

⁵⁴ ICC, *Al Hassan*, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, [671]. See also: ICTY, *Tadić*, [Trial Judgment](#), 7 May 1997, [715]; ICTY, *Tadić*, [Appeal Judgment](#), 15 July 1999, [305]; ICTY, *Kupreškić*, [Trial Judgment](#), 14 January 2000, [632]-[636]; ICTR, *Nahimana et al.*, [Trial Judgment](#), 3 December 2003, [1071]; ICTY, *Krnjelac*, [Appeal Judgment](#), 17 September 2003, [184].

Evidence must be led to establish perpetrators acted with this discriminatory intent. In the *Al Hassan case*, the Pre-Trial Chamber noted that this intent can be inferred from the perpetrator's general attitude, as well as the circumstances surrounding the commission of the crime (*'L'intention spéciale peut se déduire de l'attitude générale de l'auteur du crime, ainsi que des circonstances entourant la commission de ce crime.'*)⁵⁵

When it comes to persecution on *gender* grounds, there is not yet a great deal of practice on leading such evidence. However, prior practice in charging persecution on *other* grounds offers potentially useful guidance.⁵⁶ The ICTY's jurisprudence on persecution is particularly well-developed – indeed, of the 110 individuals tried by the ICTY, 71 were charged with this crime.⁵⁷

3.1 Evidence of discriminatory statements

First, evidence of discriminatory statements by the perpetrator may be relevant to showing a discriminatory intent. The ICTY Appeals Chamber confirmed this in *Popović et al.*, stating (in relation to a charge of persecution):

The use of derogatory language in relation to a particular group – even where such usage is commonplace – is one aspect of an accused's behaviour that may be taken into account, together with other evidence, to determine the existence of discriminatory intent.⁵⁸

In that case, evidence of an intercepted conversation showed that defendant Ljubiša Beara had used the term *balija* (a derogatory word for Muslims), to refer to 400 Muslims who had been taken into detention, and that when told that some of the detained men were killing themselves, had stated 'excellent. Just let them continue, fuck it.'⁵⁹ The Trial Chamber relied on this evidence, *inter alia*, to find that Beara had an intent to persecute on political, racial or religious grounds.⁶⁰ The Appeals Chamber found no error in the Trial Chamber's limited reliance on Beara's use of derogatory language as evidence of his discriminatory intent.⁶¹

In the ICC, discriminatory statements have likewise been cited, together with other evidence, to establish an intent to persecute on particular grounds. For example, in *Ntaganda*, the accused was charged with persecuting people of non-Hema origin, particularly Lendu people, on ethnic grounds.⁶² The Trial Chamber found that the evidence established that charge,⁶³ and that finding was upheld on appeal.⁶⁴ In

⁵⁵ ICC, *Al Hassan*, [Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud](#), 13 November 2019, [671].

⁵⁶ See, in particular: L Baig et al, 'Contextualising Sexual Violence' in S Brammertz and M Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 2016) 172, 205–209; H Brady and Ryan Liss, 'The Evolution of Persecution as a Crime Against Humanity' in M Bergsmo, WL Chea and Ping Yi (eds), *Historical Origins of International Criminal Law* (Torkel Opsahl Academic EPublisher, 2015) 429, 536–540.

⁵⁷ Brady and Liss (n 56) 501.

⁵⁸ ICTY, *Popović et al.*, [Appeal Judgment](#), 30 January 2015, [713].

⁵⁹ ICTY, *Popović et al.*, [Trial Judgment](#), 10 June 2010, [1257].

⁶⁰ *Ibid*, [1331].

⁶¹ ICTY, *Popović et al.*, [Appeal Judgment](#), 30 January 2015, [713].

⁶² ICC, *Ntaganda*, [Confirmation of charges decision](#), 9 June 2014, [58], [142].

⁶³ ICC, *Ntaganda*, [Trial Judgment](#), 8 July 2019, [989]-[1024].

relation to the discriminatory intent, the Trial Chamber relied on numerous exhibits, including prosecution witness P-0019's statement that she heard UPC soldiers say 'Lendu are useless wild animals and we can do with them anything we want. They are not humans'.⁶⁵

These cases suggest that, in terms of establishing an intent to discriminate on gender grounds, statements that include sexist, homophobic, transphobic or similarly derogatory language may be relevant. These statements could be verbal or written, and could arise in numerous contexts including social media, propaganda, religious dogma, public or private conversations, among others. Expert evidence from cultural or language experts may also be relevant, to show that a term has a sexist, homophobic, or transphobic connotation.

