



## **Joint Submission to the Office of the Prosecutor for the International Criminal Court on a New Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute**

March 18, 2022

In response to the public consultation of the Office of the Prosecutor of the International Criminal Court (OTP) on a new policy initiative “to advance accountability for Gender Persecution under the Rome Statute,” CREA, Sexual and Reproductive Health Matters, and the Global Health Justice Partnership of Yale Law School and the Yale School of Public Health,<sup>1</sup> provide this submission for consideration in the development of the policy.

This submission seeks to call the attention of the OTP to the value of comprehensive gender analysis (what we call ‘Gender 360’) in strengthening the role of the OTP with regard to the crime of gender persecution. Gender 360 analysis can help to ensure that the concept of gender is fully and inclusively understood, situating a comprehensive analysis of the risk and harms of gender persecution in an intersectional rights agenda that captures ‘gender’ within and across race, age, place, religion and disability, among key axes of investigation. This analysis can help to ensure that this work does not neglect already marginalized groups facing gender persecution.

In Section I, we present the gender 360 approach, and explore three elements in particular that can enable critical meaning-making and victim visibilization in fact-finding, evidence collection, case construction and prosecution related to gender persecution. It explains how gender 360 provides intersectional analysis attentive to the conditions and systems that give rise to crimes, it provides a support for thinking beyond the two-sex binary, and it allows analysis to more fully capture non-sexual gender persecution. We also highlight the links between this gender 360 analysis and rights promotion: as this submission supports the work of the OTP, we also seek to critically reflect on the use (and potential for abuse) of criminal law in overall rights promotion.<sup>2</sup>

In Section II, we consider how adopting gender 360 analysis can enhance complementarity analysis, and support the OTP in creatively engaging its policy of positive complementarity, including its structural role related to normative developments in national standards. We discuss potential expansion of the OTP’s conception of complementarity using a gender 360 approach, and present three substantive examples where OTP practices can substantially advance understanding of gender persecution and the violation of fundamental human rights:

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<sup>1</sup> CREA, <https://creaworld.org/>; Global Health Justice Partnership of Yale Law School and Yale School of Public Health, <https://law.yale.edu/ghjp>; Sexual and Reproductive Health Matters, <http://www.srhm.org/>.

<sup>2</sup> CREA, AMNESTY INTERNATIONAL, RESURJ, IWRAW-ASIA PACIFIC AND THE GLOBAL HEALTH JUSTICE PARTNERSHIP OF YALE LAW SCHOOL AND THE YALE SCHOOL OF PUBLIC HEALTH, JOINT SUBMISSION TO UN SPECIAL RAPporteur ON VIOLENCE AGAINST WOMEN: THEMATIC REPORT ON “RAPE AS A GRAVE AND SYSTEMATIC HUMAN RIGHTS VIOLATION AND GENDER-BASED VIOLENCE AGAINST WOMEN” (May 21, 2020).

enforced sterilization; rape, particularly rape of cisgender men and gender non-conforming persons; and enforced prostitution.

In Section III, we discuss how to best position the work of a global criminal court on gender persecution, alongside other crimes, relative to the wide range of other rights promoting interventions and policies necessary to prevent, redress and repair gender-based violations of fundamental rights.<sup>3</sup> This may include systemic reforms of legal systems, education and housing, health systems and services, among other key steps.

In Section IV, we conclude with recommendations drawn from the analysis of this submission.

We hope that this submission prompts and promotes critical conversations about how gender, sexed bodies, and sexuality are linked by distinct systems of regulation, such that both sexual and non-sexual crimes of gender persecution receive adequate attention. Further, we hope that it will support the OTP to reflect and complement rights-based global efforts to alter the conditions of power that put some people at particular risk of atrocities and violations of fundamental human rights.

#### **I. Gender 360: How a Comprehensive and Intersectional Understanding of Gender Can Advance Analysis of Gender Persecution**

The term ‘gender’ requires a comprehensive and intersectional scope in order to ensure the full understanding of how gender norms and stereotypes produce risk of atrocity, set out persons for targeting, and inhibit effective redress. A more comprehensive scope is attentive to the risk that some crimes - and many survivors and victims of gender-based crimes - might otherwise be overlooked by the OPT under siloed gender analysis and response. This is a particular risk for differently gendered persons, who may be differently visible - or even invisible - and the harms against them not recognised, imperiling also “their rights to participate in peace and transitional justice mechanisms.”<sup>4</sup>

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<sup>3</sup> Throughout this submission we refer to “fundamental human rights” as a core part of the definition of persecution under Article 7(2)(g), and recognize that current international human rights law includes the full range of sexual and reproductive rights: for an examination of the attempt to limit fundamental rights through reframing, see Aya Fujimura-Fanselow, Jayne Huckerby and Sarah Knuckey, *An Exercise in Doublespeak: Pompeo’s Flawed “Unalienable Rights” Commission*, JUST SECURITY (July 29, 2020), <https://www.justsecurity.org/71705/an-exercise-in-doublespeak-pompeos-flawed-unalienable-rights-commission/>.

<sup>4</sup> Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20(1) NORTHWESTERN J. HUM. RTS. 1 (2021).

We note that charges for gender persecution have been brought in *Al Hassan*,<sup>5</sup> *Abd-al-Rahman*<sup>6</sup> and *Said*,<sup>7</sup> and notably that *Abd-al-Rahman* includes persecution on the basis of presuming males to be fighters. We also note that gender persecution charges were sought in *Mbarushimana* but the case as a whole did not proceed for evidentiary reasons,<sup>8</sup> and that commentators have highlighted previous cases where gender persecution was likely present, but not charged.<sup>9</sup>

We seek to support, expand and, in some cases, challenge the OTP as it continues its critical work – across investigations, evidence collection, case strategy and prosecution – underpinning the ICC’s role as the leading international criminal tribunal to evaluate the specifically gender-based deprivation of fundamental rights and the definition of “gender” as a ground for persecution.<sup>10</sup> To this end, we propose an approach that understands the structure of gender as fully and always relational and contextual, and that engages gender analyses more substantively with the ideas and systems of power which work together to produce gendered roles and rules for all persons.<sup>11</sup> To capture this approach we use the phrase “Gender 360”.

#### A. *Emphasizing Intersectional Power Analysis in Relation to Gender Will Strengthen OTP Work Against Gender Persecution*

Gender 360 recognizes that gender is constructed and embodied within, and engages with, a social and relational context, especially in its relationship to sexual and gender diversity and a diversity of sex characteristics. It also interconnects with other intersecting structures, such as caste and class, religion, race, (dis)ability, ethnicity and place. ‘Gender’ cannot – and does not – work alone; it is one key but endlessly inter-connected variable that expands beyond the traditional frameworks used to define it. In addition, various power structures, work alongside gender to create exclusion and harm, through producing various hierarchies of power:<sup>12</sup> “addressing gender based violence, including sexual violence requires an intersectional lens that

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<sup>5</sup> The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No. ICC-01/12-01/18, Corrected Confirmation of Charges (Nov. 23, 2021).

<sup>6</sup> Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/20, Corrected Document Containing the Charges (Apr. 22, 2021).

<sup>7</sup> The Prosecutor v. Mahamat Said Abdel Kani, Case No. ICC-01/14-01/21, Corrected Document Containing the Charges (Oct. 27, 2021).

<sup>8</sup> The Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Confirmation of Charges (Dec. 16, 2011).

<sup>9</sup> See, e.g., Amanda L. Strayer, *Protecting Rights in Small Places: Why Depriving Girls of the Right to Education is Gender-Based Persecution and a Crime against Humanity*, 50 GEO. J. INT’L. 947 (2019) (citing Prosecutor v. Ongwen, ICC-02/04-01/15, Confirmation of Charges, (Mar. 23, 2016)) (noting the decision documented how Ongwen and others’ “pursued a common plan to abduct girls and women to serve as domestic servants, forced exclusive conjugal partners (forced wives) and sex slaves” but the charges did not include gender persecution).

<sup>10</sup> See 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. Law 49, 63 (2006).

<sup>11</sup> In other settings, the term ‘gender narratives’ has been suggested to capture the way ideas translate into practice. See HUMAN RIGHTS AND GENDER JUSTICE CLINIC AT CUNY LAW SCHOOL, MADRE, IDENTIFYING GENDER PERSECUTION IN CONFLICT AND ATROCITIES: A TOOLKIT FOR DOCUMENTERS, INVESTIGATORS, PROSECUTORS AND ADJUDICATORS OF CRIMES AGAINST HUMANITY 12 (2021).

