


11-23-2022

Comments on the International Criminal Court Office of the Prosecutor's Draft Policy on the Crime of Gender Persecution Under the Rome Statute

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Recommended Citation

Sterio, Milena, "Comments on the International Criminal Court Office of the Prosecutor's Draft Policy on the Crime of Gender Persecution Under the Rome Statute" (2022). *Law Faculty Reports and Comments*. 11.

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**COMMENTS ON THE INTERNATIONAL CRIMINAL COURT
OFFICE OF THE PROSECUTOR'S DRAFT POLICY ON THE CRIME OF
GENDER PERSECUTION UNDER THE ROME STATUTE**

*Commentary offered by Public International Law Policy Group, Debevoise & Plimpton LLP,
and other pro bono law firm partners*

November 23, 2022

I. INTRODUCTION

The Public International Law and Policy Group (“**PILPG**”), Debevoise & Plimpton LLP, and other pro bono law firm partners offer the following comments in response to the International Criminal Court (the “**ICC**” or “**Court**”) Office of the Prosecutor’s (the “**OTP**” or “**Office**”) call for public consultation on its Draft Policy on the Crime of Gender Persecution under the Rome Statute (the “**Draft Policy**”).¹

The OTP’s excellent Draft Policy demonstrates its continued commitment to developing a comprehensive and gender-nuanced approach toward the investigation and prosecution of the crime of gender persecution. In March 2022, we submitted extensive comments in response to the OTP’s call for public consultation on the new policy initiative (the “**PILPG Commentary**” or “**Commentary**”).² We welcome OTP’s call for a second round of public consultation and engagement with its Draft Policy and are pleased to offer additional comments, thereby contributing to the development of the final policy.

In these comments, we first (II) commend the Draft Policy for its exceptionally comprehensive and progressive approach to prosecuting gender persecution, including in particular its explicit adoption of a gender-inclusive and intersectional perspective. We then offer recommendations regarding the steps the OTP can take to (III) further clarify the concepts of motive and intent in ICC proceedings, and (IV) strengthen victim participation procedures to ensure a just process and adequate reparations.

¹ International Criminal Court, Office of the Prosecutor, DRAFT POLICY ON THE CRIME OF GENDER PERSECUTION, dated 7 November 2022, available at <https://www.icc-cpi.int/news/draft-policy-crime-gender-persecution> (hereinafter “**DRAFT POLICY**”).

² See PILPG, Debevoise & Plimpton LLP, and Dechert LLP, “Comments on the International Criminal Court Office of the Prosecutor’s Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute,” dated March 2022, available at <https://www.publicinternationalallawandpolicygroup.org/s/Final-Commentary-to-ICC-OTP-Gender-Persecution-Policy.pdf> (hereinafter “**PILPG COMMENTARY**”); see also PILPG, “PILPG Comments on the International Criminal Court Office of the Prosecutor’s Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute,” available at <https://www.publicinternationalallawandpolicygroup.org/pilpg-icc-otp-gender-persecution-initiative>.

II. THE DRAFT POLICY’S GENDER-INCLUSIVE AND INTERSECTIONAL APPROACH

The Draft Policy’s conceptualization of “gender” beyond the male-female binary is a laudable and welcome approach—one that is not just consistent with, but also promises to be a leading contributor to, the progressive development of international human rights law on gender.

As noted in the PILPG Commentary previously submitted to the OTP, the Rome Statute’s definition of “gender” included the key phrase “the two sexes, male and female, *within the context of society*”—indicating that the drafters did not intend a strict binary understanding.³ In line with Article 21(3) of the Statute, which requires the Statute to be interpreted “consistent with internationally recognized human rights,”⁴ gender should be understood in the manner that has come to pervade modern international human rights practice—as both a biological *and* socially constructed concept.⁵

We commend the OTP for adopting precisely such an approach in its Draft Policy. At the outset, the Draft Policy expressly conveys the OTP’s understanding that:

Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.⁶

The OTP’s express reference to changing understandings over space and time is an important interpretive clarification, highlighting that context matters in each and every investigation and prosecution of gender persecution and related crimes.

We also commend the Draft Policy for expressly adopting an intersectional approach that “fully reflect[s] the inter-relationship between gender...and other aspects of an individual’s identity or circumstances.”⁷ Adopting an intersectional perspective was one of the key recommendations of our prior Commentary—one that has garnered increasing attention by the Court, other human rights bodies, and scholars of international law.⁸ We are pleased to see that the Draft Policy not only embraces intersectionality in principle, but also contains express

³ PILPG COMMENTARY at 10–11 (citing ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2002) (hereinafter “**ROME STATUTE**”), Art. 7(3) (emphasis added)).

