

HOW IS THE CRIME AGAINST HUMANITY OF GENDER PERSECUTION BEING LITIGATED BEFORE THE INTERNATIONAL CRIMINAL COURT, AND WHAT ARE ITS IMPLICATIONS?

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This article begins by tracing how gender persecution came to be codified in international criminal law, from Rhonda Copelon first identifying the need to add ‘gender’ as a prohibited ground of persecution in 1994, to it being criminalised in the Rome Statute by 1998. It looks to how the Office of the Prosecutor (‘OTP’) has used the charge, arguing that despite initial inaction, it has begun to deploy the charge in innovative and nuanced ways. From barely touching the crime before 2017, by 2022 it was litigating three separate trials with the crime on the indictment. While attention has been focused on the Pre-Trial Chamber’s (‘PTC’) decisions in these cases, largely overlooked has been the role of the OTP in framing the gender persecution charge.

This article argues that these rapid judicial developments have occurred through a considered change in charging practice from the OTP, matched with a responsive PTC. Combined, this has created a nascent jurisprudence around the crime that understands gender as a social construction and persecutory acts beyond sexual violence, and substantively engages with international human rights law and intersectionality. The article then explores the normative significance of understanding the crime’s reach and who it can, and should, protect. Throughout, this article returns to Copelon’s initial concept of the crime, assessing whether her vision of what the crime could achieve has been realised through this recent practice.

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I INTRODUCTION

By the mid-1990s, international criminal law's tendency to gloss over the sexual and gender-based crimes experienced by women in conflict was becoming all too apparent.¹ The International Criminal Tribunal for the former Yugoslavia ('ICTY') had just been established, with its 'limited' statute for prosecuting such crimes.² In response, Rhonda Copelon articulated the need for a new crime, one that would help 'end the historical invisibility of gender violence' occurring within mass atrocity: the crime against humanity of gender persecution.³ Copelon viewed the recently created tribunal as a 'historic opportunity ... to insist on justice for the women of Bosnia', arguing that for this to occur, 'we must surface gender in the midst of genocide'.⁴ Over the following years, as the reality of a permanent international criminal court unfolded, women's rights advocates lobbied for Copelon's vision and more.⁵

At the broadest level these advocates were successful.⁶ By July 1998, gender was included as a prohibited ground on which one could be persecuted in the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), which established the International Criminal Court ('ICC').⁷ But the multi-state treaty negotiation process to codify the crime revealed a deep division on the meaning of 'gender',

¹ See generally Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997); Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46(1) *McGill Law Journal* 217, 220–5 ('Gender Crimes'); Rosemary Grey, *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential* (Cambridge University Press, 2019) 69–86 ('*Prosecuting Sexual and Gender-Based Crimes*').

² Brigid Inder, 'Partners for Gender Justice' in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 315, 319.

³ Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' in Alexandra Stiglmayer (ed), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994) 197, 207. Copelon published a slightly amended version of this chapter soon after in the *Hastings Women's Law Journal*: Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law' (1994) 5(2) *Hastings Women's Law Journal* 243. I refer to both pieces throughout.

⁴ Copelon (n 3) 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' 199.

⁵ Lisa Davis and Danny Bradley, 'Victory for Women and LGBTIQ+ Rights under International Criminal Law: Gender in the Draft Crimes against Humanity Treaty' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022), 149–50; Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement* (Routledge, 2006) 77–93.

⁶ Doris Buss, 'The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law' (2007) 25(1) *Windsor Yearbook of Access to Justice* 3, 12.

