

**COMMENTS ON THE ICC DRAFT POLICY PAPER ON
SEXUAL AND GENDER BASED CRIMES**

**SUBMITTED BY
REFUGEE LAW PROJECT
23 FEBRUARY 2014**



This commentary was prepared by the Refugee Law Project in collaboration with the International Human Rights Law Clinic, University of California, Berkeley, School of Law.

Dr. Chris Dolan, Director, Refugee Law Project

Stephen Oola, Programme Manager, Conflict, Transitional Justice and Governance, RLP

Shayne Henry '14, Abigail Ludwig '15, and Sahar Maali '15 under the supervision of *Laurel E. Fletcher*, Clinical Professor of Law and Director, IHRLC

Vision

Human rights for all people irrespective of their legal status. This vision is informed by relevant international laws as well as the Constitution of Uganda.

Mission

To empower asylum seekers, refugees, deportees, IDPs and host communities to enjoy their human rights and lead dignified lives.

Mandate

- To promote the protection, well-being and dignity of forced migrants and their hosts.
- To empower forced migrants, communities and all associated actors to challenge and combat injustices in policy, law and practice.
- To influence national and international debate on matters of forced migration, justice and peace.
- To be a resource for forced migrants and relevant actors.

For more information, please visit:

www.refugeelawproject.org or contact us at info@refugeelawproject.org

The International Human Rights Law Clinic (IHRLC) designs and implements innovative human rights projects to advance the struggle for justice on behalf of individuals and marginalized communities through advocacy, research, and policy development. The IHRLC employs an interdisciplinary model that leverages the intellectual capital of the university to provide innovative solutions to emerging human rights issues. The IHRLC develops collaborative partnerships with researchers, scholars, and human rights activists worldwide. Students are integral to all phases of the IHRLC's work and acquire unparalleled experience generating knowledge and employing strategies to address the most urgent human rights issues of our day.

For more information, please visit:

www.humanrightsclinic.org.

Table of Contents

1. EXPERIENTIAL BASIS FOR COMMENTARY 1

2. GENERAL OBSERVATIONS ON THE IMPORTANCE OF THE DRAFT POLICY PAPER..... 2

3. SPECIFIC CONSIDERATIONS 3

 3.1 *Defining Gender*..... 3

 3.2 *Use of the Term “Gender-Inclusive”*..... 5

 3.3 *Use of “Other Identities”* 6

 3.4 *Intersectional Analysis of Multi-Faceted Crimes* 6

 3.5 *Ensuring Proper Charging of Sexual Violence Crimes Against Men*..... 8

 3.6 *Acknowledging the Role of Duress and Forced Perpetration* 9

 3.7 *The Need for Explicit Listing of Sexual Violence Crimes*..... 10

 3.8 *Investigations* 11

 3.9 *Partnership with Civil Society Organizations* 11

 3.10 *Institutional Development*..... 12

4. ADDITIONAL RECOMMENDATIONS 12

5. CONCLUSIONS 14

1. Experiential Basis for Commentary

1. Refugee Law Project (“RLP”), established in 1999, is a community outreach project of the School of Law, Makerere University, Kampala, Uganda. In its work with refugees from throughout the Great Lakes region, as well as with internally displaced persons (“IDPs”) from the Government of Uganda-LRA conflict in northern Uganda, the reality of sexual and gender based violence has become increasingly central.

2. RLP’s direct support to survivors of such violence includes acting as a service provider for refugee inflows through the provision of legal aid, psychosocial and medical support, and encouraging the establishment of survivor support groups. We work with both women and men survivors, as well as sexual and gender minorities, recognizing that the latter categories (men, gender and sexual minorities) have historically been under-acknowledged and under-served by existing international and domestic services and judicial responses to conflict-related sexual and gender-based violence (“SGBV”). This support has been coupled with research, advocacy, training and awareness raising of the nature and scale of the phenomenon; initiating a civil-society led process for reform of the Ugandan penal code; engaging in the quantitative and qualitative documentation of crimes of sexual violence against men to illuminate the scope of male victimization; and reshaping the social and legal conversation around conflict-related sexual violence at the domestic, regional, and international level.

3. Partners in this include: UNHCR,¹ UNSRSG-SVC,² Johns Hopkins School of Public Health,³ and the International Human Rights Clinic of the University of California, Berkeley (“IHRCLC”).⁴ RLP staff have provided training on these issues to UNHCR implementing partners, as well as in Justice Rapid Response trainings on the investigation of sexual and gender-based crimes.