⁴ ROME STATUTE, Art. 21(3).

⁵ See PILPG COMMENTARY at 11–13, nn. 77–85 (collecting sources).

⁶ DRAFT POLICY at 3.

⁷ *Id.* ¶ 29 (OTP will consider intersection between gender and factors that “may increase...vulnerability to persecution,” including “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, [and] status as a refugee or migrant”).

⁸ See PILPG COMMENTARY at 20–22, nn. 123–138 (collecting sources).

recommendations for incorporating intersectionality at every stage of an ICC proceeding—including charging decisions,⁹ trial,¹⁰ and sentencing.¹¹

In addition to its gender-inclusive and intersectional approach, we applaud the OTP for taking an unambiguous stance on cultural relativism. In particular, the Draft Policy states that “human rights violations prohibited under international law are not culturally determinative,” and that “breaches of fundamental rights cannot be ignored, dismissed or justified on the basis of culture.”¹² In our prior Commentary, we urged the OTP to “clarify that gender-based persecution concerns acts in violation of fundamental rights according to international law, and not local customs, national law, or the beliefs (religious or otherwise) held by perpetrators as to fundamental rights.”¹³ We commend the OTP for affirming that the fundamental right to be safe from gender persecution is non-derogable under the framework governing the Rome Statute.

We are also encouraged by the structural and procedural changes endorsed by the Draft Policy to ensure that gender persecution is not inadvertently overlooked in the OTP’s work. This includes the OTP’s repeated commitments to including a gender-persecution analysis in all of its cases,¹⁴ and to using cumulative charging as necessary to avoid subsuming gender persecution into related egregious crimes.¹⁵

Finally, we applaud the Draft Policy’s forward-looking approach. Acknowledging that the Draft Policy is not a conclusion but a starting point for continuing the fight against impunity for gender persecution, the Draft Policy duly recommends the implementation of staff training protocols, the creation of additional materials, and internal monitoring so that its guidelines can

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

¹⁰ *Id.* ¶ 81 (“The Office will further apply an intersectional analysis to gender persecution conduct, recognizing that such acts or crimes may also be motivated by additional and intersecting persecutory grounds under article 7(h).”).

¹¹ *Id.* ¶ 67 (“When assessing gravity, the Office will take into account whether there were multiple forms of persecution, the multi-faceted character of the act or acts...[and] will apply an intersectional approach to its assessment of the discriminatory basis for such acts.”).

¹² *Id.* ¶ 27.

¹³ See PILPG COMMENTARY at 22–23, nn. 139–149 (quotation at 23).

¹⁴ DRAFT POLICY ¶ 33 (OTP will “[e]nact a gender persecution analysis in all of its cases, and consider the cumulative effect of all acts of persecution and their related human rights violations”); *id.* ¶ 65 (expressing the need for a gender analysis in preliminary examinations “to highlight and address harms that are often obscured”); *id.* ¶ 73 (on training staff to apply gender analyses to investigations). See PILPG COMMENTARY at 5–7 (describing gender perspective and analysis previously recommended in International Criminal Court, Office of the Prosecutor, POLICY PAPER ON SEXUAL AND GENDER BASED CRIMES, dated June 2014, available at https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf (hereinafter “**2014 POLICY PAPER**”)).

¹⁵ DRAFT POLICY ¶ 26 (persecutory conduct should be analyzed both “as individual acts or crimes and in their cumulative effect”); *id.* ¶ 33 (OTP will “consider the cumulative effect of all acts of persecution...when analysing the severe deprivation of rights”); *id.* ¶ 40 (“The interests of justice require the Office to consider the cumulative effect of all acts of persecution[.]”); *id.* ¶ 82 (“charges for gender persecution [will be] brought wherever there is sufficient evidence”). See PILPG COMMENTARY at 17–18 (urging the adoption of a cumulative charging approach).

be translated into practice.¹⁶ We look forward to seeing the next steps that the OTP will take to continue its leadership in this important space.

Overall, the Draft Policy is impressively comprehensive. Critically, it clarifies the Office’s broad understanding of gender and other key terms; proposes important procedural improvements at all stages of ICC proceedings; addresses the need for further engagement with civil society and other stakeholders; proposes training and institutional development for OTP staff; and sheds much-needed light on one of the most egregious crimes under the Rome Statute. It is at once specific enough to effectively address longstanding difficulties in prosecuting gender persecution, and flexible enough to accommodate new dimensions to, or types of conduct that may constitute, the crime of gender persecution.

