

**Submission to the Group of Independent Experts:
The Need to Center Gender in the Review of the International Criminal
Court and Rome Statute System**

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I. Introduction

Gender permeates the planning, commission, and resolution of criminal acts within the International Criminal Court’s jurisdiction. It is woven into perpetrators’ planning and commission of crimes, as well as victims’ (individual and collective) experience and recovery of acts committed against them. Accordingly, gender must be a central criterion in the group of independent experts’ review of the International Criminal Court (“ICC” or “the Court”) and the Rome Statute system.

Laudably, the Rome Statute was among the first international treaties to extensively address sexual and gender-based violence.¹ Moreover, from the beginning of her term ICC Prosecutor Fatou Bensouda has made it a priority to close the gender justice gap, as evidenced by her Policy Paper on Sexual and Gender-Based Crimes, the first ever such policy for an international court or tribunal.²

Despite these foundational pillars and priorities, in the 18 years of the Court’s operation there has only been one standing conviction on sexual violence.³ This submission highlights avenues for improving gender justice at varying stages of a case. It identifies opportunities for progress regarding staffing and prosecutorial strategies on case selection, prioritization, and investigation that hinder access to justice in these cases. Until gender is mainstreamed throughout all stages of ICC cases, the Court will be limited in its capacity to deliver justice.

II. Gender in Mass Atrocity Crimes

Perpetrators of mass atrocities leverage existing patriarchal perceptions of what it is to be a man or woman to increase the impact of their crimes on individuals and communities. They target people on the basis of the gendered roles they are perceived to inhabit. Most commonly, men and boys are viewed as heads of households, leaders, protectors, and guardians of the group’s identity; women and girls as wives, bearers of future life, and keepers of community’s and family’s honor.

These binaries inform the types of violence committed on the basis of gender. For instance, whereas men are frequently killed by gunshots, women are killed by sexual violence, slashings, and burnings. Men and boys are routinely singled out for “fast” killings—those that take place early in atrocities and tend to use execution-

¹ Elena Moreno, *Sexual and Gender Based Crimes and the International Criminal Court*, AMICC (Nov. 12, 2018), https://docs.wixstatic.com/ugd/e13974_87b9f85f05b2434482885a62fca23c53.pdf.

² Press Release, Office of the Prosecutor, ICC Prosecutor, Fatou Bensouda, launches Policy on Sexual & Gender-Based Crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow #EndSexualViolence (Dec. 9, 2014) (available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1073>).

³ Statement by UN Women Executive Director Phumzile Mlambo-Ngcuka on the conviction of Bosco Ntaganda by the International Criminal Court, <https://www.unwomen.org/en/news/stories/2019/7/statement-ed-conviction-of-bosco-ntaganda-by-the-international-criminal-court>

style means.⁴ Women and girls' deaths are often further removed in time from the initial waves of violence or are otherwise "slow." Non-lethal violence, including sexual and gender-based violence, is more likely but not exclusively committed against women. In crises where forced labor and enslavement are inflicted on people, sexual slavery and domestic labor are more likely to be committed against women while men are forced to do manual labor.⁵

Similarly, the animus behind the underlying atrocity-acts is frequently gendered, often reflecting misogynist attitudes indicating perpetrators' intentions to enforce proscribed gender roles and punish those who do not conform with the binary expectations, or evincing perpetrators' intentions to breakdown societal structures by weaponizing gender roles and stigma. Understanding the gendered hostility behind these acts helps to grapple with the complexity of the multiple forms of violence that mass atrocity crimes encompass.

To discharge its duty to hold perpetrators accountable for the full spectrum of violence that falls within the jurisdiction of the Court, the Rome Statute system must reckon with the gendered aspects of the crimes at all levels.

III. Review Cluster 3: Preliminary Examinations, Investigations, and Prosecutions

While gendered violence often fits within the jurisdiction of the Court, a trend in international criminal tribunals generally shows that acts most commonly committed against cisgender men are more likely to be investigated, charged, and ultimately yield convictions. Measures must be adopted to ensure this pattern is not continued at the ICC.

A. Structure, organization, management, staffing and working methods of the Office of the Prosecutor

In its Policy Paper on Sexual and Gender-Based Crimes, the OTP acknowledged the need to "strengthen its in-house expertise on sexual and gender-based crimes relating to women and girls, and men and boys."⁶ The policy relies on the Special Gender Adviser to the Prosecutor and the Gender and Children Unit to enhance institutional capacity, as well as through ongoing training of staff.⁷

Prosecutor Bensouda's policy is a crucial step towards improving staff competence on sexual and gender-based violence and more must be done to ensure that the commitments contained therein are codified and institutionalized. Access to justice for victims of gendered violence cannot be subject to the idiosyncratic policy priorities of particular OTPs and/or the political tides of OTP elections. As it currently stands, the Rome Statute allows the OTP to appoint special advisers on issues including gender violence.⁸ It does not, however, require that such a position be filled.⁹ As demonstrated by former Prosecutor Moreno Ocampo's choice not to appoint anyone to the role for the first five years of his term, there is no guarantee that the OTP will have a gender subject matter expert.¹⁰ Further, the position is on a voluntary *pro bono* basis, often

⁴ Adam Jones, *Does Gender Make the World Go Round? Feminist Critiques of International Relations*, 22 Rev. of Int'l Studies 405 (1996).