¹ RLP was involved in the joint publication of REFUGEE LAW PROJECT & UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, NEED TO KNOW GUIDANCE NOTE ON WORKING WITH MEN AND BOY SURVIVORS OF SEXUAL AND GENDER BASED VIOLENCE IN FORCED DISPLACEMENT (2012).

² RLP played a leading role in facilitating the SRSG-SVC’s ‘Workshop on Sexual Violence against Men & Boys in Conflict Situations,’ which convened in New York in July 2013, *see* OFFICE OF THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON SEXUAL VIOLENCE IN CONFLICT, REPORT OF WORKSHOP ON SEXUAL VIOLENCE AGAINST MEN AND BOYS IN CONFLICT SITUATIONS (January 2014) [hereinafter SRSG REPORT].

³ RLP participated in the collaborative development of a screening tool for earlier identification of male survivors of sexual violence in refugee situations (forthcoming 2014).

⁴ RLP produced a joint working paper with the International Human Rights Law Clinic, Berkeley Law, entitled PROMOTING ACCOUNTABILITY FOR CONFLICT-RELATED SEXUAL VIOLENCE AGAINST MEN IN UGANDA, Refugee Law Project Working Paper No. 24 (July 2013) [hereinafter WORKING PAPER].

2. General Observations on the Importance of the Draft Policy Paper

4. The “DRAFT Policy Paper on Sexual and Gender Based Crimes” (“Paper” or “Policy Paper”) released by the International Criminal Court’s (“ICC”) Office of the Prosecutor (“OTP”) in February 2014 reflects and further demonstrates the leadership provided by the ICC in general and the OTP in particular in developing more gender-inclusive approaches to the application of international criminal law. These approaches are crucial in order to meaningfully address the phenomena of sexual and gender-based violence in conflict situations.

5. The OTP’s elevation of sexual and gender-based crimes as a key strategic goal for the period 2013-2015 significantly enhances the prospects of justice for survivors of conflict-related SGBV. The prospects of addressing SGBV are further enhanced by the OTP’s commitment to integrating a gender perspective and analysis in all its work, not least in the analysis of crime patterns and command structures (and within that, the “power dynamics which shape gender roles in a specific context”).⁵

6. The OTP is further to be commended for recognizing the importance of an intersectional analysis. Applying this analysis is vital in understanding and responding to the way in which a victim’s multiple identities (*i.e.*, ethnicity, religion, nationality, race, and political opinion, among others) inform his or her experience with sexual violence.

7. RLP also applauds the OTP’s categorization of gender-based crimes as “among the gravest under the Statute,” its recognition of such crimes as an aggravating factor during sentencing,⁶ and its principled commitment to “bring charges for sexual and gender based crimes explicitly as crimes in themselves, as well as charge these acts as forms of other violence within the competence of the court, where the material elements are met, e.g. rape as torture.”⁷

8. An explicit engagement to pursue justice for male as well as female victims is critically important given the tendency of international organizations addressing sexual violence, gender, and SGBV to focus overwhelmingly on women’s experiences. This has resulted in the exclusion of men – as well as others who do not conform to a simple gender binary – from accessing services and justice in the wake of such crimes. Domestic legal frameworks that prevent access to justice for male survivors (*e.g.*, domestic criminalization of sodomy and women-only definitions of rape) have often remained untouched. Pervasive gender stereotypes, victim-blaming cultures, and homophobia discourage male survivors from reporting these crimes and

⁵ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, ICC DRAFT POLICY PAPER ON SEXUAL AND GENDER BASED CRIMES ¶ 2 (February 2013) [hereinafter POLICY PAPER].

⁶ *Id.* ¶¶ 4, 37, 90-2.

⁷ *Id.* ¶ 67.

officials from prosecuting the attackers.⁸ This is perpetuated by a lack of training and resources for aid workers, investigators, and the judiciary to properly identify and provide support to, and justice for, male victims.

9. Recently, however, the issue of SGBV against men has received growing attention, in part due to improving documentation of the prevalence and variety of instances of sexual violence against men in conflict,⁹ as well as growing commitment on the part of the international community to address the issue.¹⁰ In this regard, the Rome Statute, and the policy commitments of the OTP that result from it, represent some of the most significant opportunities to expand the scope of justice to *all* victims of conflict-related sexual violence.