<sup>12</sup> See, generally, JOHANNA BOND, GLOBAL INTERSECTIONALITY AND CONTEMPORARY HUMAN RIGHTS (2021).

takes account of the complex and dynamic interplay of gender, class, caste, race, sexual orientation, ethnicity, religion, and other factors. This dynamic plays an important role in how those at the margins experience violence as well as circumscribing their access to justice.”<sup>13</sup> Note, “[f]or example, Afro-descendant women and girls have experienced oppressive gender and racial narratives that emerged in countries shaped by slavery and colonialism continues to reverberate today.”<sup>14</sup>

Gender 360 analysis focuses on the institutions, practices and ideologies that constrain gender and seek to determine its meaning for all individuals. It is attentive to the intersectionally gendered conditions and systems that give rise to crimes, and responds to the need that they be fully represented and addressed through a broad and open-ended concept of gender that enables the identification of gendered human rights abuses that are not wholly intelligible within a specific identity framework.

The relational nature of gender within gender 360 analysis underscores that the ligatures of normed social roles and expectations maintain themselves in a constrained ecosystem of joint and reinforcing behavior for both those assigned to gender roles of women, and those of men in specific ways.<sup>15</sup>

#### Gender 360 and the Regulation of Stereotypical Masculinity

Gender 360 therefore opens up space for deeper analysis of the gender persecution of men. It means that violence, including beatings, detentions, killings of men who do not conform to socially mandated roles (of conduct, dress, practice) can amount to gender persecution. Such gender regulation can include men being abused where unwilling or unable to grow a beard, for wearing stylish clothes, or gay youths being forced to fight each other in a boxing ring.<sup>16</sup> It also raises questions about the gender normalized assumptions about military drafts: only (cisgender) men are sent out to kill and be killed by other ‘men’ in battle, especially when such induction into the military may also track ethnic, regional or other class, race and caste lines.

In line with this but extending further, gender 360 also highlights the limitations in treating the ‘gender’ in ‘gender persecution’ as always about coercive practices that discipline perceived deviation or failures to conform behaviour to normative gender narratives, with a focus uniquely on women or gender non-conforming men. We seek to also visibilize the qualitatively different regulation that arises when men are killed because they are perceived (in an often racialized manner) as manly – i.e., “aggressive” – and likely to seek revenge,<sup>17</sup> or, drawing on a case outside of a conflict setting, the example of a trans man beaten by police due to his participation in a pride parade, and being told in the moment that the beating is an opportunity

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<sup>13</sup> CREA et al., *supra* note 2.

<sup>14</sup> HRGJ CLINIC AT CUNY LAW SCHOOL, MADRE, *supra* note 11.

<sup>15</sup> Marija Antić and Ivana Radačić, *The Evolving Understanding of Gender in International Law and ‘Gender Ideology’ Pushback 25 Years since the Beijing Conference on Women*, 83 WOMEN’S STUDIES INT’L FORUM 102421 (2020).

<sup>16</sup> HRGJ CLINIC AT CUNY LAW SCHOOL, MADRE, *supra* note 11..

<sup>17</sup> *Id.*

to treat him “like a man.”<sup>18</sup> This expanded focus affirms the importance of the *Abd-al-Rahman* gender persecution charges on the basis of presuming males to be fighters.<sup>19</sup>

This kind of subverted / weaponized affirmation communicates deviation from gender norms, but pulls the victim further into the narrative as punishment, rather than throwing them onto the deviation. In some ways, it is best captured by the difference between violations as a form of ‘hazing’ (enduring abuse to be recruited) and other gender disciplinary beatings in the form of bullying (abuse intended to subordinate and exclude). The fact that masculine-defining spaces such as the military, which assume men are naturally violent yet use gender and sexually degrading rituals with recruits, reveals the complex but highly visible practices of violent regulation of masculinity.<sup>20</sup>

### Gender 360 and Relational Shifts in Stereotypes

Relational gender 360 analysis also logically implies that when an act is condemned as a practice of repressive gender regulation, such that a gender role must change, all gender roles may be implicated. For example, where a shift occurs such that women are not solely charged with social reproduction (child or elder care, etc.), the roles of men in social reproduction, must also change. Consider a (borrowed) hypothetical to also track a different notion of relational shift: “Militia fighters sexually assault a local male police officer when they take over the town. They tell the police officer they want him to “remember his place is with the women.””<sup>21</sup> The proximity of the police officer to the women – whether it be geographic, racial, ethnic, communal or otherwise – informs narratives of masculinity, and the gendered nature of the assault. The relationality of gender 360 also underscores the potential applicability of ideas of *association* in persecution, such as in the case of family members of LGBTIQ people who face fundamental rights violations on the bare fact of that association.

But even where the relational shifts required to expand social inclusion (work, housing, education etc.) to persons not conforming to gender norms – whether as LGBTQ+ identified, or trans or gender fluid persons, or as heterosexual, cisgender women refusing norms of domesticity, sexual roles as ‘wives’ – are revealed primarily through persecutory acts directed at these persons, the privileged categories of ‘men’ will also need scope and structural support to change their normative practices. This is where the complementary but distinct relationship between the role of criminal law and prosecution (for gendered violence) and rights-based interventions, in education, political and cultural interventions in speech, art, legislation matter for the long term goals of gender equality.

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<sup>18</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, VIOLENCE AGAINST LGBTI PERSONS (2015).

<sup>19</sup> Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/20, Corrected Document Containing the Charges (Apr. 22, 2021).

<sup>20</sup> Dara Kay Cohen, *Explaining rape during civil war: Cross-national evidence (1980–2009)*, 107(3) AM. POL. SCI. REV. 461 (2013).

<sup>21</sup> HRGJ CLINIC AT CUNY LAW SCHOOL, MADRE, *supra* note 11.

A comprehensive framework of gender analysis – one that is able both to engage with the specificity of how gendered regimes operate to target distinct sets of persons for persecution, and make visible distinctions in how the regime of gendered harms operate – can do important analytic work, and therefore begins some of this political power shifting work. This form of analysis would put the work of the OTP, and ICC more broadly, in a constructive relationship with rights movements: “[a] view of vulnerability as part of embodied social relations and actions can help us understand how and why forms of resistance emerge as they do. Although domination is not always followed by resistance, if our frameworks of power fail to grasp how vulnerability and resistance can work together, we risk being unable to identify those sites of resistance that are opened up by vulnerability.”<sup>22</sup>

### Gender 360 and the Integration of International Human Rights Standards

All persons are subjects of gender ideas and norms, and therefore have a stake in the regulation, control, criminalisation and arbitration of ‘gender’ in gender persecution, even if ‘gender’ initially emerged in international human rights law as a tool to call attention to harms directed at ‘women’,<sup>23</sup> and advocates still come up against the perception that sexual violence is a ‘women’s issue’.<sup>24</sup> Article 21(3) and the incorporation of intersectional analysis from within international human rights law as part of gender persecution analysis is only reinforced by the concern of crimes of gender persecution, per Article 71(2)(g), with the deprivation of fundamental rights.<sup>25</sup>

Overall, the global rights system has been slowly adopting an intersectional lens:<sup>26</sup> both the ECtHR and CEDAW for example recently have demonstrated stronger capacities to see the way gender, ethnicity, age and place (i.e. rural women under CEDAW) matter both to the conditions that give rise to the violations; in these cases, forced sterilization of Roma women. In the CEDAW cases, complainants claimed that North Macedonia violated their rights with discriminatory actions based on gender, ethnicity and health status, class, age, as well as their status as rural women.<sup>27</sup> The European Court of Human Rights, in *VC v. Slovakia*, highlighted the sterilization of a Roma woman as well, conducted under ethnic stereotyped and gender/paternalistic conditions.<sup>28</sup>

To the extent that the ICC is positioned to deploy criminal prosecution as a component of overall rights enjoyment, seeking to echo this analysis is key. To the extent that actual

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<sup>22</sup> JUDITH BUTLER, *THE FORCE OF NON-VIOLENCE: AN ETHICO-POLITICAL BIND* (2020).

<sup>23</sup> Antić and Radačić, *supra* note 15.

<sup>24</sup> Davis, *supra* note 4.

<sup>25</sup> Gregor Maučec, *The International Criminal Court and the Issue of Intersectionality—A Conceptual and Legal Framework for Analysis*, 21 INT’L CRIM. LAW REV. 1 (2021).

<sup>26</sup> See, generally, BOND, *supra* note 12.

<sup>27</sup> CEDAW Committee, *S.N. & E.R. v North Macedonia*, Communication No. 107/2016, U.N. Doc. CEDAW/C/75/107/2016 (Mar. 19, 2020); CEDAW Committee, *L.A. v. North Macedonia*, Communication No. 110/2016, U.N. Doc. CEDAW/C/75/D/110/2016 (Mar. 12, 2020); CEDAW Committee, *S.B. and M.B. v. North Macedonia*, Communication No. 143/2019, U.N. Doc. CEDAW C/77/D/143/2019 (Dec. 1, 2020).

<sup>28</sup> *VC v. Slovakia*, Application no. 18968/07, Eur. Ct. H. R. (2011).

underlying violations of rights captured by ‘gender persecution’ is always somewhat intersectional (i.e. there is no abstract victim without age, place, race, etc.) supporting this analysis captures the range of harms which the ICC can attend to more thoroughly.