In the sections to follow, we address two areas where the Draft Policy could benefit from additional background research and guidance: (III) the distinction between motive and intent, which is often difficult to disaggregate in practice; and (IV) recommendations for developing a robust victim participation scheme at every step of an ICC proceeding. We hope that this information is helpful to the OTP, and trust that their inclusion in the Draft Policy will only strengthen its comprehensiveness.

III. DISTINGUISHING BETWEEN MOTIVE AND INTENT IN GENDER PERSECUTION

We commend the OTP for distinguishing between motive and intent when investigating and prosecuting acts that may amount to gender persecution.¹⁷ As the Draft Policy rightly recognizes, the two concepts “should not be conflated”;¹⁸ “personal motives...do not negate a discriminatory intent”;¹⁹ and each of motive and intent “must be carefully examined and unpacked when conducting a gender analysis.”²⁰ While personal motives “may serve as aggravating factors”²¹—and, if so, should be duly accounted for in sentencing and reparations—

¹⁶ See DRAFT POLICY ¶ 73 (OTP will provide staff training on how to “apply a gender analysis to investigations” and “identify patterns, red flags and factual indicators related to persecutory conduct”); *id.* ¶ 111 (OTP will provide “ongoing staff trainings on how properly to conduct Court examinations of cases for persecution contexts” and “on methodologies in the collection and analysis of evidence of gender persecution, presentation of in-court witness testimony, the relevant legal framework, and cultural and gender issues related to the situation and specific communities where the investigation is being conducted”); *id.* (OTP and Special Adviser on Gender Persecution “will create and maintain...(1) topic questionnaires, (2) elements guidelines, and (3) practical guidelines for implementation of this Policy, and materials specifically covering gender persecution crimes targeting men, women, LGTBQI+ persons and children of all ages”); *id.* ¶¶ 112–114 (OTP “will monitor and evaluate the implementation of this Policy”) (quotation at ¶ 114).

¹⁷ *Id.* ¶¶ 46–54.

¹⁸ *Id.* ¶ 48.

¹⁹ *Id.* ¶ 52 (emphasis omitted).

²⁰ *Id.* ¶ 54.

²¹ *Id.*

only intent to discriminate on grounds of gender must be affirmatively established to prove the crime of gender persecution.²²

While the Draft Policy duly recognizes this critical distinction, it also acknowledges that investigators, prosecutors, and judges may benefit from additional guidance on how to apply these two concepts in a variety of factual circumstances that may give rise to a charge of gender persecution. We therefore commend the OTP for suggesting staff training on identifying “factual indicators related to persecutory conduct.”²³ As a critical component of that training, we recommend that the OTP design protocols aimed at better understanding and applying motive and intent. Any such training should ideally incorporate (A) existing case law and scholarship on motive versus intent; and (B) recommendations and best practices for evidencing them at each stage of an ICC proceeding. In this section, we will address each of these in turn.

A. Motive v. Intent Under International Criminal Law

The importance of distinguishing motive from intent has long been recognized by international criminal tribunals²⁴ and scholars of international criminal law alike.²⁵ While the difference is not readily apparent as a matter of ordinary language, “[t]he most common way of distinguishing [them] is to hold that a motive...is ulterior intention—the intention with which an intention is done.”²⁶ In other words, “only the most immediate intention is called the intention in the criminal law”—i.e., the intent to persecute on grounds of gender—and not “any ‘ulterior’

²² ROME STATUTE, Art. 7(2)(g) (defining “persecution” as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”); INTERNATIONAL CRIMINAL COURT ELEMENTS OF CRIMES (2011), Art. 7(1)(h)(6) (“The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”).

²³ DRAFT POLICY ¶ 73.

²⁴ See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute of 7 March 2014, ¶ 1125 (“The perpetrator’s motive is [] irrelevant to such proof and for his or her act to be characterised as a crime against humanity, it suffices to establish, in view of the context, knowledge of the particular fact that his or her act formed part of the attack.”); *Prosecutor v. Bagilishema*, ICTR Case No. ICTR-95-1A-T, Judgment of 7 June 2001, ¶ 95 (“It is worth noting that the motives (as distinct from the intent) of the Accused are not of relevance to the legal constitution of a crime against humanity.”); *Prosecutor v. Kunarac*, ICTY Case Nos. IT-96-23 & 23/1-T, Judgment of 22 February 2001, ¶ 433 (“[T]he motives of the accused for taking part in the attack are irrelevant and [] a crime against humanity may be committed for purely personal reasons.”); *Prosecutor v. Kupreškić*, ICTY Case No. IT-95-16-T, Judgment of 14 January 2000, ¶ 558 (“Nor are the motives (as distinct from the intent) of the accused, as such, of special pertinence.”); *Prosecutor v. Tadić*, ICTY Case No. IT-94-1-A, Judgment of 15 July 1999 (hereinafter “*Tadić*”), ¶ 270 (“[T]he relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, ‘purely personal motives’ do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.”).