⁷ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 7(1)(h) ('*Rome Statute*').

resulting in the term being defined, unlike any other ground of persecution.⁸ The process also came with the broader challenge of demarcating national human rights violations from the international crime of persecution.⁹ Overall, the threshold to successfully prosecute gender persecution was set intentionally high and fundamental questions were left to trial chambers to resolve, most critically the ambit of the ‘gender’ definition.¹⁰

Despite high hopes of what the Court might achieve with the new crime, it remained largely untouched until very recently. In 2010, the Office of the Prosecutor (‘OTP’) used the charge briefly at a preliminary stage in *Prosecutor v Mbarushimana*, though abandoned it soon after.¹¹ It was not until 2019, over twenty years after those lobbying efforts at the Rome Conference, that the Pre-Trial Chamber (‘PTC’) first confirmed the charge of gender persecution in the Malian case *Prosecutor v Al Hassan* (‘*Al Hassan*’).¹² In 2021, the charge was confirmed a second and third time, in the Sudanese case *Prosecutor v Abd-Al-Rahman* (‘*Abd-Al-Rahman*’) and the Central African Republic case *Prosecutor v Said* (‘*Said*’).¹³ Today, these latter two cases are at varying stages of trial, while the parties in *Al Hassan* delivered their closing addresses in May 2023. For the first time, a Trial Chamber is set to adjudicate whether the Prosecutor has established each element of the crime, including the gender definition, beyond a reasonable doubt.

While much attention has been focused on the PTC’s decisions in these three cases, largely overlooked has been the role of the OTP in framing the gender persecution charge. This article argues that these rapid judicial developments over the last four years have not occurred organically, but through a considered change in charging practice from the OTP, matched with a responsive PTC. I argue that this ‘call and response’ between the OTP and the PTC has created a nascent jurisprudence around the crime. That jurisprudence understands gender as a social construction; understands persecutory acts beyond sexual violence; and engages

⁸ See generally Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* 55 (‘A Step Forward or Back’).

⁹ Darryl Robinson, ‘Defining “Crimes against Humanity” at the Rome Conference’ (1999) 93(1) *American Journal of International Law* 43, 53; Helen Brady and Ryan Liss, ‘The Evolution of Persecution as a Crime against Humanity’ in Morten Bergsmo et al (eds), *Historical Origins of International Criminal Law: Volume 3* (Torkel Opsahl Academic EPublisher, 2015) 429, 554–5.

¹⁰ Valerie Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ (2014) 16(4) *International Feminist Journal of Politics* 563, 574 (‘Constructive Ambiguity’).

¹¹ *Prosecutor v Mbarushimana* (Prosecution’s Application under Article 58) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04, 20 August 2010) 7 [7], 17 [27] (Count 11), 36 [97]; *Prosecutor v Mbarushimana* (Prosecution’s Notice of Charges under Article 61(3) of the Rome Statute) (International Criminal Court, Preliminary Chamber I, Case No ICC-01/04, 15 July 2011) 25 [96], 47 (Count 13) (‘*Mbarushimana* Notice of Charges’).

¹² *Prosecutor v Al Hassan* (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 13 November 2019) (‘*Al Hassan* Charge Confirmation Decision’).

¹³ *Prosecutor v Abd-Al-Rahman* (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/20, 23 November 2021) (‘*Abd-Al-Rahman* Charge Confirmation Decision’); *Prosecutor v Said* (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/14-01/21, 9 December 2021) (‘*Said* Charge Confirmation Decision’).

substantively with international human rights law and intersectionality. Numerous implications arise, of which this paper explores only a slice: broadly, the normative significance of understanding the crime's reach and who it can, and should, protect. Throughout, this article returns to Copelon's initial concept of the crime, assessing whether her vision of what the crime could achieve has been realised through this recent practice.

Section I traces how the crime of gender persecution came to be in the *Rome Statute*, drawing on key developments in international criminal law and international human rights law in the mid-1990s to situate Copelon's vision of the crime and the harm it was designed to capture. Section II analyses how the OTP has prosecuted the crime, primarily focusing on the *Al Hassan* and *Abd-Al-Rahman* cases. It argues that a nascent jurisprudence is developing based on a sophisticated framing of the charge by the OTP, matched with a receptive PTC. Section III explores the implications and emerging tensions of this development, arguing that the two cases serve as valuable counterparts, together illustrating what the crime looks like, and the specific harm it captures. It forecasts the Court's next challenge in prosecuting gender persecution, namely whether it extends to people persecuted based on their sexual orientation and gender identity. It then explores the broader questions around which groups, and subsets thereof, are afforded protection by international criminal law. The section concludes by reflecting on Copelon's original vision of the crime, with a tentative optimism that 'gender in the midst of' persecution is at last 'surfacing' at the ICC.¹⁴