10. RLP strongly believes that a gender-inclusive approach to the investigation, charging, and prosecution of gender-based crimes is vital to meeting the ICC’s mandate to end impunity and hold perpetrators accountable as part of a broader struggle for gender justice. We also concur with the OTP’s view, as reflected in the structure of the Policy Paper, that for such an approach to be effective it must be underpinned by gender-inclusive institutional development and policy. We therefore offer the following comments on the Draft Policy Paper in a spirit of constructive collaboration.

3. Specific Considerations

3.1 Defining Gender

11. RLP encourages the OTP to further elaborate on its definition and use of both SGBV and the term “gender” in the Paper. RLP recognizes that the definition of gender provided by the ICC Rome Statute is binding on the OTP when it comes to charging, prosecuting, and sentencing,¹¹ but notes that there is room for the OTP, in its policy and programming initiatives, to incorporate

⁸ See WORKING PAPER, *supra* note 4.

⁹ The initial findings of the RLP-Johns Hopkins screening data for 447 refugee men (99% Congolese), average age 30 years, are that 13.4% had experienced sexual violence in the year preceding the screening, rising to 38.5% having had an experience over their lifetime. See WIRTZ, A, ET AL., SEXUAL VIOLENCE, HIV RISK AND PREVENTION AMONG MALE REFUGEES IN UGANDAN SETTLEMENTS (forthcoming 2014 – to be presented at the International AIDS conference); see also, SRSG REPORT, *supra* note 2.

¹⁰ *Id.*

¹¹ ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 7(3), U.N. Doc. A/CONF.183/9 (1998) [hereinafter ROME STATUTE] (“For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”).

and operationalize a more expansive conceptualization of gender through Article 21(3).¹² While appearing to restrict analysis to a female-male gender binary, the phrase “within the context of society”¹³ does offer some room for more expansive interpretation. In this regard, RLP would emphasize that even in those societies where gender *is* premised on an over-arching male-female binary, it is further segmented by age, as reflected in distinctions between child, youth, adult and elder, and that in many other societies, including non-western cultures, the binary is challenged further by the reality of third sex, intersex and transgendered persons.

12. We welcome the Policy Paper’s reference to the 1979 Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”),¹⁴ and wish to highlight that CEDAW offers an important example of how a UN body, faced with a restrictive treaty definition, expansively interpreted the treaty provision to more effectively promote the protection and advancement of human rights in the area of anti-discrimination: While the CEDAW Convention only explicitly refers to discrimination on the basis of sex, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention interprets Article 1 of the Convention to incorporate a broader understanding of what sex-based discrimination encompasses.¹⁵ Specifically, the Recommendation expands CEDAW’s conceptualization of sex-based discrimination to cover gender-based discrimination against women. Further, the Recommendation goes on to note that discrimination associated with gender is “inextricably linked with other factors . . . such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity,”¹⁶ thereby extending the reach of its approach to account for the intersections of multiple areas of discrimination.

13. Similarly, the OTP has the opportunity to conceptualize gender and gender-inclusion more broadly in its advocacy work and other policy initiatives. A more expansive understanding of gender would better allow the OTP to reflect the emerging and evolving understanding of gender by other UN bodies, such as those provided by UNHCR¹⁷ and WHO.¹⁸ Indeed, one might further

¹² *Id.* art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth *or other status*.”) (emphasis added).

¹³ POLICY PAPER, *supra* note 5, ¶ 13.

¹⁴ *Id.* ¶ 20.

¹⁵ See UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28, available at <http://www.refworld.org/docid/4d467ea72.html> [accessed 26 February 2014].

¹⁶ *Id.* ¶ 18.