²⁵ See, e.g., Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317 (2003) (hereinafter “*Kaufman*”); Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT’L L. 49 (2006) (hereinafter “*Oosterveld*”); Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 N.W. J. H. R. 1, 20 (2021).

²⁶ Kaufman at 322–323 (internal quotation marks omitted).

intent [which] is called the motive”²⁷—*e.g.*, for “sexual gratification” or the “opportunity” to commit rape.²⁸

Unless motive is expressly listed in the criminal elements (*e.g.*, for certain hate crimes), the traditional view is that “the defendant’s motive is strictly irrelevant to liability.”²⁹ As one international criminal tribunal noted, however, this is “subject to the *caveat* that motive becomes relevant at the sentencing state in mitigation or aggravation of the sentence.”³⁰

Therefore, as the Draft Policy affirms, motive is not only irrelevant to liability, but motive on its own does not negate discriminatory intent.³¹ As long as the perpetrator “intended to act in a way which, in the normal course of events, would cause [the crime of gender persecution],” then intent is satisfied even if the perpetrator was motivated to commit the crime “for purely personal reasons.”³²

B. Evidencing Motive and Intent in ICC Proceedings

In its Draft Policy and any corresponding staff training protocols, the OTP has the opportunity to clearly elucidate the distinction between motive and intent as a matter of international criminal law. In this section we will divide practical suggestions by phase—investigation, trial, and sentencing—and recommend best practices for evidencing motive and intent at every stage of an ICC proceeding.

Investigation. At the investigation stage, OTP staff should be trained on implementing a subjective approach to gender persecution. The subjective approach is more nuanced and flexible, considering not only the objective characteristics shared by the victims (which can be difficult to determine in early stages, when victims are still being identified), but also how the perpetrator subjectively perceives his or her victims (which can be investigated as soon as a perpetrator is identified). As discussed in our prior Commentary to the OTP, the subjective

²⁷ *Id.* at 323; see also *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14-A, Judgment of 29 July 2004 (hereinafter “*Blaškić*”), ¶ 694 (“*Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act.”).

²⁸ DRAFT POLICY ¶ 49.

²⁹ Kaufman at 317; see also *supra* n. 24 (collecting cases).

³⁰ *Tadić* ¶ 269.

³¹ See DRAFT POLICY ¶ 52 (citing *Prosecutor v. Kvočka*, ICTY Case No. IT-98-30/1-A, Appeals Chamber Judgment of 28 February 2005 (hereinafter “*Kvočka*”), ¶ 463 (“[P]ersonal motives, such as settling old scores, or seeking personal gain, do not exclude discriminatory intent.”) (discussed in Oosterveld at 61–62); *Prosecutor v. Kunarac*, ICTY Case Nos. IT-96-23 & 23/1-A, Appeals Chamber Judgement of 12 June 2002 (hereinafter “*Kunarac*”), ¶ 153 (“[E]ven if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture[.]”)); see also *Prosecutor v. Krnojelac*, ICTY Case No. IT-97-25-T, Judgment of 15 March 2002, ¶ 102 (“The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”) (internal quotation marks omitted); *Prosecutor v. Dordević*, ICTY Case No. IT-05-87/1-A, Judgment of 27 January 2014, ¶ 887 (“[P]ersonal motive does not preclude a perpetrator from also having the requisite specific intent.”).

³² *Kunarac* ¶¶ 103, 153.

approach more accurately captures the persecution of marginalized, non-binary individuals that do not necessarily share any unifying “outward” characteristics.³³

Indeed, the Draft Policy reflects the OTP’s willingness to adopt a subjective perspective.³⁴ It notes, for example, that an attack against a school to prevent girls from attending may also victimize male teachers and staff; so long as the perpetrator is targeting the school based on gender, it does not matter that the male teachers and staff do not share outward characteristics with the female students.³⁵

The subjective approach is also consonant with the need to prove intent. After all, in every case it brings, the OTP will need to establish that the perpetrator subjectively held discriminatory intent, no matter how apparent or obscure the unifying characteristics of the victims. In the *Blé Goudé* case, for example, the Pre-Trial Chamber found evidence of persecution on political, ethnic, and religious grounds.³⁶ Rather than trying to find some unifying characteristic of the victims (many of whom were persecuted on multiple or intersecting grounds, whether real or perceived), attention could be paid instead to evidence of the subjective persecutory intent of the accused (*e.g.*, “that the attackers made reference to the victims’ perceived ethnicity or political affiliation” by, for instance, “referr[ing] to the adversaries as ‘rebels’”).³⁷

By explicitly adopting and providing staff training on the subjective approach, the OTP can better shape judicial outcomes.