II CODIFYING GENDER PERSECUTION

'Persecution is grounded in discrimination. It is based upon the notion that people who share ... bonds different to those of a dominant group are to be treated as inferior to the latter. In the crime of persecution, the discriminatory intent is aggressively achieved by grossly and systematically trampling upon the fundamental human rights of the victim group. Persecution is only one step away from genocide ...'.¹⁵

A *Persecution as a Crime against Humanity: Locating the Inter/National Boundary*

In their sweeping history of persecution as a crime against humanity, Brady and Liss frame persecution as going 'to the heart of what it is to be human'.¹⁶ They reflect, as the ICTY did in its *Prosecutor v Kupreškić* ('*Kupreškić*') judgment above, how the crime 'simultaneously reduces a person to their identification with ... a group, and attacks the group itself'.¹⁷ Though persecution had long been a concern of the international community, it did not become an international crime until it was drafted into the 1945 *Charter of the International Military Tribunal*

¹⁴ Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' (n 3) 199.

¹⁵ *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) 298 [751] ('*Kupreškić Trial Judgement*').

¹⁶ Brady and Liss (n 9) 554.

¹⁷ *Ibid.*

(‘*Nuremberg Charter*’).¹⁸ That Charter provided the tribunal with jurisdiction over three categories of crimes: crimes against peace, war crimes, and crimes against humanity.¹⁹ This latter category, itself ‘formulated and defined in the realm of positive law’ for the first time, read:²⁰

... murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, *or persecutions on political, racial or religious grounds* in the execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²¹

Following the *Nuremberg Charter*, ‘[s]imilar, but not identical formulations’ of crimes against humanity were adopted in each subsequent international and hybrid court and tribunal.²² Simultaneously, the prohibited grounds of persecution shifted and changed: from only ‘political or racial’ grounds at the Tokyo Tribunal; to adding national and ethnic grounds at the International Criminal Tribunal for Rwanda (‘ICTR’); to its widest articulation at the ICC, including cultural, gender and ‘other grounds’.²³ There, significantly expanded compared to the *Nuremberg Charter*, reflective of the intervening rise of the international human rights movement, the crime reads:²⁴

Persecution against any identifiable group or collectivity on *political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds* that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.²⁵

Central to these shifting formulations, from Nuremberg to Rome, has been the challenge for drafters and State Parties, each with differing motivations, to locate the appropriate boundary between international crimes and human rights violations.²⁶ As the Trial Chamber also observed in *Kupreškić*, ‘not every denial of a human right may constitute a crime against humanity’.²⁷ For persecution in particular, the tension has been to partition ‘discriminatory conduct [of] domestic

¹⁸ Ibid 434; Valerie Oosterveld, ‘Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime against Humanity of Gender-Based Persecution’ (2006) 17(1) *Duke Journal of Comparative & International Law* 49, 56 (‘Gender, Persecution, and the ICC’); *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 UNTS 279 (signed and entered into force 8 August 1945) annex (‘*Nuremberg Charter*’).

¹⁹ *Nuremberg Charter* (n 18) art 6(a)–(c).

²⁰ A Widney Brown and Laura Grenfell, ‘The International Crime of Gender-Based Persecution and the Taliban’ (2003) 4(2) *Melbourne Journal of International Law* 347, 352.

²¹ *Nuremberg Charter* (n 18) art 6(c) (emphasis added).

²² Brown and Grenfell (n 20) 353. See also David Luban, ‘A Theory of Crimes against Humanity’ (2004) 29(1) *Yale Journal of International Law* 85, 161.

²³ Oosterveld, ‘Gender, Persecution, and the ICC’ (n 18) 56–7.

²⁴ Brady and Liss (n 9) 497.

²⁵ *Rome Statute* (n 7) art 7(1)(h) (emphasis added).