¹⁷ UNHCR, *Handbook for the Protection of Women and Girls* (Jan. 2008), at 12, available at <http://www.unhcr.org/47cfa9fe2.html> (last visited Feb. 22, 2014) (“The term ‘gender’ refers to

argue that these alternative conceptualizations of gender comprise the “internationally recognized human rights” with which the ICC’s application of law must be consistent under Article 21(3) of the Rome Statute.¹⁹

3.2 Use of the Term “Gender-Inclusive”

14. The term “gender-inclusive” as used in the Paper is ambiguous. It appears the Paper uses “gender-inclusive” to denote vigilance toward the potentially gendered nature of the crimes it is investigating and prosecuting, rather than to signify recognition that females and males, as well as those who fall outside the gender binary, can all be victims of sexual violence. For example, although the Paper successfully highlights the similarities among gender-based sexual violence against men and women, it fails to address the historical exclusion of male victims from international conceptions of conflict-related sexual violence,²⁰ and does not capture the distinctions between male and female experiences of this violence. It is striking, for example, that the same gender-logic that informs the subordination of women through sexual violence is also found in attacks on men insofar as the sexual subordination of the victim is seen as feminizing him. However, this attack on the male victim’s *gender* identity can also frequently compromise the victim’s *sexual* identity insofar as the penetration of a man is interpreted in many cultures as incontrovertible evidence of his homosexuality.

the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.”) (citing Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), *Concepts and definitions*, available at <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited Feb. 22, 2014)).

¹⁸ World Health Organization, *Gender women and health*, available at <http://www.who.int/gender/whatisgender/en/> (last visited Feb. 22, 2014) (“Gender refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women” while “[s]ex refers to the biological and physiological characteristics that define men and women.”).

¹⁹ See ROME STATUTE, *supra* note 11, art. 21(3).

²⁰ For more discussion about the historical context that resulted in the exclusion of male victims from the international discourse on conflict-related sexual violence, see WORKING PAPER, *supra* note 4; see also S. Sivakumaran, *Sexual Violence against Men in Armed Conflict*, 18 EUR. J. INT’L L. 253, 257-58 (2007).

15. RLP encourages the OTP to define a gender-inclusive approach, and we offer the following definition for further discussion:

A gender-inclusive approach necessitates recognizing that all persons are gendered and have a particular gender identity, which frequently falls within a male-female binary, but can also fall outside it. A gender-inclusive approach further recognizes that all gender identities can be both sources of power and sources of vulnerability, and that this is situationally determined, necessitating careful examination of gender dynamics, as well as their intersections with other sources of power and discrimination, in any given context.

16. In this regard, the Policy needs to guard against reverting to reductionist assumptions about the nature and targeting of sexual violence as being something limited to crimes perpetrated by men against girls and women. We note, for example, paragraph 19 of the Policy Paper, which states that “the Court may exercise jurisdiction over other sexual and gender based crimes for which girls and women are particularly targeted.”

3.3 Use of “Other Identities”

17. The Policy Paper states that “the approach by the Office will also encompass an understanding of the use of certain types of crimes, including acts of sexual violence, to diminish gender, ethnic, racial and other identities.”²¹ It is clear from footnote 16 of the Paper that “other identities” alludes to – amongst other things – non-heteronormative sexual and gender identities.

18. While recognizing that language such as “other identities” is always useful given that no legal framework can fully capture the diversity of human identities and experiences, and while fully understanding the sensitivities of these issues, RLP believes that international leadership on deconstructing heteronormative assumptions regarding the victims of sexual violence is necessary if crimes against persons who belong to sexual or gender minorities are to be recognized and addressed. We therefore urge the Policy Paper to clearly articulate as many of the “other identities” as can be readily identified at this point in our understanding of sexual and gender-based crimes, not least sexual and gender minorities.

3.4 Intersectional Analysis of Multi-Faceted Crimes

19. The OTP properly notes the importance of applying an “intersectional” analysis to better understand the “multi-faceted” nature of sexual and gender-based violence,²² but the Paper would benefit from a clearer statement of how each term is to be understood and applied –

²¹ POLICY PAPER, *supra* note 5, ¶ 15.

²² *Id.* ¶ 67.

sociologically and legally – to ensure that their usage is consistent throughout.

20. As applied in paragraph 15 of the Paper, RLP understands the term “multi-faceted” to mean that because crimes of sexual violence are complex, due to the confluence of gender roles and social dynamics, the OTP will apply an intersectional analysis to more accurately account for the perpetrator’s socially-constructed intent and the victim’s distinct experience with gender-based crimes. In this manner, the OTP properly characterizes intersectionality as a tool for studying, understanding, and responding to the ways in which various forms of identity (*i.e.*, gender, ethnicity, nationality, class, political opinion, religion, *etc.*) interact to inform individual experiences with discrimination and injustice.²³ An intersectionality approach cautions officials against compartmentalizing identities (*i.e.*, looking at violence solely as a matter of race or solely as a matter of gender), but rather asks officials to consider the totality of circumstances, thus empowering victims to properly articulate their claims and access justice.²⁴