Trial. At trial, the OTP should train its staff on how to clearly identify and distinguish intent evidence, which is necessary to establish liability, from motive evidence, which is relevant only at the sentencing phase as a mitigating or aggravating factor.³⁸

It may be difficult to disaggregate intent and motive evidence in practice, given that evidence as to the perpetrator’s state of mind is often only circumstantial. It may also be difficult

³³ PILPG COMMENTARY at 13–15.

³⁴ DRAFT POLICY ¶ 42 (“[P]ersons may be targeted for gender persecution when they are perceived to carry (gender) criteria prohibited by the perpetrator; or are perceived to not carry (gender) criteria required by the perpetrator.”); *id.* ¶ 44 (“It is...sufficient that the perpetrator perceived the person as a member or an affiliate of the targeted group” even if “the person does not personally identify” with that group.); *id.* ¶ 45, n. 60 (“Trans men and boys may also be targeted when persons are perceived as female by the perpetrator.”).

³⁵ *Id.* ¶ 43.

³⁶ *Prosecutor v. Charles Blé Goudé*, ICC-02/11-02/11-186, Decision on the Confirmation of Charges Against Charles Blé Goudé of 11 December 2014, ¶¶ 122–123.

³⁷ *Id.* ¶¶ 23, 97.

³⁸ DRAFT POLICY ¶¶ 46–49, 54, 98.

to disaggregate intent and motive evidence where, for instance, a perpetrator has mixed motives for acting.³⁹

Nevertheless, disaggregating intent and motive evidence wherever possible will facilitate successful prosecutions. Failing to disaggregate motive from intent at the trial level, for example, may prolong proceedings by requiring clarity at the appellate stage as to whether intent was satisfied notwithstanding seemingly contradictory personal motives.⁴⁰ Thus, we recommend that the OTP’s contemplated staff trainings include, at minimum: identifying and distinguishing each category of evidence; clearly referring to each category as such at trial; maintaining clear parameters of what is needed to satisfy the elements of gender persecution; and the preservation of motive evidence for appropriate phases of trial and sentencing.

For example, OTP staff could be instructed to avoid language such as, “the accused was motivated by a discriminatory intent,” so as not to confuse the terms. Rather, it would suffice to say, “the accused acted with a discriminatory intent.” Moreover, OTP staff should be trained not only on presenting intent evidence as such at trial, but also on explicitly making clear that motive evidence is separate from and does not negate intent.⁴¹ Consistent attacks against transgender individuals, for instance, evidence discriminatory intent on grounds of gender, even if any individual accused was also motivated by financial gain or power over his or her victims.

Sentencing. At the sentencing stage, the OTP should continue to distinguish the persecutor’s discriminatory intent—which by then has already been proven as an element of gender persecution—from evidence of additional ulterior motives. Motive evidence, which becomes relevant at this stage, may serve as mitigating or aggravating factors but do not vitiate the already-established intent.

For example, in *Delalić* the ICTY Trial Chamber explained that “motive is not an essential ingredient of liability” but “is to some extent a necessary factor in the determination of sentence after guilt has been established.”⁴² Certain motives may be aggravating factors, such as “cold, calculated premeditation, suggestive of revenge against the...victim”; other motives may be mitigating factors, such as “having committed the offence charged reluctantly and under the influence of group pressure,” or “demonstrated compassion towards the victim.”⁴³ Citing testimonial evidence from victims, the Chamber concluded that one of the defendants, Hazim Delić, had “a general sadistic motivation” and “was driven by feelings of revenge against

³⁹ See, e.g., *Prosecutor v. Rukundo*, ICTR Case No. ICTR-2001-70-A, Partially Dissenting Opinion of Judge Pocar of 20 October 2010, ¶ 10 (“[T]he Majority’s suggestion that Rukundo’s crime was merely ‘opportunistic’ does not fully appreciate the clear distinction between motive and intent[.]”); *Blaškić* ¶ 694 (“The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.”).

⁴⁰ See, e.g., *Kvočka* ¶ 463 (disentangling motive and intent at the appellate stage, with the Appeals Chamber finding that the perpetrator’s personally covetous motive did not negate that the victim was detained and persecuted on grounds of his religion).

⁴¹ See *supra* n. 31 for relevant case studies.