²⁶ M Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’ (1999) 32(3) *Cornell International Law Journal* 443, 462; Brady and Liss (n 9) 555. See also William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 37.

²⁷ *Kupreškić Trial Judgement* (n 15) 249 [618].

concern' from criminal conduct befitting a crime against humanity.²⁸ Nilsson describes this tension as two opposing 'poles': one reflecting society's 'need to deal with situations of massive violations of human rights' historically dealt with through national amnesties and truth commissions; the other reflecting the 'fundamental requirements' of international criminal law and procedure, with its focus on individual criminal responsibility and 'crimes well confined in scope and time'.²⁹ In this way, Brady and Liss observe persecution's 'fascinating dual role', both 'a quintessential international crime and a crime on the very precipice between the national and the international'.³⁰

B *Defining Persecution at Rome*

This precipice was particularly visible throughout the 1998 *Rome Statute* negotiations, with 160 state parties negotiating a multilateral treaty, and with individuals from each state potentially subject to the crimes within the statute.³¹ As Robinson observed, states were keen to ensure that 'any discriminatory practice' within their borders could not be characterised as persecution, and for the court's jurisdiction to be concerned with 'serious violations of international criminal law, not international human rights law'.³² This was not an abstract concern: the protection of the individual from the state had been repeatedly invoked throughout the post-World War II international human rights instruments, starting with the right to be free from discrimination in the 1948 *Universal Declaration of Human Rights* ('UDHR').³³ Though in time the ICTY would produce a rich body of jurisprudence on persecution, during the Rome negotiations, there was still 'very little applicable' case law, and no previous definition existed.³⁴ To resolve this shared concern, a definition of persecution was drafted to confine the crime's potentially broad scope, utilising almost all of the limiting devices from the previous international tribunals.³⁵ Though the statute had expanded the prohibited grounds of persecution, in every other respect, the ultimate definition was a narrow one: "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.³⁶

This relatively short definition belies its complexity. The ICC's *Elements of Crimes* document breaks down the crime and its definition into six elements, each of which the Prosecution is required to prove beyond a reasonable doubt.³⁷ It must

²⁸ Brady and Liss (n 9) 554–5.

²⁹ Jonas Nilsson, 'The Crime of Persecution in the ICTY Case-Law' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 219, 220–1. See also Frédéric Mégret, 'What Sort of Global Justice is "International Criminal Justice"?' (2015) 13(1) *Journal of International Criminal Justice* 77, 96.

³⁰ Brady and Liss (n 9) 430.

³¹ Robinson (n 9) 43, 53.

³² *Ibid* 53.

³³ Brady and Liss (n 9) 497–500.

³⁴ Oosterveld, 'Gender, Persecution, and the ICC' (n 18) 57; Nilsson (n 29) 220.

³⁵ Brady and Liss (n 9) 544, 556.

³⁶ *Rome Statute* (n 7) art 7(2)(g).

³⁷ International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) art 7(1)(h) ('*Elements of Crimes*').

prove the perpetrator acted with specific discriminatory intent (a notoriously high threshold) targeting a person because of their relationship to the group or collective.³⁸ That targeting must be based on one or more of the prohibited grounds.³⁹ There must be a nexus between the persecutory conduct and any crime within the Court's jurisdiction, a requirement not used since the *Nuremberg Charter*.⁴⁰ This addition was a direct response to states' concerns that the crime could capture broader discriminatory conduct beyond 'the context of war crimes or crimes against humanity'.⁴¹ Other elements are applicable to all crimes against humanity, including that the conduct be part of a widespread or systematic attack.⁴² 'Attack' is separately defined, being 'pursuant to or in furtherance of a State or organizational policy to commit such attack'.⁴³ These elements and definitions combined create a 'complex and multilayered' crime with a high evidentiary standard.⁴⁴

Within the elements much remains unsettled, such as what constitutes a 'fundamental right' and what amounts to a 'severe deprivation'.⁴⁵ The question of what defines a 'group or collectivity' is also unsettled, including whether a victim need actually belong to the group, or whether it is the perpetrator's subjective perception that they do so.⁴⁶ There are conceptual challenges too: a victim's membership of a 'targeted group' is a separate element to the prohibited grounds on which a victim is persecuted, though the two are often conflated.⁴⁷ For gender persecution, there is the additional element of the 'gender' definition, currently unadjudicated by a Trial Chamber.