### B. *Gender Beyond a Two-Sex Binary*

While Article 7(3) of the Rome Statute provides that “the term “gender” refers to the *two sexes, male and female*, within the context of society,” we seek to reinforce developments that signify movement beyond binary, two-sex category understanding of both sex and gender. The OTP’s 2014 Policy Paper on Sexual and Gender-Based Crimes underscores that: “[t]his definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.”<sup>29</sup> Further, it confirms that the OTP “will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3).”<sup>30</sup> Notably, “[t]his understanding of gender narratives assigned “men” and “women” should be viewed from the perpetrator’s intent to enforce prescribed narratives,” and “it should not be taken as a presumption that the OTP views the construct of gender as limited to a binary.”<sup>31</sup>

This move of the OTP beyond the un-scientificallly supported yet naturalized view of a rigid two-sex classification, finds support in the work of other international bodies and advocates.<sup>32</sup> Notably, advocates for persons with differences of sex characteristics, or inter-sex characteristics, have succesfully engaged with both national and international law on this point,<sup>33</sup> as well as being critical of the sex dualism in the “foremost criterion” of the definition of ‘gender’ at the time of Rome Statute adoption: “[a]lthough the phrase ‘within the context of society’ may have broadened the concept of gender to cover LGBT persons, it does not do so for intersex individuals. Indeed, the phrase is intended to encapsulate sociocultural assumptions attached to gender, including gender roles and inequalities, as well as sexual orientation.”<sup>34</sup> Moreover, human rights-oriented work on athletes with differences of sex characteristics, have noted that gender narratives about who is or should be ‘assigned’ to one sex or another are distinctly racialized: Identification and assessment efforts, including invasive questioning by sports related authorities and medical professionals “have been revealed to track stereotypes around race, gender, sexuality, and conventional notions of femininity. Evidence suggests that

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<sup>29</sup> INT’L CRIM. CT., OFFICE OF THE PROSECUTOR, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES (2014) [hereinafter OTP Policy Paper].

<sup>30</sup> *Id.*

<sup>31</sup> Lisa Davis, *supra* note 2 (citing Conversation with Patricia Viseur-Sellers, Special Advisor for Gender for the Office of the Prosecutor of the International Criminal Court, Mar. 12, 2018 (on file with Author)).

<sup>32</sup> OHCHR, Background Note on Human Rights Violations against Intersex People (2019); *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, U.N. Doc. A/HRC/38/43 (May 11, 2018).

<sup>33</sup> M. Cabral and M. Carpenter, *Submission by GATE to the World Health Organization: Intersex codes in the International Classification of Diseases (ICD) 11 Beta Draft* (2014); Morgan Carpenter, *Intersex Variations, Human Rights, and the International Classification of Diseases*, 20(2) HEALTH HUM. RTS. (2018).

<sup>34</sup> Sexual Violence Research Initiative, *Gender under the Rome Statute: Intersex outcast*, (Jan. 9, 2017), <https://www.svri.org/blog/gender-under-rome-statute-intersex-outcast>

athletes from the Global South are scrutinized and intervened upon disproportionately – with the assistance of medical professionals – despite identifying as women for social and legal purposes since birth.”<sup>35</sup>

Efforts to go beyond the two-sex system and to see gender more comprehensively will support the OTP as it moves onward from the 2014 Policy Paper, which did not mention transgender or intersex persons. It relied on an outdated frame of binary sex; current review of WHO materials suggest that it has adopted a more expansive definition of sex: “Sex refers to the biological characteristics that define humans as female or male.” While these sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, they tend to differentiate humans as males and females.”<sup>36</sup>

In sum, beyond “women’s rights and gender equality”<sup>37</sup> frames and jurisprudence, the OTP should provide seek to advance a holistic interpretation of Article 7(3) with regard to intersex persons, as well as all LGBTQ persons in line with evolving practices and norms in international human rights.

### *C. Ensuring Gender Persecution Captures the Sex, Sexuality and Sexual Conduct Elements of Harm and Attending to Non-Sexual Gender Crimes*

A gender 360 approach both requires specific attention to the conditions for and elements of conduct defining crimes of sexual violence, and allows for distinction and specific attention - where appropriate - between sexual crimes and gender-based crimes as underlying crimes to gender persecution.

We note the relevance of a comprehensive gender analysis within work to investigate and prosecute crimes of sexual violence. Such analysis might consider whether violations arise outside of a gender binary and/or whether abusive practices seek to reassert a strict gender binary of male/female or a specific masculine (penetrator) and feminine (penetrated) role. A close, gender 360 analysis of both persecutory acts *and* the national legal regimes ostensibly responding to them can reveal the in-built discriminatory effects of both the act and the laws themselves. Some national laws, for example, only recognize the crime of rape or sexual assault when committed against cisgender women by cisgender men. This leaves men of all kinds who

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<sup>35</sup> Submissions on Behalf of the World Medical Association and the Global Health Justice Partnership as Amicus Curiae, *Semenya v. Switzerland*, Case No. 10934/21 Eur. Ct. H.R. (2021) (citing HUM. RTS. WATCH, ‘THEY’RE CHASING US AWAY FROM SPORT – HUMAN RIGHTS VIOLATIONS IN SEX TESTING OF ELITE WOMEN ATHLETES’ (2020), Katrina Karkazis and Rebecca M. Jordan Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30(2) FEMINIST FORMATIONS 1 (2018); Letter from Special Rapporteur on the right to enjoyment of the highest attainable standard of physical and mental health et al to IAAF (18 September 2018), [https://www.ohchr.org/Documents/Issues/Health/Letter\\_IAAF\\_Sept\\_2018.pdf](https://www.ohchr.org/Documents/Issues/Health/Letter_IAAF_Sept_2018.pdf); *Intersection of race and gender discrimination in sport: Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/44/26 (June 15, 2020).

<sup>36</sup> World Health Organization, Gender and health (n.d.), [https://www.who.int/reproductivehealth/topics/gender\\_rights/defining\\_sexual\\_health/en/](https://www.who.int/reproductivehealth/topics/gender_rights/defining_sexual_health/en/)

<sup>37</sup> OTP Policy Paper.



face sexual assault – as is frequent in conflict<sup>38</sup> – without claims on a legal redress system at the national level.<sup>39</sup> It also leaves the survivors – whether cisgender heterosexual men, transgender, gender fluid persons or gay-identified men – without support, often without access to health services, and excluded from the narrative of ‘worthy victims.’<sup>40</sup>

As noted in the 2014 Policy Paper, “[g]ender-based crimes are not always manifested as a form of sexual violence.”<sup>41</sup> Gender persecution can - and must - include a wide range of crimes that have a sexual component, such as sexual violence, as well as crimes directed at persons because of their expressions of diverse sexual orientations.

At the same time, a gender 360 approach helps to render visible harms that are done that not solely sexual, or not centrally defined through or by a sexual harm, or indeed that are gendered, but not sexual. While the regimes of gender and sexuality intersect, they are not identical, and gender-based crimes such as gender persecution are not coterminous with sexual crimes. Just as there are gender-based crimes which are not sexual, there are instances of sexual crimes not grounded in gender discrimination, such as where “a perpetrator intending to torture victims may target their sex organs to achieve a higher degree of pain, regardless of gender status.”<sup>42</sup> We are concerned that while sexual harms still require high levels of attention, the non-sexual forms of gender-based crimes may be obscured, thereby leading to inadequate analysis of what constitutes gender persecution. In this submission we assume that the OTP is fully committed to its work to investigate sexual violence as an aspect of gender persecution, and therefore turn our also consider here – and in Section II – specific complexities arising from non-sexual gender-based crimes.

The imperative to recognize other types of gender-based harm requires the use of a comprehensive, holistic and intersectional approach to how gender is constructed and deployed in gender persecution, and other crimes against humanity. A Gender 360 approach facilitates this, and ensures that ‘gender’ is also not definitionally cabined to ‘women’. Acts of violence aimed at persons for gender-non-conformance may amount to gender persecution under the Rome Statute, especially as they include violations of fundamental human rights. Such acts include coercive living and movement restrictions, assault and beatings, killings, and also coercive dress and other sumptuary laws (applied across genders and including the arrests and detention of persons for violating such laws),<sup>43</sup> and forced sterilization. Despite the reference to forced sterilization in Article 7(2)(g), certain forms of forced sterilization should not be

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<sup>38</sup> CHRIS DOLAN, LAUREL E. FLETCHER, AND STEPHEN OOLA, PROMOTING ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE AGAINST MEN: A COMPARATIVE LEGAL ANALYSIS OF INTERNATIONAL AND DOMESTIC LAWS RELATING TO IDP AND REFUGEE MEN IN UGANDA (2013).

<sup>39</sup> For analysis of how this is also a failure of complementarity, see *infra* Section II.

<sup>40</sup> See Alice M. Miller, unpublished manuscript (on file with GHJP).

<sup>41</sup> OTP Policy Paper.

<sup>42</sup> Davis, *supra* note 4.