⁵ While certain types of violence are more frequently committed against certain genders compared to others, it is overbroad and improper to attribute any type of violence to a single gender or to essentialize all people of that gender's experiences.

⁶ ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, para. 14 (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> [hereinafter Policy Paper on SGBV].

⁷ *Id.*

⁸ Rome Statute art. 42(9).

⁹ Yvonne McDermott, *Article 42(9)*, LEXSITUS (June 30, 2016), <https://cilrap-lexsitus.org/clicc/42-9/42-9>.

¹⁰ Niamh Hayes, *La Lutte Continue: Investigating and Prosecuting Sexual Violence at the ICC*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 801, 838 (Carsten Stahn ed., 2015).

part-time. An optional position that is unlikely to be fully integrated into daily work is insufficient to carry the burden of ensuring that sexual and gender-based crimes are adequately investigated, charged, and prosecuted.

The Gender and Children Unit has been a consistent and important presence since its establishment in 2003.¹¹ It is, however, noteworthy that it is primarily a component of the investigative division only. A group of experts siloed in one apparatus of the Court is insufficient to fully integrate gender throughout the prosecutorial and jurisdictional components of the OTP's work. Moreover, it is important to ensure that individuals targeted on the basis of their gender and children are not treated as a monolith. Indeed, being grouped with children as a singular "vulnerable group," reinforces misogynist notions of subordination and infantilizes women.¹² Although the two factors certainly intersect and children may also be subjected to gendered violence, there are unique skills and competencies needed in each case. Further gender expertise and training throughout the divisions of the OTP can ensure that victims and survivors of all identities have the opportunity to see justice.

While it is not the duty of women to introduce matters of gender into investigative and prosecutorial strategy, the impact of activist feminist voices in court systems has motivated progress in recognizing gender violence in international crimes.¹³ Accordingly, the OTP and other sectors of the Rome Statute system should take measures to ensure that people of diverse sexual orientation, gender identity and expression, and sex characteristics are represented within the office and in leadership positions. The United Nations Gender Parity Strategy recommends temporary measures to recruit, retain, and promote women, including some gender-specific hiring calls, requiring justification for failure to yield a minimum percentage of female applicants, using parity targets for senior positions, and creating an enabling environment.¹⁴ This strategy should provide guidance to the Rome Statute system in its own recruitment and training activities.

B. Prosecutorial strategies, including on case selection and prioritization

The current policy on case selection uses objective criterion, such as the general principles of the Court and fundamental legal standards: jurisdiction; admissibility; and interest of justice. Importantly, the OTP's policy on sexual and gender-based crimes has identified many acts of sexual and gender-based violence that fit within the subject matter jurisdiction of the Court and the general principles of international criminal law.¹⁵ However, other of the specific criteria for case selection—gravity of the crime; degree of responsibility of perpetrators; and the charges—can benefit from a more thorough gender interpretation.

Gravity

The Rome Statute provides that the Prosecutor take into account the gravity of the crime committed and the interests of victims to support a finding that pursuing a particular case is in the interest of justice.¹⁶ The OTP policy further states that gravity is "the predominant case selection criteria" and the other criteria are inherently rooted in it.¹⁷

¹¹ ICC Office of the Prosecutor, Policy on Children, para. 5 (Nov. 2016), https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF.

¹² See, e.g., Sophie Namy et al., *Towards a feminist understanding of intersecting violence against women and children in the family*, 184 SOC. SCI. & MED. 40 (2017).

¹³ See, Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles," Berkeley J. Int'l Law, Vol. 21, Issue. 2, 288, [317], 2003.

¹⁴ United Nations, System-Wide Strategy on Gender Parity (Oct. 6, 2017), https://www.un.org/gender/sites/www.un.org/gender/files/gender_parity_strategy_october_2017.pdf.

¹⁵ Policy Paper on SGBV.

¹⁶ Rome Statute art. 53(1)(c).

¹⁷ Office of the Prosecutor, Policy paper on case selection and prioritization, para. 6 (Sept. 15, 2016) https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [hereinafter Policy Paper on Case Selection].

“Gravity” considers numerous factors of an attack—the temporal intensity, number of incidents, and geographic spread of the violations.¹⁸ “Counting” incidents of sexual and gender-based violence is uniquely challenging because of stigma and lack of reporting that is endemic of this type of crime.¹⁹ Victims must not be denied justice on the basis of this investigative challenge. The OTP should take into account underreporting and adjust numerical standards when comparing across different types of violence.

Finally, the term “interest of justice” is undefined in the Rome Statute.²⁰ Criminal justice is clearly envisaged by the term, but a broader interpretation including restorative justice is also arguably within the discretion of the Prosecutor.²¹ The Court has a significant role to play in sexual and gender-based violence to restore the affected communities due to the use of gendered norms to breakdown societal structures. It could further address the stigma, shame, and ostracization to which victims are subjected. The OTP should adopt this broader approach to evaluating the gravity of the crime.