21. The importance of such an intersectional analysis in understanding crimes of sexual violence is very evident in RLP’s work with male survivors of sexual violence. In-depth interviews consistently indicate that perpetrators frame - and victims interpret - the violence as an attack on the victims’ ethnicity or nationality, as the following examples illustrate:

Ex. 1 (Congolese) “One took a bucket of cold water and threw it over me. He told

²³ See KIMBERLEY CRENSHAW, BACKGROUND PAPER FOR THE EXPERT MEETING ON THE GENDER-RELATED ASPECTS OF RACE DISCRIMINATION 1 (2000) (“The intersectional problem is not simply that one discrete form of discrimination is not fully addressed, but that an entire range of human rights violations are obscured by the failure to address fully the intersectional vulnerabilities of marginalized women and occasionally marginalized men.”); Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L LAW 350, 365 (2003) (discussing the importance of intersectional analysis in defining and prosecuting sexual violence within the ICTR and ICTY: “An overemphasis on gender to the exclusion of all other possible motivating factors can obscure other characteristics of a woman’s identity that determine which women are raped . . . Sexism and racism, therefore, operate in conjunction to determine which women are raped. Indeed, rape survivors are women and members of a given national, political, or religious group. Their identities as women cannot be separated from their membership in a particular race or religion. According to this school of thought, therefore, rape cannot be defined by gender alone, and some reliance on the community aspects of the crime must continue.”).

²⁴ See Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L. J. 71, 101-137 (2003) (“Intersectionality of racism, sexism, classism, and heterosexism must inform the way we conceptualize women’s human rights. Individuals do not experience neatly compartmentalized types of discrimination based on mutually exclusive forms of, for example, racism and sexism. Rather, individuals experience the complex interplay of multiple systems of oppression operating simultaneously in the world. To deal with this practical reality, intersectionality must also inform the institutionalized structure of the United Nations, other international bodies, and the NGOs that promote human rights around the globe.”).

*me to stand up and said 'now we are going to show you.' One of them gave his rifle to a colleague, took his zip down. He told me to suck his cock. I told him 'I'm sorry, I'm not used to this, let us go home and I give you money and you go.' They told me **'we don't want Tutsi money – what are you doing in the country anyway?'** I told him we were born here, we are Congolese, Banyamulenge.' He said, 'who said they are Congolese?'' He told me to do it (to suck). He threatened to kill me. I had no choice, I didn't want to die, so I started to suck. I vomited. He said 'so, turn around and bend over.' They did very bad things to me...²⁵*

*Ex. 2 (Burundian who returned from exile in Tanzania and was arrested as a former member of FNL) "Q: how would you describe your ethnicity?" A: "I am seen as a Hutu. The person who raped me was also forced [to rape], and a Hutu. The police was saying **'you are the enemies of Burundi, so we are going to kill all of you'**. He told both of us to penetrate by force, **'otherwise we will kill you.'** We used to stay together in Tanzania. I was arrested first, he [the other victim] found me in prison. Even the one who penetrated me, I knew him in Tanzania, he was killed when I left detention."²⁶*

22. On the other hand, the term “multi-faceted” in paragraph 67 of the Paper appears to suggest that, by applying an intersectional analysis (*i.e.*, looking at the intersection of gender *and* ethnicity/religion/nationality/*etc.* of the victim), “rape” as a crime becomes multi-faceted as it is viewed both as a crime of “rape” and the crime of “rape as genocide/persecution/*etc.*” This interpretation of “multi-faceted” accords with rulings passed down by the ICTR and the ICTY, which have recognized that gender-based crimes can be constituent acts of multiple international crimes, *e.g.* genocide, crimes against humanity, and war crimes.²⁷ In this respect, the “multi-faceted” nature of sexual violence captures in law what rape is in real life: a constituent act of genocide, a form of torture, or a form of terror, *etc.*²⁸ It appears that an intersectional analysis results in the capacity to describe a particular crime as “multi-faceted,” which in turn allows the law to account more completely for what the victim actually experiences.

3.5 Ensuring Proper Charging of Sexual Violence Crimes Against Men

23. RLP commends the OTP’s self-reflection and candor in noting its attempt to charge the

²⁵ Excerpt from transcript of interview with male refugee survivor from Nakivale refugee settlement, RLP, September 2013.