<sup>43</sup> See, e.g., *Malaysia: Court Ruling Sets Back Transgender Rights ‘Oppressive and Inhuman’ Cross-Dressing Ban Restored*, HUM. RTS. WATCH (Oct. 8, 2015), <https://www.hrw.org/news/2015/10/08/malaysia-court-ruling-sets-back-transgender-rights>.

considered a crime of sexual violence.<sup>44</sup> Forced sterilization often arises at the intersection of gender and racial/ethnic discrimination, for example, as historically performed on some men of the ‘unworthy’ caste, race and class or geographic place, or as targeted against Roma women – and other stigmatized women worldwide – on the basis of narratives of gender and racial ‘unworthiness to reproduce’.<sup>45</sup> In addition, according to many national laws, forced sterilization is a requirement for gender legal recognition, underlying binary normative roles in relation to reproduction.

Moreover, there are regulatory regimes – such as those arising in sport, or at birth in some countries – which seek to intervene with pseudo-medical justifications in the bodies of persons not conforming to rigid sex binaries:<sup>46</sup> while these particular practices may not meet the other predicates of crimes against humanity and indeed, may not be best responded to by criminal prosecutions (absent evidence of other criminal intent and violence) their documentation flags the way that bodies are subject to gender regulation which is not, at the first instance, sexual in the sense of based on sexual conduct. Similarly, many social practices seek to restrain or force persons toward particular gender expressions, and at times of conflict or in tandem with other violent actions targeted toward disfavored gender groups, demonstrate the requisite disfavored group, categorized by gender traits.

## **II. The [Gendered] Structure of the Rome Statute, Positive Complementarity and International Criminal Law’s Relationship to National Standards**

We call attention to the importance of the normative work of substantive legal reforms at the national level in both criminal and other rights-related law. National level advances can be promoted or inhibited by work on gender persecution by the OTP in light of its institutional role, which comprises not only the investigation and prosecution of specific incidents but also a wide-ranging policy of positive complementarity engaging national courts and law, as well as cooperation with global and local civil society organizations and public awareness work. In part, “enhanced scrutiny is capable of promoting prioritization of sexual violence prosecutions”: subsequent to ICC preliminary examinations in Colombia regarding rape and sexual violence as specifically listed focus issues, Colombian authorities broadened their investigations to include sexual violence crimes.<sup>47</sup> A gender 360 approach underscores, moreover, how the expressive and substantively persuasive practices of the OTP, along with the juridical analysis of gender persecution, are much needed at the national level as national courts and legislatures grapple with resistance to gender comprehensive work.

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<sup>44</sup> Forced sterilization as a non-sexual crime is further considered, along with the normative potential of the OTP’s work in this area under positive complementarity, *infra* Section II.

<sup>45</sup> OPEN SOCIETY FOUNDATIONS, *AGAINST HER WILL: FORCED AND COERCED STERILIZATION OF WOMEN WORLDWIDE* (2011); *ee e.g.* Priti Patel, *Forced sterilization of women as discrimination*, 38 PUB. HEALTH REV. 15 (2017).

<sup>46</sup> *See* WMA and GHJP, *supra* note 35; HUM. RTS. WATCH, “I WANT TO BE LIKE NATURE MADE ME”: MEDICALLY UNNECESSARY SURGERIES ON INTERSEX CHILDREN IN THE US (2017).

<sup>47</sup> Amrita Kapur, *Complementarity as a Catalyst for Gender Justice in National Prosecutions*, in THE OXFORD HANDBOOK OF GENDER AND CONFLICT 235 (Fionnuala Ní Aoláin et al. eds., 2018).

As noted in the 2014 Policy Paper, barriers to “genuine” national proceedings may include “discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes...”<sup>48</sup> This could include, for example, laws framing sexual violence “in terms of indecency or immorality, or as a crime against the family or society...,” rape as a crime specifically against women and girls, or, even more particular, with a definition that is “limited to penetration of the penis into the vagina of a woman or girl and excludes forced oral sex, rape with an object, anal rape, and other common forms of sexual violence, which are characterized merely as indecent assault.”<sup>49</sup>

Such laws, as written or interpreted by national courts, exclude certain forms of harm from being recognised, to the extent that they do not incorporate the comprehensive and intersectional gender 360 analysis explored in Section I, and further applied throughout Sections II and III. For example, gender-specific rape laws render some nations unable to address the rape and sexual assault of men, and force women, including and in addition to some transgender or non-binary survivors, to self-present in specifically gendered / feminized ways in order to make harms legible.

This, and concomitant questions of complementarity, stretch “[b]eyond the characterization of physical acts” to variable conceptions across jurisdictions of legal consent and the surrounding circumstances, such as “[t]he requirement of resistance to prove non-consent; the admissibility of previous sexual behavior; the existence of marital rape as a crime; the sufficiency of recklessness to prove the requisite mens rea; and the relevance of any delay in complaint...”<sup>50</sup> Indeed, through “gender-sensitive” interpretation of Article 17 addressing inadequacies in the criminal legal system, “[u]nwillingness could be interpreted to encompass rules that discriminate against victims of sexual violence, such as valuing a woman’s testimony less than a man’s, or lacking procedures to protect rape victims from re-traumatization. Inability could be understood in terms of gender incompetency, including systemic elements such as laws, procedures, and policies governing the investigation and prosecution of sexual violence crimes and the failure to provide gender-sensitive witness protection.”<sup>51</sup>

This is particularly pertinent, as the activities of the OTP may catalyze and inform a range of impacts, including civil law reform across other areas to ensure consistency with the domestic implementation of the Rome Statute’s criminal standards, and even with the potential to extend into restorative justice initiatives.<sup>52</sup> As the 2014 Policy Paper notes, such policies have a role in harmonizing the efforts of a range of actors, across local and international spaces,<sup>53</sup> and also

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<sup>48</sup> OTP Policy Paper.

<sup>49</sup> Kapur, *supra* note 47 (quoting, on framing, UN WOMEN, 2011–2012 PROGRESS OF THE WORLD’S WOMEN: IN PURSUIT OF JUSTICE (2011)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (internal citations omitted).

<sup>52</sup> *Id.*

<sup>53</sup> OTP Policy Paper.

influences other international and regional justice mechanisms.<sup>54</sup> Critically, this may normatively align with and reinforce work by States as duty bearers to address underlying gender inequality and gender-based discrimination as a means to prevent gender persecution, “including by amending laws that discriminate against women, girls and LGBTIQ+ people; addressing harmful gender stereotypes, social norms and practices; and supporting a safe and enabling environment for the work of women-led and LGBTIQ+-led civil society organizations and human rights defenders, including peacebuilders, politicians and journalists.”<sup>55</sup>

A gender 360 approach also highlights the value of a positive complementarity policy that views the “complementary efforts by States and other stakeholders to *stop, prevent, and punish* sexual and gender-based crimes”<sup>56</sup> encouraged by the OTP as capacious goals not coterminous with prosecution, and that would be enhanced by OTP policy more actively and creatively looking at the criminal law and its mandate as part of more holistic initiatives for prevention and accountability with regard to gender-based persecution. This opens up space for more contextual complementarity analysis that engages in meaningful consultation with victims and States to understand the “genuine”-ness of holistic or alternative approaches to accountability, and the important goals and context that they are addressing.<sup>57</sup>

Notably, cooperation, which joins complementarity as “the two fundamental components of the Rome Statute system,”<sup>58</sup> extends beyond engagement with States to work to support and strengthen cooperation with international and local civil society organizations in preventing and addressing sexual and gender-based crimes, to build a network of organizations that can support effects to reach out to more victims, and which “may also help promote community awareness and understanding of the activities and mandate of the Office and other Organs of the ICC.”<sup>59</sup> These organizations “also play a crucial role transforming public attitudes towards gender equality, and addressing gender-based crimes;” ratification and “the adoption of domestic rape and sexual violence legislation in line with the Statute;” and “supporting an international norm of accountability for crimes, including sexual and gender-based crimes.”<sup>60</sup> On both a general normative basis, and because of the critical need for comprehensive and intersectional analysis of gender persecution, a gender 360 approach underscores the importance of OTP policy on gender persecution that commits to models of collaboration/cooperation that do not veer towards extraction and instrumentalization in seeing civil society and human rights networks as a means of access to communities, victims or for the acceptance of international organizations in those communities, but as partners in the

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<sup>54</sup> Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law* 24(3) 24 WM. & MARY J. WOMEN & L. 443 (2018).

<sup>55</sup> HRGJ CLINIC AT CUNY LAW SCHOOL, MADRE, *supra* note 11.

<sup>56</sup> OTP Policy Paper.

<sup>57</sup> Caroline D. Kelly, *Contextual Complementarity: Assessing Unwillingness and "Genuine" Prosecutions In Colombia's Special Jurisdiction For Peace*, 48(3) GEORGETOWN J. INT'L LAW 807, 834-35 (2017).

<sup>58</sup> OTP Policy Paper.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

meaning-making, mapping and direction of fact-finding, and the nuanced understanding of complementarity in cases of gender-based persecution.