This is particularly true in light of other factors in the OTP’s “gravity” analysis: the impact and brutality of the acts. Unlike earlier conceptions of gravity as being limited to physical harm, the Pre-Trial Chamber has found that considerations of “impact” of acts can include: psychological trauma, social stigma, and unwanted pregnancies resulting from sexual violence, as well as displacement and the separation of families.²² Regarding brutality of the acts, rape in the context of mass atrocities is often committed en masse, in public, or by multiple perpetrators. It is also often accompanied by mutilation, beatings, threats, and detention. In still other situations, threats and violence against family members are indicative of particular brutality. The devastating impact and brutality of these characteristics supports the need for a restorative view of justice.

Degree of Responsibility

Originally the OTP asserted that it would investigate and prosecute those “most responsible” for the acts in question. The OTP’s 2012-2015 Strategic Plan signaled a nuance within this strategy, which has been continued in the 2019-2021 Strategic Plan.²³ These plans articulate that due to the realities and difficulties associated with always pursuing those who are most responsible, the OTP would also consider utilizing an “upwards building” strategy where mid- and high-level perpetrators would be prosecuted with the goal of eventually getting to those most responsible.²⁴ Such a strategy is critical to securing a full picture of justice, particularly where sexual violence is part of a systemized campaign. A traditional shortcoming of prosecutions on sexual violence has been the tendency to view them as random acts with individual motivations rather than part of larger campaigns for which leaders must be held accountable.

Charges

The focus on charges is intended to ensure that the most serious offenses are tried and to take a representative sample that reflect the larger conflict. In its most recent policy on case selection and prioritization, the OTP committed to “pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based

¹⁸ Situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr., PTC II, ICC, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Kenya, ¶¶ 62, 190-191 (Mar. 31, 2010).

¹⁹ See, United Nations High Commissioner for Human Rights (OHCHR), *Integrating a Gender Perspective into Human Rights Investigations* (2018), https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective_EN.pdf.

²⁰ Rome Statute art. 53(1)(c).

²¹ Karel De Meester, *Article 53(1)(c)*, LEXSITUS (Aug. 23, 2017), <https://cilrap-lexsitus.org/clicc/53-1-c/53-1-c>.

²² *Situation in the Republic of Kenya*, Case No. ICC-01/09-19-Corr., PTC II, ICC, Decision Pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation of the Republic of Kenya, ¶¶ 194-196 (Mar. 31, 2010).

²³ Office of the Prosecutor of the Int’l Criminal Court, *Strategic Plan June 2012-2015*, ¶ 5(a) (Oct. 11, 2013), <https://www.icc-cpi.int/iccdocs/otp/OTP-Strategic-Plan-2013.pdf> [hereinafter Strategic Plan].

²⁴ Strategic Plan at ¶4(a).

crimes.”²⁵ This new policy is of paramount importance and must be supported at every level in the Rome Statute system.

C. Investigations and case-preparations (including investigative techniques, strategies and tools, financial investigations)

The OTP set a strategic goal to achieve a high rate of success in Court. While it rightfully motivates high performance, the focus on success and “the aim of being trial-ready as early as possible in the judicial proceedings”²⁶ could inadvertently limit investigation into sexual and gender-based crimes—investigation of which is often hindered by stigma and underreporting. It is not uncommon for prosecutions to develop a

tendency to focus their energy, resources, and expertise on cases that were perceived as winnable at the expense of capturing a full picture of the crimes committed. There is a lesson in the fact that 250,000-500,000 women were raped in the Rwandan genocide, and there are preciously few cases charging rape as genocide in the ICTR.²⁷ Of course, the interests of justice favor a high rate of success, but so too does it favor a full and robust representation of the crimes committed.

IV. Conclusion

International actors and legal standards must reckon with the complexity of mass atrocities—including the distinct ways in which they are planned and committed based on gender. The ability of the OTP to adequately pursue justice for these gendered crimes is dependent on staff that has expertise in gender analyses. Policies on case selection, prioritization, and investigation further influence the equitable outcomes. Strategies and criteria that are objective on their face may have the inadvertent effect of excluding sexual and gender-based crimes from being adequately investigated, charged, and prosecuted. Accordingly, the OTP must evaluate its policies and expand its interpretation to ensure it is inclusive.

²⁵ Policy Paper on Case Selection at ¶ 46.

²⁶ Strategic Plan at ¶ 14(a).

²⁷ Stephanie K. Wood, *A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious Crime in the International Criminal Tribunal for Rwanda*, 13 Columbia J. of Gender and Law 274, 299-301 (2004). *See also*, UN Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Report on the Situation of Human Rights in Rwanda, ¶ 16 U.N. Doc. E/CN.4/1996/68, Jan. 29, 1996 (discussing the methodology and difficulties in estimating the number of rapes during hostilities). *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Sept. 2, 1998.