²⁶ Excerpt from transcript of interview with male refugee survivor from Nakivale refugee settlement, RLP, September 2013.

²⁷ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (holding that rape is an act of genocide); Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (holding that sexual mutilation and forced performance of male-on-male oral sex intersected with other mistreatment, all of which the ICTY classified as crimes against humanity).

²⁸ Catherine Mackinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 944 (2006).

genital mutilation of Luo men in the Kenyatta case as crimes of a sexual nature—an effort frustrated by the ICC Pre-Trial Chamber’s decision not to confirm the crimes as charged by the OTP. RLP regards the dedication of the OTP in seeking the proper classification of these crimes as “sexual crimes” as an important step in preventing the silencing and disappearance of the sexual nature of gender-based violence against men in future indictments. Indeed, further reflection on the case within the Paper could offer an opportunity to emphasize the more general problems stemming from a disregard for sexual violence against men, of which the Kenyatta decision is emblematic.

3.6 Acknowledging the Role of Duress and Forced Perpetration

24. While the Paper offers some recognition of the role of coercion and duress in the commission of gender-based crimes, it does not go beyond articulating the OTP’s commitment to prosecuting authority figures who facilitate or order the commission of crimes by their subordinates.²⁹ To ensure that investigation, charging, and sentencing take full account of the harms that forced perpetration inflicts on the victims conscripted into their own victimization, we recommend that the Paper articulate in more detail the nature of these harms, as well as specify the ways in which these particular forms of coercion vitiate the criminal liability of the forced “perpetrator,” while simultaneously aggravating the nature of their victimization.

25. For example, the SRSG Conference Report reflects documented examples of forced perpetration, including detained individuals being forced to have sex with others who are also in detention, or men being forced to have sex with family members while being watched by others.³⁰ In these situations, the mantle of both perpetrator and victim is imposed on the individual compelled to engage in the perpetration of sexual violence. In particular, we note the mental harm, both in terms of an individual’s moral and sexual identity, where he is forced to take an active (frequently penetrative) role in sexual violence against another victim, whether male, female, or other. We also note that such attacks harm not only the individual but also their families and communities, social units which the forced perpetrator can often no longer comfortably occupy.³¹

²⁹ POLICY PAPER, *supra* note 6, ¶ 71 (“Pursuant to Article 28 of the Statute, cases may be brought against individuals who may be responsible for the commission of rape and other sexual and gender based crimes committed by those under their effective command and control (or effective authority or control), on the basis of either (military) command responsibility or superior responsibility. The Office will, as appropriate, increasingly explore the potential of bringing charges on the basis of article 28 in light of the possible impact on the behaviour of commanders and non-military superiors.”).

³⁰ See SRSG REPORT, *supra* note 2.

³¹ RLP has worked with numerous male clients who, in the wake of such experiences, have withdrawn from their families and communities as the only means of coping with their own sense of shame.

26. In fully recognizing the influence of duress and coercion in the commission of sexual violence against men, the OTP should be cognizant of this occurrence when investigating the circumstances of a gender-based crime in order to properly allocate criminal responsibility and liability upon the true perpetrators of violence. Additionally, RLP suggests that the OTP pursue these acts of forced perpetration as aggravating factors during the sentencing phase of trials.

3.7 The Need for Explicit Listing of Sexual Violence Crimes

27. The OTP should provide a list of crimes that meet the Statute’s definition of “any other form of sexual violence of a comparable gravity”³² based on, among other sources, the collective jurisprudence of the ICC and the *ad hoc* tribunals. RLP can assist in the development of this list, recognizing that no such list can ever be comprehensive, and that the language of “any other form of sexual violence of a comparable gravity” should always be retained.

28. In elaborating on forms of sexual violence that have been documented to date, the SRSR Conference Report is particularly instructive, as it includes a list of documented acts of sexual violence perpetrated against men in recent conflicts, including: oral rape, as well as rape using objects; having ropes tied to the genitalia and being pulled around by these; having electric wires attached to the genitalia and shocks administered; being made to have sex with holes in the ground/trees/objects; being forced to have sex with others who are also in detention; being forced to have sex with some family members while being watched by others; extended sexual slavery; castration and other forms of mutilation of the genitalia.³³

29. The SRSR list will undoubtedly be further expanded as investigations into sexual violence against men and boys become more commonplace in a range of conflict settings. For this reason, the SRSR list should serve only to illustrate the types of violence documented to date, not to create an exhaustive list that might foreclose the recognition of other acts of violence. This list should be used to train investigators to recognize male victims and better document and pursue these incidences of violence. Further, it should be used to guide prosecutors as they prepare the charges under which they will prosecute perpetrators.