The ICC OTP has already utilised such evidence to support charges of gender-based persecution on several occasions. One example is the *Al Hassan* case, which as noted above, includes a charge of persecution on gender grounds against women and girls in Timbuktu. The Prosecution cited numerous pieces of evidence to show that this targeting was based on gender grounds, including evidence that members of Ansar Dine and AQIM had made statements expressing discriminatory views about women,⁶⁶ as well as evidence of a clear pattern of violence against women and girls.⁶⁷ Similarly, in relation to Afghanistan, the Prosecution cited statements attributed to the Taliban, expressing discriminatory views toward women, to support an allegation of gender-based persecution.⁶⁸

Building on this practice, I suggest that the forthcoming policy recognises that evidence of sexist, homophobic, or transphobic statements can be valuable in establishing an intent to target a particular group on gender grounds.

3.2 Evidence of selective and systematic targeting

Second, evidence of selective targeting of people of a particular gender identity or sexual orientation may be relevant to establishing a discriminatory intent. Numerous ICTY cases support this point.⁶⁹ For instance in the *Krnjelac* case, there was evidence that only non-Serb detainees in the KP Dom prison were subjected to abuse (e.g. beatings, held in unhygienic conditions), whereas Serb prisoners were not. The Appeals Chamber accepted that this evidence was relevant to establishing that the non-Serb detainees had been persecuted on religious or political grounds.⁷⁰

⁶⁴ ICC, *Ntaganda*, [Appeal Judgment](#), [636].

⁶⁵ ICC, *Ntaganda*, [Trial Judgment](#), 8 July 2019, [1021].

⁶⁶ ICC, *Al Hassan*, [Version publique expurgée de la 'Version amendée et corrigée du Document contenant les charges contre M. Al HASSAN Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud'](#), 2 July 2019, [951]-[954].

⁶⁷ *Ibid*, [955].

⁶⁸ ICC, *Afghanistan*, [Public redacted version of "Request for authorisation of an investigation pursuant to article 15"](#), 20 November 2017, [118]-[119].

⁶⁹ See the analysis of the *Kvočka et al* case, *Krnjelac* case, *Brdanin* case, *Stanišić & Župljanin* case, *Milutinović et al.* case, and *Đorđević* case in Baig et al (n 56) 205–209.

⁷⁰ ICTY, *Krnjelac*, [Appeal Judgment](#), 17 September 2003, [181]-[188].

ICC Chambers have also used evidence of selective and systematic targeting to support an inference of a persecutory intent. For example, in *Ntaganda*, the Trial Chamber held that a charge of persecution on ethnic grounds was established based, *inter alia*, on evidence that the UPC (a primarily Hema group) carried out attacks on areas whose inhabitants were ‘predominantly Lendu’⁷¹ and that, while the UPC detained people of various ethnicities for questioning, ‘the majority of Lendu were killed after the questioning, while members of other ethnicities were released.’⁷²

These cases suggest that, where there is evidence that the perpetrators singled out people of a particular gender identity or sexual orientation for specific crimes, that evidence of a gendered pattern of victimisation can help to establish an intent to target the victims on gender grounds.

Such evidence may be particularly useful in cases where persecution on *intersecting grounds* is charged. For example, there may be evidence that the perpetrators committed different crimes against male and female members of an ethnic group (such as raping the women and girls, and killing men and boys). Such evidence could potentially be used to establish that gender was one of the grounds of persecution, even if there is no other evidence to establish that discriminatory intent⁷³

To some extent, the OTP has already adopted this approach. An example can be seen in the *Abd-al-Rahman* case, from the situation in Darfur. In that case, counts 21 and 31 allege that the perpetrators detained, tortured, and killed men of the Fur ethnic group in Mukjar and Deleig whom they perceived as rebels or rebel-supporters, based on intersecting ‘political, ethnic and gender grounds’.⁷⁴ To support its allegation that these victims were targeted on ‘gender’ grounds, the Prosecution relied primarily on evidence of the pattern of victimisation – namely, that the victims who were detained, tortured, and killed were all male. Based on the public court records, there appears to have been little other evidence to support the inference that ‘gender’ was a basis of persecution.⁷⁵

A second example can be seen in the *Said* case, from the situation in the Central African Republic. In that case, the Prosecution has alleged that the accused and other members of the Seleka coalition persecuted suspected supporters of President Francois Bozize on ‘political, ethnic, religious, and/or gender grounds’ by detaining and torturing them at the OCRB detention facility.⁷⁶ Based on the public court records, the inference that the perpetrators intended to discriminate on gender grounds seems to be based solely on evidence of ‘a clear pattern of gendered targeting’ showing that relevant victims were male.⁷⁷

⁷¹ ICC, *Ntaganda*, [Trial Judgment](#), 8 July 2019, [1014]-[1022].