⁴² *Prosecutor v. Delalić et al.*, ICTY Case No. IT-96-21-T, Judgment of 16 November 1998, ¶ 1235.

⁴³ *Id.*

people of Serb ethnicity.”⁴⁴ At the same time, the Chamber considered “mitigating factors,” including the defendant’s arrangement for medical care for certain victims.⁴⁵ Those motives, however, were different than the discriminatory intent needed to establish liability: “Mr. Delić, by his acts, intentionally caused serious physical and mental suffering.”⁴⁶

Capacity Building. The OTP’s promising commitment to increased staff training on the nuances of prosecuting gender-based persecution offers an opportunity to highlight the distinction between motive and intent across investigations, trials, and sentencing. We urge the OTP to continue engaging with civil society groups and other experts on the important yet complex nuances between these concepts. Any such training could be complemented by user-friendly guidance on gathering, categorizing, and preserving intent- and motive-evidence for use in every stage of an ICC proceeding.

IV. DEVELOPING A ROBUST VICTIM PARTICIPATION SCHEME

As recommended in our prior Commentary to the OTP, the Draft Policy duly recognizes the special challenges that arise when interacting with victims of gender-based persecution.⁴⁷ It also acknowledges and elaborates on the “various measures” taken by the OTP “to protect the safety, physical and psychological well-being, privacy and dignity” of the victims of gender persecution.⁴⁸ Indeed, the ability of victims to safely partake in proceedings is central to achieving the ICC’s mandate of holding perpetrators accountable for the most egregious crimes, including and in particular the crime of gender persecution.

In this section, we urge the OTP to establish a robust scheme to ensure participation by victims as active agents—and not merely passive beneficiaries—of every phase of gender persecution prosecutions. The Draft Policy notes the OTP’s policy objective of “actively engag[ing] with States, civil society organisations and other key stakeholders, in order to continue to improve the effectiveness of preventing and addressing gender persecution.”⁴⁹ In light of the unique opportunity for victim participation at the ICC,⁵⁰ as well as the OTP’s commendable prior work on this topic,⁵¹ we recommend that the Draft Policy explicitly clarify

⁴⁴ *Id.* ¶ 1269.

⁴⁵ *Id.* ¶ 1270.

⁴⁶ *Id.* ¶ 1058. Hazim Delić was ultimately sentenced to 20 years’ imprisonment. *See* ICTY, “Hazim Delic and Esad Landzo Transferred to Finland to Serve their Prison Sentences,” dated 10 July 2003, *available at* <https://www.icty.org/en/press/hazim-delic-and-esad-landzo-transferred-finland-serve-their-prison-sentences>.

⁴⁷ *See* PILPG COMMENTARY at 15–19; DRAFT POLICY ¶¶ 29, 76–78.

⁴⁸ DRAFT POLICY ¶ 78.

⁴⁹ *Id.* ¶ 106.

⁵⁰ *See* ICC, *Understanding the International Criminal Court*, ICC-PIOS-BK-05-009/20_Eng, dated 2020, ¶ 70 (“Victims before the ICC have rights that have never before been granted before an international criminal court.”), *available at* <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>; PILPG COMMENTARY at 15 (“The Court is unique in the field of international criminal law in permitting victim participation in proceedings.”).

⁵¹ *See, e.g.,* International Criminal Court, Office of the Prosecutor, POLICY PAPER ON VICTIMS’ PARTICIPATION, dated April 2010, at 1 (“Under the Rome Statute, victims are actors of international justice rather than its passive subjects.”), *available at* https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf.

that victims are indeed “key stakeholders” in the fight to eradicate gender persecution and bring perpetrators to justice.

Thoughtful, comprehensive victim engagement is not only in line with the priorities articulated in the Draft Policy,⁵² but will also improve prosecutorial outcomes and the responsiveness of reparation, encouraging future victims to come forward. The forthcoming gender persecution policy is an opportunity for the OTP to build upon its past work and develop comprehensive victim participation policies at each stage of proceedings, including evidence gathering, charging decisions, and reparation.