We present here three substantive legal examples where OTP practices informed by gender 360 analysis can substantially advance understanding of gender persecution and the violation of fundamental human rights. First, we engage with the gender neutrality of the Rome Statute and gender persecution involving the the rape of cisgender men and gender non-conforming persons, and women as perpetrators of sexual violence. Second, we consider enforced sterilization, which in practice connects both intersectional analysis and a critical non-sexual example of gender persecution. Finally, we discuss enforced prostitution and sexual slavery, the prosecution of which, absent clarity as to the practices which constitute ‘force’ – through Gender 360 analysis – could encroach on the rights of persons in sex work, migrants, refugees, and others.

#### A. Rape of Cisgender Men and Gender Non-Conforming Persons<sup>61</sup>

Gender 360 provides an analytical frame that helps to grapple with and provide clarity through the great volatility in political struggles and in humanitarian service delivery over how to characterize and address the rape of men.<sup>62</sup> The fact that the Rome Statute, Elements of Crimes, and Rules of Procedure and Evidence are gender neutral provides the OTP with a great opportunity to expand a comprehensive gender understanding of the conditions for and the practice of, rape. Here, we call to the central meaning-making function of the ICC in its expressive function as well as the structural impacts of the requirements of complementarity.

We note that the ICC has, as a practice, differently characterized the rape of men most commonly as ‘torture’ rather than ‘rape’; only a few cases have proceeded with the sexual penetration of a cisgender man by another man (either with an object or with penile penetration) as rape, and the *Bemba* conviction was notably overturned on other grounds.<sup>63</sup> Historically, rape as a war crime was a central focus of feminist/women’s rights advocacy in the 1990’s and in the process of the creation of the ICC.<sup>64</sup> However, neither feminism as a practice as we conceive it, nor the work of the OTP ought to be limited to the rape of women.

In regard to specific prosecutions for crimes of sexual violence against men, there are other disturbing trends and gaps to note: on the one hand, a handful of men victimized by sexual violence have had their suffering acknowledged in the ICTY, and the ICC.<sup>65</sup> On the other hand, it

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<sup>61</sup> See Alice M. Miller, *supra* note 40.

<sup>62</sup> See Chris Dolan, *Letting go of the gender binary: Charting new pathways for humanitarian interventions on gender-based violence*, 98(1) Int’l Rev. Red Cross 485 (2014); Jeanne Ward, *It’s not about the gender binary, it’s about the gender hierarchy: A reply to “Letting Go of the Gender Binary,”* 98(1) Int’l Rev. Red Cross 275 (2016).

<sup>63</sup> See *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment on Appeal (June 8, 2018); *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Case No. ICC-02/05-01/20, Corrected Document Containing the Charges (Apr. 22, 2021).

<sup>64</sup> See, e.g., Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime*, 34(4) Int’l Lawyer 1223 (2000).

<sup>65</sup> See, generally, for the ICTY and ICTR, Claire Bradford Di Caro, *Call It What It Is: Genocide Through Male Rape and Sexual Violence in the Former Yugoslavia and Rwanda*, 30 DUKE J. COMP. & INT’L L. 55 (2019).

appears that the prosecutor's office and the courts 'de-sexualize' certain crimes of sexual violence against men, charging them as CIDT or torture in various case and not 'other crimes of a sexual nature.'<sup>66</sup> Moreover, in another series of cases before the ICTY, the relationship between gender and ethnicity is severed: male detainees were coerced into engaging in oral sex with each other. The Trial Chamber found the sexual acts constituted torture (severe physical and mental pain) committed with the intent to discriminate based on their *ethnicity*. Sexual violence against men was made to constitute persecution sufficient to amount to a crime against humanity not through gender – despite the fact that in the *Čelebići case*, the Court found sexual assault/rape to be persecution as an element of a crime against humanity because of the victim's gender as a woman.<sup>67</sup>

In the more recent ICTY case of *Karadžić*,<sup>68</sup> the Tribunal seems to have wrapped a great many scenarios of violence against men into its holding that sexual violence “amounted to denial of or infringement upon a fundamental right and were of equal gravity to the other crimes listed under Article 5 of the Statute [crime against humanity].” For the first time, the Chamber explicitly stated that “Bosnian Muslim women, men, girls, and boys were subject to rape and other acts of sexual violence”.<sup>69</sup> Overall, in a review of more than dozen cases involving male sexual victims, the Court seems never to have grappled with how, if at all, the forced sexual intercourse by a man toward a woman, or oral sex, might constitute rape, or another crime of sexual violence, against the man.

The ICC in the *Bemba* case issued a relatively clear judgment on rape of a man for the purposes of proving a crime against humanity: it found, in the case of the anal penetration of a man with a truncheon (in front of the victims family), that these acts met the standard of rape. The Court clarified that “invasion” as required by the definition of rape is gender neutral and includes invasion carried out by some one of the same sex. In addition, the Tribunal clarified that both women and men can be perpetrators and victims of rape. It found that “oral penetration, by a sexual organ, can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration.”<sup>70</sup> The ICC has also found evidence of rapes against men in a Pre-Trial Decision regarding the situation in Kenya.<sup>71</sup>

The *Bemba* case and the emerging jurisprudence around the Kenyan investigation suggest a relatively more forceful and clear analysis to encompass sexual violence against men from the ICC but other signs suggest this area may remain very complex: the struggle over ‘thematic prosecutions’; as well as past training and frameworks suggest that the conceptual frames around the gender of sexual violence against men may still be up for debate. Legal scholarship in dominance feminism on the work of rape as instantiating the power of men over women has played a critical role in shaping some case law and advocacy in ways we find unhelpful to

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<sup>66</sup> DOLAN ET AL., *supra* note 38.

<sup>67</sup> ICTY, Prosecutor v. Simić et al., Case No. IT-95-9-T, Trial Judgment (Oct. 17, 2003).

<sup>68</sup> ICTY, Prosecutor v. Karadžić, Case No. IT-95-5/18, Trial Judgment (March 24, 2016).

<sup>69</sup> *Id.*

<sup>70</sup> ICC, The Prosecutor v. Bemba-Gombo, Case No. ICC-01/05-01/08 (March 21, 2016).

<sup>71</sup> ICC, Situation in the Republic of Kenya, Case No. ICC-01/09-19-Corr 01-04-2010 (Mar. 31, 2010).

undoing gender norms around both same and different gender sexual conduct: this scholarship treated a raped man as the victim of a gendered crime because he is made ‘as if a woman’, i. e., equating all penetration with dominance.<sup>72</sup>

What this framing contributed to the understanding of how certain men were chosen as targets of rape is utterly unclear—before they are raped, the men are outside the gender subordination system; once raped, they are inside. This random ‘gendering’ would seem to go directly against the feminist theorizing on causes and consequences as being structural, not haphazard. We underscore that, in gender analysis, there are stakes on the ground as well as stakes in a wide variety of institutions: how men who are raped can get adequate treatment, from providers and protection from discrimination is remarkably under-addressed.<sup>73</sup>

The way that narratives of violence against women, predominately understood and told as rape stories of ‘women by men’ moved into international law, especially criminal law is widely documented, celebrated and critiqued.<sup>74</sup> The fact that on the one hand a narrative of women as victims of sexualized gender violence plays a central role in the development of the scope of certain crimes in the Rome Statute, but the actual crime of sexual violence is gender neutral leaves a wide scope for interpretation, and yet, as described above, the spaces for interpretation are very thinly occupied. Moreover, the fact that at the national level, the definition of rape in the law is most often gender specific (to female victims and male perpetrators) leaves the actual prosecution of these cases ad hoc and rare.<sup>75</sup> Because the point of international criminal law is meant to be, in part exemplary and complementary, this posture of ‘exemplary’ law begs the question of how and who else is making meaning and redress for male victims of rape.

More recently, within NGO work, both the All Survivors Project and HRW have attempted to bring to the fore more cases of the rape of men, first as violations of fundamental human rights and then, potentially, depending on underlying fact patterns as crimes against humanity.<sup>76</sup>

*B. Enforced Prostitution, Sexual Slavery and Trafficking: Steps to ensure that OTP actions do not inadvertently impede sex workers’ and others’ rights*

An inter-sectional, power-systems aware gender 360 analysis can also support the work of the OTP in clarifying, and making meaningful distinctions, in addressing of gender persecution that includes acts that may be classified as enforced prostitution or sexual slavery. In particular we seek here to call attention to the negative impact on sex worker rights, which experience has

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<sup>72</sup> Catharine A. MacKinnon. *Oncale v. Sundowner Offshore Services, Inc.*, 96-568, Amici Curiae Brief in Support of Petitioner, 8(1) UCLA WOMEN’S L. J. (1997). See also Dolan, *supra* note 58 and Ward, *supra* note 58.

<sup>73</sup> R. Charli Carpenter, *Recognizing gender-based violence against civilian men and boys in conflict situations*, 37(1) SECURITY DIALOGUE 83 (2006).