⁷² *Ibid.*, [1016].

⁷³ R. Grey, ‘Gender-based Persecution against Men: the ICC’s *Abd-al-Rahman* Case’, *Opinio Juris*, 30 May 2021.

⁷⁴ ICC, *Abd-al-Rahman*, [Public redacted version of “Second Corrected Version of ‘Document Containing the Charges’”](#), 22 April 2021, [93]-[94], [136]-[137].

⁷⁵ *Ibid.* See also the transcript of the confirmation hearing: ICC, *Abd-Al-Rahman*, [Transcript](#), 24 May 2021, 66-91.

⁷⁶ ICC, *Said*, [Public Redacted version of “Corrected Version of Document Containing the Charges”](#), 1 December 2021, Counts 7 and 14.

⁷⁷ ICC, *Said*, [Public Redacted Version of “Pre-Confirmation Brief”](#), 8 December 2021, [193]. See also [192]-[200].

However, the OTP seems not to have made this same inference (that the perpetrators intended to discriminate on gender grounds) based solely on evidence of gendered targeting against women and girls.

For example, in the *Abd-al-Hassan* case, there is evidence of sexual crimes committed primarily (if not exclusively) against Fur women and girls in Bindisi, Kodoom, and surrounds.⁷⁸ These sexual crimes are included in the charge of persecution on ‘political and ethnic grounds’, rather than the subject of a separate charge of persecution on intersecting political, ethnic and *gender* grounds. Likewise, several other ICC cases contain evidence of pattern of targeting women and girls for sexual crimes, without naming gender as one of the grounds of persecution.

I respectfully suggest that the forthcoming policy recognises that evidence of a pattern of targeting women and girls for sexual crimes may, in most cases, serve as evidence that gender was one of the persecutory grounds. This would make visible the gendered ideology that contributes to widespread sexual crimes against women and girls. Moreover, it would align with the approach taken in the *Abd-al-Rahman* and *Said* cases, in which the Prosecution appears to have inferred an intent to persecute on gender grounds based primarily, if not solely, on evidence that victims of a particular sex or gender identity were singled out for particular crimes.

3.3 Evidence that victims were forced to adopt certain practices

Third, evidence that the perpetrators forced a victim to abandon practices that expressed the victim’s sexual orientation and/or gender identity may be relevant to establishing that the targeting was ‘based on’ gender grounds. Analogies can be drawn with the practice of the ICTY (for example, forcing Muslims to consume alcohol, in defiance of their religious convictions, was regarded as evidence of a persecutory intent)⁷⁹ and Extraordinary Chambers in the Courts of Cambodia (for example, evidence that Cham Muslims were barred from reading the Koran, were forced to eat pork, and that Cham women were forced to stop wearing headscarves, was used to support a finding of persecution on religious grounds).⁸⁰

These cases suggest that evidence that victims were forced to abandon expressions of their sexual orientation and/or gender identity, or to perform a *different* sexual orientation and/or gender identity to that of their own choosing, may be relevant establishing that the targeting was ‘based on’ gender grounds. This might include evidence that the victims were forced to change how they act or dress, or were forced to engage in sexual acts that were contrary to their sexual orientation.

Conclusion: Thank you to the ICC OTP, particularly Prosecutor Khan and Professor Davis, for this opportunity to engage with the process of developing a policy on gender-based persecution. I would welcome the opportunity to further discuss these points with the OTP.

⁷⁸ ICC, *Abd-al-Rahman*, [Public redacted version of “Second Corrected Version of ‘Document Containing the Charges’](#), 22 April 2021, [57]-[58].

⁷⁹ Baig et al (n 56) 206.

⁸⁰ ECCC, *Case 002/2*, [Trial Judgment](#), 16 November 2018, [3327]-[3332].