Evidence Gathering. Early collaboration between the OTP and victims is especially critical in the gender persecution context. As the Draft Policy acknowledges, collaboration with victims can facilitate (i) the early establishment of discriminatory intent (or, for that matter, intent in general);⁵³ (ii) the bringing of charges that fully and accurately reflect the harm done;⁵⁴ and (iii) the design of effective and restorative forms of reparation that respond to the crimes committed, while also accounting for cultural practices and gender-specific impact.⁵⁵

As the OTP is well aware, evidence of sexual and gender-based crimes is not only exceedingly difficult to gather, but may also dissipate over time as victims and witnesses become unavailable, evidence deteriorates, and recrimination risk or social stigma coerce victims into silence.⁵⁶ The OTP rightly acknowledges these difficulties in the Draft Policy by advocating for additional training for investigators in trauma-informed interviewing and fact-gathering tactics.⁵⁷

In order to combat these risks, we urge the OTP to adopt and implement clear policies and guidelines for victims and their legal representatives to intervene as early as practicable during preliminary investigations into situations of gender persecution. Such policies might include, but are not limited to, public information campaigns announcing preliminary investigations at the earliest possible moment, with information on the crimes being contemplated and how victims and legal representatives can get in touch with OTP; early collaboration with civil society groups and experts who have been seized of the matter under investigation; and frequent and early on-the-ground investigations and victim/witness interviews.

⁵² See, e.g., DRAFT POLICY ¶¶ 33, 67 (urging a contextualized approach to investigations and examining persecution through an intersectional lens).

⁵³ See *id.* ¶¶ 10, 49–54, 94–95.

⁵⁴ See *id.* ¶ 84.

⁵⁵ See *id.* ¶¶ 100–101.

⁵⁶ See Veena Suresh, *The Victim’s Court? An Analysis of the Participation of Victims of Sexual Violence in International Criminal Proceedings*, 8(2) GRONINGEN J. INT’L L. 244, 257 (2021); WORLD HEALTH ORGANIZATION, *Ethical and Safety Recommendations for Researching, Documenting and Monitoring Sexual Violence in Emergencies*, at 14, Box 5 (2007).

⁵⁷ See DRAFT POLICY ¶¶ 73–77, 111.

Charging Policy. Historically, evidence of gender persecution has been used to support charges of persecution on other grounds, but not in its own right.⁵⁸ The OTP’s 2014 Policy Paper and 2022 Draft Policy both recognize this reality and commit to charging gender persecution as such and to pursuing cumulative charging where appropriate.⁵⁹ Cumulative charging in particular is a crucial, and welcome, step toward obtaining convictions and sentences that reflect the gravity of the conduct committed. We encourage the OTP to meaningfully expand on those commitments by codifying procedures to engage victims in all aspects of charging decisions.

For instance, the Draft Policy contemplates the compiling of investigative materials with guidance from the Special Adviser on Gender Persecution.⁶⁰ We urge the OTP and Special Adviser to consider including, in those materials, guidance on best practices for engaging victims at an early stage and working with special classes of victims, such as children. Such guidance may include, for example, a period of victim consultation prior to the submission of charges or a solicitation of proposed charges from victims and their representatives.⁶¹

Furthermore, and in line with its interest in enhancing both the clarity and “preventive impact of the Statute,”⁶² the OTP can also increase transparency into its charging policies by publicizing the criteria applied to determine whether gender persecution has been committed. Such a practice will inform key stakeholders as to the decision-making process of the Office and increase the quality of victim participation in future.

A charging policy informed by victim participation will benefit from the context and experience of those who have endured the offending conduct and therefore more accurately reflect the crimes suffered on the ground. It will also prioritize inclusivity at a stage early enough to inform how the case is tried, and eventually, how reparations are conferred, further protecting the interests and safety of victims. Indeed, the Myanmar case aptly illustrates the

⁵⁸ See, e.g., *Prosecutor v. Katanga*, ICC-01/04-01/07-T-336-ENG, Closing Statements Transcript of 15 May 2012, at 7 (evidence of forced pregnancy presented at trial but not charged); *Prosecutor v. Katanga*, ICC-01/04-01/07-T-206-Red, Trial Hearing Transcript of 19 October 2010, at 17 (same for evidence of genital mutilation); *Prosecutor v. Katanga*, ICC-01/04-01/07-T-80-ENG, Trial Hearing Transcript of 24 November 2009, at 25 (“All these women were victimised on the basis of their gender. They were attacked in particular because they were women.”). See also *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo of 15 June 2009, ¶¶ 297–300, 302, 501 (Pre-Trial Chamber striking certain charges as cumulative of the rape charge); *Prosecutor v. Bemba*, ICC-01/05-01/08-3636-Red, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III’s Judgment of 8 June 2018, ¶ 196 (Appeals Chamber acquitting the accused in part because the conduct proved at trial was beyond the scope of the confirmed charges); *Prosecutor v. Lubanga*, ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito of 10 July 2012, ¶¶ 21–23 (arguing that evidence of sexual violence should qualify as aggravating sentencing factors notwithstanding non-conviction on such grounds).

⁵⁹ 2014 POLICY PAPER ¶ 7; DRAFT POLICY ¶¶ 83–84.