<sup>74</sup> Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law* 46 McGill L. J. 217 (2000).

<sup>75</sup> Flavia Agnes, *Law, ideology and female sexuality: Gender neutrality in rape law*, 37(9) ECON. POL. WKLY 844 (2002).

<sup>76</sup> See, All Survivors Project (n.d.), <https://allsurvivorsproject.org/>.

taught us, is produced in failing to distinguish clearly between the crime of ‘trafficking’ – the coercive, intentional placing and holding persons in positions of exploited labor – and the practice of sex work. As flagged in the discussion of complementarity, the OTP’s work here can constructively support conceptual clarification and progressive revision of national standards.<sup>77</sup> The conceptualisation and interpretation of these crimes at the international level can serve to uphold harmful gender and sexual norms, creating further exclusion, stigma and discrimination against sex workers, migrants and refugees, and people of diverse genders.

We note that Ntagenda was the first person to be charged by the ICC for the crime of “sexual slavery,” yet there is little clarity on the specific nature of the acts which led to these charges; the court records from this trial show a deep contention between prosecution and defence about these charges, and whether his actions amount to “sexual slavery”, as opposed to “rape.”<sup>78</sup>

Historically, much international law and national legislation often equated “trafficking” and sexual slavery with prostitution: contemporary law in some settings repeats this association, even as many international agencies and human rights, including sex worker rights NGOs, are today clarifying the distinctions between trafficking and sex work.<sup>79</sup> The implementation of “anti-trafficking” laws and policies that collapse such distinctions, as well as similar laws and policies meant to criminalize various iterations of “slavery,” often lead to grave human rights abuses, especially of sex workers, migrants, refugees, and genuine victims of trafficking (whether or not they engage in sex work). These harms have been rigorously documented both by sex workers’ rights and anti-trafficking advocates around the world.<sup>80</sup>

We seek to ensure that the OTP’s work in investigating and prosecuting gender persecution on the basis of “enforced prostitution” and “sexual slavery,” as well as those crimes individually, does not pave the way for such abuses, including for workers in informal labour, including sex workers. The OTP’s work can constructively proceed with an understanding of the vast and dangerous scope of so-called “anti-trafficking” and “anti-slavery” laws and policies, in a manner that recognizes and contends with how they do not address the harms done by labor exploitation, the structural causes underlying such experiences and the fact that they are often simply anti-migration and anti-worker. There are a number of key considerations about these discussions.

First, advocates are providing tools for making meaningful distinction between coercion and decisions made in complex or constrained circumstances, actively engaging in explicit analysis

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<sup>77</sup> ANN D. JORDAN, *THE ANNOTATED GUIDE TO THE COMPLETE UN TRAFFICKING PROTOCOL* (2002).

<sup>78</sup> *The Prosecutor v. Bosco Ntagenda*, Case No. ICC-01/04-02/06, Judgment (July 8, 2019).

<sup>79</sup> SEX WORKERS & ALLIES NETWORK AND THE GLOBAL HEALTH JUSTICE PARTNERSHIP OF YALE LAW SCHOOL AND THE YALE SCHOOL OF PUBLIC HEALTH, *ISSUE BRIEF: SEX WORK VS. TRAFFICKING: HOW THEY ARE DIFFERENT AND WHY IT MATTERS* (2020); NSWP, *SEX WORK IS NOT TRAFFICKING* (2011).

<sup>80</sup> NSWP, *THE IMPACT OF ANTI-TRAFFICKING LEGISLATION AND INITIATIVES ON SEX WORKERS* (2018); Janie A. Chuang, *Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy*, 158 U. PA. L. REV. 1655 (2010).



that grapples with the difficulties in this area. Analysis of “consent” encompasses decision-making along a spectrum, which experience with national courts reveals is often hard to capture in criminal legal proceedings, especially as they have histories of failing to address differently marginalized populations. However, we have seen that the consent/coercion bifurcation ignores the complex nature of many people’s lives and processes of decision-making. This is compounded by the reality that many people who end up being victims of trafficking, or indeed of “sexual slavery”, were at some time motivated by a strong desire to migrate and flee their circumstances, and may not want to return to those circumstances, regardless of their situation.<sup>81</sup>

Structural inequality, especially socio-economic inequality and injustice, often underlies experiences of “enforced prostitution” and “sexual slavery.” These root causes must also be recognized in experiences of “sexual slavery” or “enforced prostitution.” The ability of survivors or victims to give and withdraw consent to a variety of choices, including sex work, must be recognized and given validity. In particular, people selling or exchanging sex for money or goods in humanitarian settings must be considered rights-bearers, and their rights guaranteed. Further, pervasive structural problems such as poverty, gender-based violence including by family members, climate disaster, armed conflict, socio-economic inequality, discrimination, exclusion, isolation and marginalization can compel people to migrate. In the absence of a strong, intersectional analytical framework which allows for the development of rights-based solutions to those structural problems, any law or policy that attempts to address trafficking and labor exploitation, including forms of “slavery”, especially through criminalisation, only exacerbates and reproduces harms, and leaves the structural challenges faced by victims unaddressed.

Sex workers may also create their own narratives of “coercion”, in order to distance themselves from the stigma associated with sex work, or indeed, to avoid criminalisation, according to Yasmin Tambiah’s study of Sri Lankan sex workers (“Turncoat Bodies: Sexuality and Sex Work under Militarization in Sri Lanka”, 2005). Tambiah examines the lives of these sex workers as they operated in ‘border towns’, working primarily for the Sri Lankan armed forces, during the Sri Lankan civil war, and attempts to unpack the way in which sexual and gender norms become exaggerated during a war, as the warring parties try to outdo one another on the grounds of moral purity, making those who choose sex work therefore more intensely marginalized and criminalized in militarized states.

OTP analysis should engage with the increasing and solid empirical and analytical base for distinguishing coercion from consent in this area. For example, the UN Populations Fund (UNFPA) and the UN High Commission for Refugees (UNHCR) have clear guidance on working with people exchanging or selling sex in humanitarian settings, which includes an acknowledgement that some mis-steps in the drafting of the Palermo Protocol may lead to a problematic conflation between “sexual exploitation” and sex work. We encourage engagement

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<sup>81</sup> Alice M. Miller and Tara Zivkovic, *Orwellian rights and the UN Trafficking Protocol*, in ROUTLEDGE HANDBOOK OF HUMAN TRAFFICKING (2017).

with the guidance and academic literature in this area in meaning-making around these concepts, and in the the most careful and rights-promoting application and interpretation of the Protocol,<sup>82</sup> including from other UN bodies.<sup>83</sup> Notably, much of the guidance takes an expansive and intersectional approach to “gender” (similar to the gender 360 approach), and goes beyond seeing ‘gender’ as only being related to the category of ‘women’. It includes core principles, including adopting “do no harm” and rights-based approaches.<sup>84</sup>

Secondly, there is an emerging consensus among advocates, scholars, national level and international experts on the limits of “anti-trafficking” as a rights-affirming approach, and the OTP should be attentive to this growing ecosystem of advocacy, discourse and strategy.<sup>85</sup> The OTP’s choice of cases can impact, and will be read through, these debates arising on the national and international level. Indeed, the consistent rhetorical and analytical conflation of the terms and concepts of “prostitution”, “slavery” and “human trafficking” have had a devastating impact on human rights, with predictably muddled and confused legal standards, increasing policing and criminalisation of certain communities, ultimately eroding safeguards for human rights, and rendering certain people unequal before the law.

Anti-trafficking advocates who emphasize a rights-based approach in their work, and sex worker rights advocates, have persistently drawn our attention to the way that the consistent conflation of trafficking with “sexual exploitation”, “sexual slavery”, and various (mis)understandings of sex work, mean that many other, at times much more pervasive, forms of labor exploitation are being ignored.<sup>86</sup> This is a phenomenon termed “sex work exceptionalism”: the overwhelming association of trafficking with trafficking for sex work or just with sex work itself. The experiences of migrant women, refugees, and those in conflict can provide informative illustrations of how these terms may not capture the complexity of survivors’ situations, nor provide relief. For example, work on the issue of militarized sex work examining the lives of Filipina entertainers in US military encampments in South Korea proposes that these women are not merely “sex objects” or “sex slaves”, but could simply be understood as migrant women, who are themselves subjects of aspiration and ambition, including for a better life through migration and work.<sup>87</sup> Dominant narratives about “trafficking” and “sexual slavery” which cast people in sex work as “victims” in need of rescue, ignore the agency and aspirations of diverse women and people – even if they are victims of trafficking.

Moreover, the OTP should be aware of national laws which de jure reproduce the conflation of sex work and trafficking. For example, in India, the Immoral Trafficking Prevention Act of 1956 criminalizes prostitution through the criminalization of “trafficking”, legally, analytically and

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<sup>82</sup> See, e.g., Anne T. Gallagher, *Two Cheers for the Trafficking Protocol*, 4 ANTI-TRAFFICKING REV. 14 (2015).