³⁸ Kelly D Askin, 'Crimes Within the Jurisdiction of the International Criminal Court' (1999) 10(1) *Criminal Law Forum* 33, 43; Brady and Liss (n 9) 553.

³⁹ *Elements of Crimes* (n 37) art 7(1)(h) element 3.

⁴⁰ *Ibid* art 7(1)(h) element 4.

⁴¹ Brady and Liss (n 9) 544.

⁴² *Elements of Crimes* (n 37) art 7(1)(h) element 5.

⁴³ *Rome Statute* (n 7) art 7(2)(a).

⁴⁴ Niamh Hayes, 'Understanding and Recognising Gender-Based Persecution: Concepts and Legal Elements' (Speech, Adjudicating Gender-Based Persecution at the ICC & Beyond Conference, Northumbria University, 7–8 October 2021) <<https://www.northumbria.ac.uk/about-us/news-events/events/2021/10/adjudicating-gender-based-persecution/>>, archived at <<https://perma.cc/L43L-H5BL>> ('Understanding and Recognising Gender-Based Persecution').

⁴⁵ *Elements of Crimes* (n 37) art 7(1)(h) element 1; Rosemary Grey et al, 'Gender-Based Persecution as a Crime against Humanity: The Road Ahead' (2019) 17(5) *Journal of International Criminal Justice* 957, 971–5. See also *Dusting off the Law Books on Gender Persecution: Fundamental Rights* (Public International Law & Policy Group, 27 June 2023) <<https://www.publicinternationallawandpolicygroup.org/expert-roundtable-why-a-policy-on-the-crime-against-humanity-of-gender-persecution-1>>, archived at <<https://perma.cc/9FEY-EKU3>>.

⁴⁶ *Elements of Crimes* (n 37) art 7(1)(h) element 2; Lisa Davis, 'Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities' (2021) 20(1) *Northwestern Journal of International Human Rights* 1, 5.

⁴⁷ *Elements of Crimes* (n 37) art 9(1)(h) elements 2 and 3; Grey et al, (n 45) 969–70. See also *Dusting off the Law Books on Gender Persecution: Targeted Groups* (Public International Law & Policy Group, 14 July 2023) <<https://www.publicinternationallawandpolicygroup.org/gender-persecution-policy-targeted-groups>>, archived at <<https://perma.cc/9LU3-FA6E>>.

C Defining Gender at Rome

As has been frequently observed, the international tribunals of the 1940s either did not explicitly criminalise sexual and gender violence, or did so on a limited basis.⁴⁸ In the *Nuremberg Charter* and *Charter of the International Military Tribunal for the Far East*, rape was not listed as a crime against humanity.⁴⁹ Though the Tokyo Tribunal convicted some defendants of rape as a war crime, entirely absent from proceedings was the ‘systemic military sexual slavery’ operating throughout.⁵⁰ Though rape was included as a crime against humanity in the *Control Council Law No 10 Charter*, nobody was indicted, despite widespread evidence.⁵¹ Generally then, the conduct was cast as the ‘inevitable by-product’ or ‘legitimate tactic of war’,⁵² with the legal frameworks tending to ‘obscure’ the gendered nature of the harm.⁵³ In 1993, the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (‘ICTY Statute’) was established, also listing rape as a crime against humanity.⁵⁴ Soon after, the ICTR added rape and enforced prostitution as war crimes.⁵⁵ Though broadly considered a ‘significant improvement on the earlier classification of gender-based crimes’, women’s rights activists saw these provisions as ‘limited’ relative to the full gamut of violence committed against women during conflict.⁵⁶

Writing at the outset of the ICTY, Rhonda Copelon identified that crimes against humanity should be ‘broadened to encompass persecution based on gender’.⁵⁷ Her specific impetus was to capture the ‘multiple, intersectional harms’ being experienced by Bosnian women in the sexual violence and genocide of the unfolding Yugoslav conflict.⁵⁸ Copelon argued that although crimes against

⁴⁸ See generally Kelly D Askin, ‘Women and International Humanitarian Law’ in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Transnational, 1999) vol 1, 41, 41–87.