30. While the SRSR list focuses on the physical harms to the victim, it is important to characterize not just the act itself, but also what it signifies to the perpetrator and the victim, given underlying patterns of gender and sexuality socialization. This relates directly to the observation made in the Paper under “Mental Element”³⁴ that “establishing intent and knowledge of the person under investigation or the accused in relation to the crimes is one of the major

³² ROME STATUTE, *supra* note 11, art. 7(1)(g).

³³ See SRSR REPORT, *supra* note 2 at 11.

³⁴ POLICY PAPER, *supra* note 5, ¶¶ 72-74.

challenges for the office.”³⁵

31. Compiling recurrent forms of sexual violence against men in this manner will enable investigators to ask more focused questions, laying the groundwork for the OTP to investigate these and other similar acts, as well as providing notice and deterrence for future perpetrators and assisting in the appropriate charging of these violations, whether as crimes against humanity, war crimes, or genocide.

3.8 Investigations

32. RLP’s own experience working with refugees suggests that SGBV crimes are an important cause of flight for people of all genders, and that, as such, refugee populations may be key sites for investigators to find evidence. That said, it should be recognized by investigators that the vulnerabilities of such victims add to the already significant complexities of witness protection.

33. In line with paragraph 62 of the Paper, RLP encourages the OTP to collaborate closely with civil society organizations and UNHCR and its implementing partners to normalize screening of refugee populations for early identification of cases of SGBV and as an important source of evidence of whether or not such crimes are widespread or systematic in a particular refugee-producing context. Ideally, new refugee arrivals should be routinely screened for experiences of conflict-related sexual violence. The data thereby collected can – in addition to informing humanitarian responses – provide a solid evidentiary base for the extent of conflict-related sexual violence against women and men in a given context.

3.9 Partnership with Civil Society Organizations

34. RLP commends the OTP on its expressed commitment to involve the work of NGOs and advocacy groups in addressing gender-based crimes and sexual violence. We note the crucial role civil society organizations play in “preventing and addressing sexual and gender based crimes” and “transforming public attitudes towards gender equality.”³⁶ However, we would encourage the OTP to further clarify the Office’s commitment to involving civil society organizations, in addition to States Parties, in its work on sexual and gender-based violence. To this end, RLP hopes that the OTP will robustly disseminate its policy to all levels of stakeholders by pro-actively suggesting (as opposed to simply responding to) domestic initiatives by States Parties and civil society in line with this policy. Such initiatives should include facilitating domestic trainings, encouraging domestic penal reform, and ensuring the timely investigation and prosecution of crimes of sexual violence.

³⁵ *Id.* ¶ 72.

³⁶ *Id.* ¶¶ 98-9.

35. In general, RLP requests greater specificity with respect to each of these points—for example, by listing the nature of intended initiatives, such as directly engaging or sub-contracting with civil society organizations to pursue training and awareness-raising campaigns in collaboration with States Parties. RLP would also encourage the OTP to emphasize the need for other multi- and bi-lateral institutions to ensure sufficient resources to properly train first responders, direct service providers, and aid workers to ensure they are equipped to identify and pursue suspected incidences of conflict-related sexual violence against men.³⁷ To facilitate this process, the OTP should clarify the specific skills, knowledge, and sensitivities necessary for staff interacting with male survivors and survivors falling outside the gender binary.³⁸ RLP welcomes the commitment to staff training on methodologies in the collection and analysis of evidence of such crime and stands willing to engage in the development and delivery of such training programs.³⁹

3.10 Institutional Development

36. RLP notes that ensuring the “skills, knowledge and sensitivity”⁴⁰ necessary to successfully address sexual and gender-based violence requires not just the right skills, but also the right identities. As noted by the ICTR’s Committee for the Review of the Investigation and Prosecution of Sexual Violence, for example, the gender dynamics between the investigator and the person giving testimony is central, and in many instances improved, if the two people share the same gender identity.⁴¹ It is also essential that the investigator understands the non-sexual intent behind what appear to be sexual acts.