<sup>83</sup> UNODC, THE ROLE OF ‘CONSENT’ IN THE TRAFFICKING IN PERSONS PROTOCOL (2014).

<sup>84</sup> UNHCR, UNFPA, OPERATIONAL GUIDANCE: RESPONDING TO THE HEALTH AND PROTECTION NEEDS OF PEOPLE SELLING OR EXCHANGING SEX IN HUMANITARIAN SETTINGS (2021).

<sup>85</sup> Chuang, *supra* note 80.

<sup>86</sup> Goździak, Elżbieta M., and Kathleen M. Vogel, *Palermo at 20: A retrospective and prospective*, 6(2) J. HUM. TRAFFICKING 109 (2020).

<sup>87</sup> SEALING CHENG, ON THE MOVE FOR LOVE: MIGRANT ENTERTAINERS AND THE U.S. MILITARY IN SOUTH KOREA (2013).

practically conflating the two. This national-level legislation was propelled forward after India became a signatory to the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, in 1950 – a clear example of how the international shapes the national.

Finally, a gender 360 approach encourages analysis that engages meaningfully with complex gender narratives and stereotypes, and their impact on the ecosystem of gender persecution, instead of taking them at face value. Conflations, expressed in 20th and 21st century anti-trafficking laws, have typically arisen from an effort by leaders of the time to assert sexual moralism, and out of contentions about sexual and gender politics, rather than a concern about the harms produced by trafficking. For example, in the US, “The Bush administration made trafficking a priority largely because it supported the promotion of the evangelical Christian position that all sex work is inherently coercive and must be abolished. This policy was linked to the larger moral goals of reinstating traditional gender roles, the sanctity of marriage, and heterosexual norms within American society, as well as extending these arrangements around the world.”<sup>88</sup> Notably, this global moralism is being challenged by a growing chorus of voices seeking to decriminalize sex work in part to support anti-trafficking efforts. Here we flag not only the positions of UNAIDS, and WHO, but also a range of INGOS and national NGOs<sup>89</sup>

### C. *Forced Sterilization as a Non-Sexual Crime with Intersectional Scope*

Gender 360 analysis is critical for full understanding and good practice in regard to forced sterilization as part of gender persecution, in order to render visible both the nature and extent of harm, and to engage with and address how specific populations are targeted.

Per the text of Article 7(1)(h), gender persecution must be in connection with an act enumerated under Article 7(1) or any crime within the jurisdiction of the ICC,<sup>90</sup> and the crime of enforced sterilization is enumerated under Article 7(1)(g) along with “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, ...or any other form of sexual violence of comparable gravity.” “International criminal tribunals have demonstrated a tendency to focus on proof of

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<sup>88</sup> Benjamin Harkins, *Base Motives: The case for an increased focus on wage theft against migrant workers*, 5 ANTI-TRAFFICKING REV. 42 (2020).

<sup>89</sup> See ACLU, *IS SEX WORK DECRIMINALIZATION THE ANSWER? WHAT THE RESEARCH TELLS US* (2021); AMNESTY INTERNATIONAL, *POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS* (2016); GAATW, *SUBMISSION TO CONSULTATION SEEKING VIEWS ON UN WOMEN APPROACH TO SEX WORK, THE SEX TRADE AND PROSTITUTION* (2016); HUM. RTS. WATCH, *WHY SEX WORK SHOULD BE DECRIMINALIZED: QUESTIONS AND ANSWERS* (2019); TRANSGENDER LAW CENTER, GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), LAMBDA LEGAL, NATIONAL CENTER FOR LESBIAN RIGHTS AND NATIONAL CENTER FOR TRANSGENDER EQUALITY, *JOINT STATEMENT IN SUPPORT OF AMNESTY INTERNATIONAL RESOLUTION* (2015); Open Society Foundations, *Ten Reasons to Decriminalize Sex Work* (2015); UNAIDS welcomes the decision by the Northern Territory of Australia to decriminalize sex work, UNAIDS (Dec. 2, 2019), <https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2019/december/decision-northern-territory-australia-decriminalize-sex-work>; WHO, *PREVENTION AND TREATMENT OF HIV AND OTHER SEXUALLY TRANSMITTED INFECTIONS FOR SEX WORKERS IN LOW- AND MIDDLE-INCOME COUNTRIES* (2012); SWOP-USA, *SUGGESTED POLICY POSITION ON SEX WORK & DECRIMINALIZATION* (2018).

<sup>90</sup> See, generally, Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93(1) AM. J. INT’L L. 43 (1999).

the specific sub-crimes as underlying acts of persecution instead of the requirement of a fundamental right violation, even when it is not required,”<sup>91</sup> and there is the risk, under this enumeration rubric for prosecution to mis-characterize enforced sterilization as always or only a form of *sexual* violence, and to fail to identify it when it is not otherwise connected or along with other cases of gender persecution that are not sexual. This has particular implications for understanding, charging and developing case work which aligns with effective intersecting, system-wide strategies to prevent and remediate forced sterilization.

Stereotypes around sexuality may prompt narratives of a social need to control reproduction, narratives that give rise to enforced sterilization. For example, racist and ethnic stereotypes of ‘loose women’, or narratives of ‘hypersexuality’ (synonymous with ‘lack of control’) according to which adolescents with certain intellectual disabilities may be sterilized for ‘protection’ purposes have been used to justify sterilization.<sup>92</sup> Indeed, in the case of persons with disabilities, enforced sterilization holds in tension harmful narratives or perceptions of both hypersexuality and sexual inactivity or asexuality.<sup>93</sup> Acts of enforced sterilization may occur according to harmful ideas related to sexuality and may have significant impacts on sexual activity, but they are not cases of *sexual(ized) violence*, and the reflex to characterize it as such fuses ‘sexual and gender-based crimes’ in a manner that subsumes the latter under the former, and defines sex characteristics wholly by their association to sexual activity. Moreover the ways in which social reproduction is naturalized as the business of women’s bodies – and necessitating differential controls over differently gendered persons – is not exposed in the erroneous subsuming of enforced sterilization as a crime of sexual violence. Indeed, and particularly in the case of persons with disabilities, enforced sterilization engages questions related not only sexual behavior, sex drive and vulnerability to sexual abuse, but also harmful control and exclusion of menstruation, fertility and pregnancy, and desires to become parents, including through paternalistic decisions by parents or the policies of residential institutions or community services that may involve involuntary surgical treatments, and ignore options for long-term contraception and support to look after children.<sup>94</sup>

Our Gender 360 analysis therefore underscores that the OTP should ensure its charging practices including the characterization of charges and evidence, do not exclude acts of enforced sterilization because they are not sexualized, and that recognizes such non-sexual acts as gender-based harms that can amount to gender persecution. If construing enforced sterilization in a manner that appreciates the extent to which it is not a *sexual* act is constrained by its nesting within crimes of *sexual* violence in the Rome Statute, the OTP could seek to charge such acts under the “[o]ther inhumane acts” of Article 7(1)(k). Indeed, construing enforced sterilization in this manner specifically honors the compromise reached at the Rome Conference to require the link between persecution and enumerated acts under Article 7(1) or crimes

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<sup>91</sup> HRGJ CLINIC AT CUNY LAW SCHOOL, MADRE, *supra* note 11 (citing Baig, Jarvis, Martin Salgado, & Pinzauti, *Contextualizing Sexual Violence: Selection of Crimes*, in PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE ICTY (2016)).

<sup>92</sup> HUM. RTS. WATCH, *STERILIZATION OF WOMEN AND GIRLS WITH DISABILITIES: A BRIEFING PAPER* (2011).

<sup>93</sup> OHCHR, UN WOMEN, UNAIDS, UNDP, UNFPA, UNICEF AND WHO, *ELIMINATING FORCED, COERCIVE AND OTHERWISE INVOLUNTARY STERILIZATION: AN INTERAGENCY STATEMENT* (2014).

<sup>94</sup> *Id.*

within the jurisdiction of the ICC, lest it be conceived simply as an auxiliary offense “used as an additional charge or aggravating factor but never as a crime in itself.”<sup>95</sup> In the 2014 Policy Paper, the OTP commits, in line with this, to “bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other violence within the Court’s subject-matter jurisdiction, where the material elements are met, e.g., charging rape as torture, persecution, and genocide.”<sup>96</sup>

A comprehensive analysis also highlights that fact-finding and charging practices should be attentive to how forced sterilization often arises at the intersection of gender and racial/ethnic discrimination, such as how, historically, some men of the ‘wrong’ caste, race and class or geographic place have been subjected to the practice,<sup>97</sup> as have indigenous and minority women.<sup>98</sup> Roma women continue to be targeted by coercive sterilization policies and practices, performed without informed consent – due to duress, misinformation or failure to disclose other forms of contraception – and often even without knowledge, including during caesarean sections,<sup>99</sup> on the basis of narratives of gender and racial ‘unworthiness to reproduce’.<sup>100</sup> Human rights bodies have affirmed that this is a violation of basic human rights, and “a manifestation of multiple discrimination on the grounds of gender and race.”<sup>101</sup>

Further, fact-finding and charging practices should recognize the “long history of discrimination and abuse related to sterilization” of transgender and intersex persons, though legal and medical requirements for identity recognition and, for intersex persons particularly, “cosmetic and other nonmedically necessary surgery in infancy.”<sup>102</sup> These practices have likewise been recognized as human rights violations by international human rights bodies and on the national level.<sup>103</sup>

### III. Situating Criminal Prosecution in Human Rights Efforts for Gender Equality

We conclude by calling attention to the relationship of criminal law to other efforts at prevention, response and transformation of gender-based crimes, which are so essential to meaningful change at the local level. In this section, we raise questions regarding the best ways to situate the work of the OTP on gender persecution, and criminal prosecution more generally, in broader human rights efforts to change the inequalities giving rise to the harms associated with the specific gender-based crimes under the jurisdiction of ICC. This both relates back to positive complementarity, and is a question of a targeted and strategic approach to

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<sup>95</sup> Robinson, *supra* note 90.