⁴⁹ *Ibid* 65.

⁵⁰ Patricia Viseur Sellers, ‘The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation’ (Discussion Paper, OHCHR Women’s Human Rights and Gender Unit, 2008) 8.

⁵¹ ‘Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity’ (1946) 3 *Official Gazette of the Control Council for Germany* 50, art II(1)(c); Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 204.

⁵² Beth Van Schaack, ‘Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson’ (2009) 17(2) *American University Journal of Gender, Social Policy and the Law* 361, 362.

⁵³ Rosemary Grey, ‘Submission for ICC Prosecutor’s Policy on Gender-Based Persecution’, Submission to International Criminal Court, 21 March 2022, 2 (‘Gender Persecution Submission’); Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 207.

⁵⁴ SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) arts 5(g), 7(3) (‘ICTY Statute’).

⁵⁵ SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex (‘Statute of the International Tribunal for Rwanda’) art 4(e) (‘ICTR Statute’). Note the argument that rape was already a war crime: Patricia Viseur Sellers, ‘Gender Strategy is Not a Luxury for International Courts’ (2009) 17(2) *American University Journal of Gender, Social Policy and the Law* 301, 304–5 (‘Gender Strategy’).

⁵⁶ *Ibid* (n 2) 319.

⁵⁷ Rhonda Copelon, ‘Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law’ (n 3) 248.

⁵⁸ *Ibid* 247.

humanity were ‘popularly associated’ with the ‘religious and ethnic genocide’ of the Holocaust, the ‘concept is a broader one, and the categories of persecution are explicitly open-ended ... [able] to embrace new understandings ...’.⁵⁹ Copelon was drawing on Crenshaw’s foundational piece on intersectionality: how anti-discrimination law in the US viewed race and gender as separate categories, obscuring the ‘unique compoundedness’ and ‘multidimensionality of Black women’s lives’.⁶⁰ Similarly, Copelon argued that rape was an insufficient charge alone when the raping of Bosnian women was a ‘vehicle of some other form of persecution’, gender invariably a factor.⁶¹ Including gender as a ground of persecution would help ‘end the historical invisibility of gender violence as a humanitarian and human rights violation’.⁶² For this to occur, she argued, ‘we must surface gender in the midst of genocide’, and recognise the ‘gender dimension’ of sexual violence in war.⁶³

Copelon was writing at a unique moment in both international criminal law and international human rights law. Prior to this mid-1990s period, violence against women had been understood as ‘an issue of women’s rights and crime prevention rather than of human rights’.⁶⁴ The Committee on the Elimination of All Forms of Discrimination against Women’s (‘CEDAW’) *General Recommendation 19: Violence against Women* marked a turning point in that perception.⁶⁵ Not only did it recognise gender violence for the first time in the Convention’s history, it also recognised it ‘as a *per se* form of discrimination’.⁶⁶ The 1993 *Vienna Declaration and Programme of Action* then ‘significantly expanded the international human rights agenda’ by providing a ‘framework for understanding the relationship between [violence] against women and systematic gender discrimination’.⁶⁷ Soon after, the 1995 United Nations Conference on Women (‘Beijing Conference’) recognised ‘women’s rights ... as human rights’, accepting them as an aspect of international human rights law.⁶⁸ Throughout this period, gender was repeatedly

⁵⁹ Ibid 261.

⁶⁰ Ibid 247–8; Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies’ [1989] 1 *University of Chicago Legal Forum* 139, 150, 157. As Atrey later observed, ‘[i]ntersectionality has since emerged as the go-to idea for making sense of disadvantage which cannot be neatly segregated into silos ... [and therefore] has a wide import in human rights law’: Shreya Atrey, ‘Introduction: Intersectionality from Equality to Human Rights’ in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (Hart Publishing, 2020) 1, 3.