⁶⁰ DRAFT POLICY ¶ 111 (investigative materials to include topic questionnaires, elements guidelines, practical guidelines, and guidelines specific to special classes of victims, including LGBTQI+ persons and children).

⁶¹ While the ICC Rules of Procedure contemplates a notification to victims of the confirmation of charges hearing, the OTP has the opportunity to clarify and strengthen victims’ opportunity to participate even prior to being notified of the hearing. See RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT (2019), Rule 92 (3).

⁶² DRAFT POLICY ¶ 19.

importance of such policies. In that case, early engagement with and submissions by the victims' legal representatives in the pre-situation phase proved instrumental to expanding the scope of the crimes under investigation to include gender-based persecution, with the Court citing directly to those submissions in its decision on jurisdiction.⁶³

Reparations. The OTP's emphasis on reparations for gender-based persecution is a commendable addition to the Draft Policy.⁶⁴ Any reparation-specific goal, however, cannot be meaningfully realized without full victim participation. A holistic view of victim involvement at every stage of the process is crucial to ensuring just reparations, including by ensuring a more inclusive and reflective approach to the victim class and recognition and acknowledgment of those that have suffered.

The Draft Policy provides an opportunity for the OTP to strengthen not only the ICC's mandate, but also its legacy as a victim-focused institution. Consultation with victims informs every aspect of a proceeding, from protection and evidence gathering, to charging, to conviction and sentencing. Beyond shaping positive judicial outcomes, participation is valuable in its own right: It affords victims a degree of recognition that in itself is a component of reparation.⁶⁵

V. CONCLUSION

The Draft Policy promises to be a seminal contribution not only to the OTP's policy and practice and the ICC's jurisprudence on gender persecution, but also to the development of international criminal law generally. Building on its prior work, including the 2014 Policy Paper, the OTP is well placed to develop policies and procedures that protect historically marginalized and oppressed groups, deliver justice that accurately reflects the depth and breadth

⁶³ See *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-RoC46(3)-01/18-37, Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute of 6 September 2018, ¶¶ 74–79 (establishing that the Court would have jurisdiction over gender-based persecution, given that “part of [the] crime (i.e. the cross-border transfer) [took] place on the territory of a State Party”); ICC-01/19-27 14-11-2019, 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 of 14 November 2019, ¶ 109 (“[As] confirmed by victims['] representations [and] based on the available information[,] the Prosecutor could reasonably believe that the targeting may have been based on ethnic and/or religious grounds.”); Fatou Bensouda, Keynote Remarks at SAIFAC Conference, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* 2, 5 (2019) (noting that “sexual and gender-based violence pervade the contexts in which the Court operates,” including in Nigeria and Myanmar); Wayne Jordash & Uzay Yasar Aysev, “Victim Participation in the Pre-Situation Phase: Insights from the Pre-Trial Chamber's Rohingya Decision,” in *Victims at the Center of Justice: From 1998 to 2018: Reflections on the Promises and the Reality of Victim Participation at the ICC*, FIDH – INT'L FED. HUM. RTS. 13–21 (2018).

⁶⁴ DRAFT POLICY ¶¶ 100–103.

⁶⁵ In line with the ICC's recognition that reparation may include “monetary compensation, return of property, rehabilitation, medical support, victims' services centres, or symbolic measures such as apologies or memorials,” the chance for a victim's voice to be heard is both symbolic and practical, as it allows victims to speak their truth and preserve persecutory conduct in the historical record, facilitating convictions and concrete reparations in future. See ICC, Victims, last accessed 22 November 2022, available at <https://www.icc-cpi.int/about/victims>.

of the gender persecution suffered, and shed light on a crime that has to date received only limited attention.

As it finalizes the Draft Policy for publication and adapts its policies into practice, we urge the OTP to maintain its focus on (i) articulating the distinction between motive and intent in gender persecution, and (ii) engaging fully with gender persecution victims at every stage of a prosecution. In doing so, the OTP can more effectively continue to deliver on the Rome Statue's promise of ending impunity for the world's most serious crimes.

VI. ABOUT THE AUTHORS

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The Public International Law & Policy Group is a global pro bono law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution.

Since its founding over 25 years ago, PILPG has provided legal assistance with over two dozen peace negotiations, and over two dozen post-conflict constitutions, and has assisted every international and hybrid criminal tribunal, as well as helped to create a number of domestic transitional justice mechanisms. Over the past 25 years PILPG has operated offices in 25 countries and annually provides \$20 million worth of pro bono legal assistance.

PILPG represents a diverse array of pro bono clients including states, sub-state actors, opposition groups, self-determination movements, civil society, and marginalized actors, including women and youth.

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