<sup>96</sup> OTP Policy Paper.

<sup>97</sup> See, e.g., Hannah Green, The Legacy of India’s Quest to Sterilize Millions of Men, PULITZER CENTER (Oct. 1, 2018), <https://pulitzercenter.org/stories/legacy-indias-quest-sterilize-millions-men>.

<sup>98</sup> OHCHR et al., *supra* note 93.

<sup>99</sup> *Id.*

<sup>100</sup> See e.g. Patel, *supra* note 45.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

investigations and prosecution, and a commitment to fostering appropriate restraint with regard to the punitive power of the state.

While international criminal law and international human rights law both situate criminal responses as necessary components to a range of gendered harms in peace and conflict settings as covered under the Rome Statute, we -- and others -- have noted that criminal law alone is insufficient to prevent and alter the conditions giving rise to harm.<sup>104</sup> Indeed, many states are hiding behind mere criminal law reform to protect them from criticism of failures to act on gender-based violence, and fail to fully implement laws with sufficient training and accountability within their policing and courts. Some states are also not enforcing laws targeting to sexual and gender-based crimes, or apply such laws in pretextual ways to disenfranchise racial and other minoritized persons, while neglecting to establish and build infrastructure around institutions and services related to health, education and labor participation across gender.<sup>105</sup>

Work by the OTP to prosecute and punish, much like other work on the international level within human rights mechanisms, can elucidate and facilitate States' ability to meet their obligations to "prosecute and punish" effectively and appropriately limited, if criminal responses are explicitly linked to other state due diligence obligations to prevent, remedy and redress sexual and gender-based crimes.<sup>106</sup> These obligations, often deprioritized vis-à-vis punishment and redress, can help to address the current dynamic, which we have diagnosed as a counter-productive focus on harsh criminal responses, in which interconnected forms of sexual and gender-based harms are perversely exacerbated, particularly for racial, ethnic, religious, and sexual minorities, and for other marginalized communities, such as Indigenous, refugee and migrant, and victims/survivors with disabilities.<sup>107</sup> Seeing the OTP's work with the ICC as aligned with comprehensive state responses to persecution, may also shift focus to the root causes of violence and harm, such as multiple power inequalities, social exclusions, and the unequal distribution of services and resources.

In this, and its broader work, the OTP should consider how criminal legal systems are influenced by wider socio-cultural structures that generate inequality and sustain pre-existing axes of power, especially in regard to race. Decisions around what types of conduct and how and the extent to which to punish it are not neutral. Rather, they are guided by existing structures of economic and social inequality based on race, gender, sexuality, disability, and poverty, among others.<sup>108</sup> Effectively addressing gender-based crimes requires an intersectional lens that takes account of the complex and dynamic interplay of gender, class, caste, race, sexual orientation, ethnicity, religion, and other factors. This dynamic plays an important role in how those at the margins experience violence as well as circumscribing their access to justice. Research indicates

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<sup>104</sup> See, e.g., Kapur, *supra* note 47.

<sup>105</sup> CREA et al., *supra* note 2.

<sup>106</sup> See *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Sonia Corrêa and Maria Lucia Karam, *Brazilian Sex Laws: Continuities, Ruptures, and Paradoxes*, in *BEYOND VIRTUE AND VICE* (Miller and Roseman eds., 2018)

that marginalized women and gender diverse people suffer from pervasive violence and yet often lack sufficient access to justice and services. Those who live in poverty, lack education and support networks and/or transgress social, gender and cultural norms need the greatest protection from gender-based violence, including sexual violence. Yet, they are also the least likely to have access to criminal legal systems, and more likely to be penalized by them. Criminal responses may also provide them only limited responses that may not offer meaningful resolutions for victims or survivors, ignore the structural reasons why human rights violations occur, or obscure the fact that States have the duty to protect all rights-bearers.

Further, the OTP can productively locate its efforts within current global critiques which consider how national level criminal legal systems themselves perpetrate human rights abuses, often reproducing oppressive power structures and inequality. Biases and prejudices on the basis of classifications such as gender, sexuality, sexual orientation and gender expression, race, ethnicity, class, caste, and ability, play a powerful role in the construction of criminality, whereby members of certain groups carry a historical burden of being strongly associated with criminality.<sup>109</sup> We note that these efforts to put the OTP in conversation with rights advocacy connect to on-going debates over the historical association of certain groups and communities, with criminality or with identification as “war criminals,” and within global concerns about unequal distribution of global accountability.

Further, and in line with the wide-ranging scope of positive complementarity, the OTP’s work can be accomplished in a manner that does not impede activists’ collective grassroots and civil society action at the national level to address the harms of criminalization and criminal systems, including the denial of fundamental rights and freedoms, and to structurally shifts responses to crime away from creating and entrenching those harms. In this way, it can be more consistent with intersectional models of gender justice. On a specific, positive and granular level, this could include more creative involvement of survivors and victims in ICC proceedings, in the process of gathering evidence, and in designing solutions to harms or crimes addressed by the ICC.

While the OTP is not a human rights tribunal, this “does not bar progressive and dynamic interpretation,”<sup>110</sup> in light of progression in human rights principles, and is not necessarily opposed to a critical analysis of the use and abuse of criminal law. Indeed, the ICC “is pursuant to Article 21(3) of the Rome Statute required to interpret and apply its law in a manner that protects fundamental rights,” and broader “human rights dimensions underlie every single statutory provision.”<sup>111</sup> The fundamental relationality between criminal law, systems for justice and human rights must be visiblized, in order to conceive of rights-affirming responses to sexual and gender-based harm.

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<sup>109</sup> Miller and Roseman, *supra* note 108.

<sup>110</sup> Maučec, *supra* note 25.

<sup>111</sup> *Id.* (citing Situation in the Democratic Republic of the Congo, ICC-01/04-168, Judgment on the Prosecutor’s Application (July 13, 2006); Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-772, Judgment on Appeal (Dec. 14, 2006).

Thus, in addition to proposing that the OTP take a comprehensive and intersectional view of 'gender,' as elaborated in Section 1, we urge the OTP to analyze and examine the circumstances leading to gender persecution, in order to locate its work in rights-based efforts to undo the structures that reinforce sexual and gender norms, which are harmful to all.

We call on the OTP, further, to consider how both international and national responses to gender abuses may inadvertently reinforce regressive gender and race dynamics. Everything that is a harm is not a crime, and as rights advocates we do not wish to see the scope of criminal law unnecessarily broadened as if only the attention and condemnation of prosecution can end gender inequalities. The OTP has a role in ensuring that the ICC does not over-reach, and that its work meaningfully complements efforts outside of the criminal law to support rights-based and justice-centered solutions for different kinds of abuses arising around the world.

#### **IV. Recommendations for Consideration**

**Ensure that a comprehensive gender analysis (gender 360) is used, in order to ensure an intersectional analysis attentive to the conditions and systems that give rise to gender persecution and other crimes under the jurisdiction of the ICC, and that can reach persons subject to a wide range of gendered harms occurring to many differently gendered persons, regardless of embodiment and sex characteristics, and provides a support for thinking beyond the two-sex binary.**

**Ensure that a gender analysis that allows OTP activities to more fully capture non-sexual gender persecution is used, including an analytic approach that both supports specific attention to the conditions for – and elements of – conduct comprising crimes of sexual violence, allowing for distinction and specific attention – where appropriate – between sexual crimes and non-sexual gender-based crimes as underlying crimes addressed in prosecutions for gender persecution, and an understanding of gender persecution that includes not only those crimes that have a sexual conduct component, such as sexual violence, but also crimes directed at persons because of their expressions of diverse sexual orientations.**

**Adopt a gender analysis for gender persecution that can enhance a positive complementarity posture for the ICC, in particular in its role in influencing the content of substantive criminal law, i.e., progressive normative development in national standards, and that situates criminal prosecution in light of progressive human rights efforts for gender equality, especially by recognizing the relationship of criminal law to other efforts at prevention, response and transformation, which are essential to meaningful change at the local level.**