37. In this regard RLP notes that both the current Special Advisors at the ICC are women, and proposes that, in line with paragraph 105 of the Policy Paper, additional advisors should be sought to ensure that advisors and other staff reflect the mainstream gender binary in a manner that is helpful to male survivors, but also goes beyond it.

4. Additional Recommendations

38. With regard to **Preliminary Examinations**, the Paper states that “the Office will also examine the general context within which the alleged sexual and gender based crimes have

³⁷ For example, in 2011 RLP and the UNHCR worked together to develop a guidance note for staff working with male victims of sexual violence. *See* RLP & UNHCR, *supra* note 1.

³⁸ *See* POLICY PAPER, *supra* note 6, ¶ 16.

³⁹ *See id.* ¶ 110.

⁴⁰ *Id.* ¶ 16.

⁴¹ *See* L. Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES*, 123-149 (Intersentia 2013).

occurred.” We concur with this statement and encourage the OTP to articulate more clearly what an examination of the general context should focus on, which we suggest should include “gender norms, sexuality norms, parenting patterns, degree and form of militarization, patterns of economic and political disempowerment.”

39. Under **Sentencing** (paragraphs 90 – 92), we recommend that the factors be further elaborated as suggested below in bold:

Several factors, including the extent of the **physical, psychological, and social** damage caused, in particular the harm caused to the victims and their families **and their communities . . .** [in line with the end of paragraph 90 which references victims, families and the *community*].

40. With regard to **external relations strategy** (paragraph 95), we recommend that an additional clause be inserted as follows:

As part of its external relations strategy, the Office will enhance its efforts to identify, support and engage with initiatives undertaken to respond to the scourge of sexual and gender based crimes, **and to promote awareness of gender-inclusive approaches to such crimes and what such approaches entail in terms of legislative reform, training, and attitudinal change** including the facilitation of contacts between various entities in this field.

41. We agree that States Parties are primary duty bearers when it comes to addressing sexual and gender-based crimes (paragraph 96), but we would encourage a more elaborated policy vis-à-vis representation of civil society in state-led initiatives to address this scourge.

42. We also recommend a stronger emphasis on encouraging states not only to adopt new domestic legislation that incorporates the conduct proscribed under the Statute (*e.g.*, the ICC Act of Uganda), but also to ensure that existing domestic legislation is reformed to bring it into alignment with the provisions of the Statute. For example, although Uganda has domesticated the Rome Statute, it must also reform domestic criminal laws that operate as barriers to accountability and redress for SGBV, such as the restrictive definition of rape, which only provides for female victims. This definition, coupled with the Ugandan Penal Code’s anti-sodomy provision, serves to exclude male victims of rape from the protection of the law while also chilling the reporting of these crimes, as victims face criminal prosecution (and social persecution) if they try to file a report with law enforcement—since men cannot be raped, the law reasons, the man reporting the crime must have engaged in intercourse consensually.⁴²

⁴² For more discussion of the problems posed by the Ugandan Penal Code’s definition of rape, see WORKING PAPER, *supra* note 4.

5. Conclusions

43. RLP is of the view that the OTP's Policy Paper is an important step toward increased recognition of and accountability for conflict-related sexual violence against men. The language of the Paper touches on issues crucial to adequately addressing this type of violence, including the elements of intersectionality and duress often present in the occurrence of these crimes. This platform affords the OTP the opportunity to achieve our shared goals by providing further contextualization and specificity when addressing the complex dynamics at play in the commission of crimes of sexual and gender-based violence against women *and* men *and* others, allowing the OTP to play a more effective role in providing redress for victims and deterring the recurrence of these crimes.

44. The severity and pervasiveness of conflict-related sexual violence against men remains under-recognized, and requires the OTP to assume a stronger leadership role in the international criminal justice community on this issue. To this end, the OTP needs to explicitly emphasize that sexual and gender-based violence includes violence against both sides of the mainstream gender binary, as well as persons falling outside it, and needs to clearly note that this spectrum of victims presents a distinct set of particularities that must inform and impact the operations of the OTP in identifying, investigating, and prosecuting perpetrators of sexual violence. In this regard, it is crucial that the OTP robustly disseminate a progressive and comprehensive policy, not only to the international community at large, but also to stakeholders on the ground.