⁶¹ Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 208.

⁶² Ibid 207.

⁶³ Ibid 199, 208.

⁶⁴ Radhika Coomaraswamy, ‘Reinventing International Law: Women’s Rights as Human Rights in the International Community’ (1996) 28(2) *Bulletin of Concerned Asian Scholars* 16, 18.

⁶⁵ *General Recommendation No 19: Violence against Women*, contained in Committee on the Elimination of All Forms of Discrimination against Women, *Report of the Eleventh Session*, UN GAOR, 47th sess, Supp No 38, UN Doc A/47/38 (1993).

⁶⁶ Rhonda Copelon, ‘Toward Accountability for Violence against Women in War: Progress and Challenges’ in Elizabeth D Heineman (ed), *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press, 2011) 232, 239 ‘Toward Accountability for Violence against Women in War’.

⁶⁷ Donna J Sullivan, ‘Women’s Human Rights and the 1993 World Conference on Human Rights’ (1994) 88(1) *American Journal of International Law* 152, 167.

⁶⁸ Coomaraswamy (n 64) 16.

framed as a social construct, beyond the more limited language of ‘sex’, though its focus was primarily on gender as it related to women.⁶⁹ For Copelon, the logical next step was for gender violence to be recognised as a crime in international criminal law.⁷⁰

With the establishment of the ICTY and ICTR, there was renewed interest in a permanent international criminal court. In 1994 the International Law Commission (‘ILC’) released its draft statute for an international criminal court, the foundational document upon which subsequent negotiations would be based.⁷¹ It listed rape as a crime against humanity, though no other crime of sexual or gender violence, showing ‘little awareness of gender-based crimes’.⁷² Any changes to the draft had to be ‘proposed and supported and ... subject to compromise’.⁷³ In 1995 that process formally began with ‘Preparatory Committee’ discussions (‘PrepComs’), providing states — and, crucially, NGOs — an avenue to comment on the draft.⁷⁴

Women’s rights activists, buoyed from the recent developments in Vienna and Beijing, appreciated this significant opportunity to lobby for Copelon’s vision and more.⁷⁵ To centralise their efforts, they formed the ‘Women’s Caucus for Gender Justice’, with the broader aim of creating a ‘gender-sensitive’ statute.⁷⁶ During this PrepComs period, ‘gender’ was added as a prohibited ground of persecution, country delegations having been influenced by recent developments in international refugee law.⁷⁷ However, it was inserted in brackets, indicating it was ‘not accepted by consensus’.⁷⁸ Other sexual and gender crimes were added to the draft statute, as were various administrative and procedural provisions designed to improve the experience of victims of such crimes testifying before the court.⁷⁹ These multiple inclusions were ‘in large part’ due to the Women’s Caucus and ‘gender-supportive states’.⁸⁰ However their success prompted a backlash of conservative opposition, such that the Rome Conference became ‘a battleground on the meaning of “gender”’.⁸¹

Oosterveld, herself a delegate at the 1998 Rome Conference, provides a detailed history of the ‘extremely contentious negotiations’ to include gender as a

⁶⁹ Lisa Davis, ‘Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes against Women and LGBTIQ Persons’ (2018) 24(3) *William & Mary Journal of Women and the Law* 513, 539; Hilary Charlesworth, ‘Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations’ (2005) 18 *Harvard Human Rights Journal* 1, 14–15.

⁷⁰ Copelon, ‘Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law’ (n 3) 263.

⁷¹ International Law Commission, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN GAOR, 49th sess, Agenda Item 137, Supp No 10, UN Doc A/49/10 (1994) ch II(B)(f).

⁷² Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) 101.

⁷³ Oosterveld, ‘Constructive Ambiguity’ (n 10) 564.

⁷⁴ Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) 99.

⁷⁵ See Inder (n 2) 317–20.

⁷⁶ *Ibid* 320.

⁷⁷ Oosterveld, ‘A Step Forward or Back’ (n 8) 59 n 25.

⁷⁸ Grey et al (n 45) 964.

⁷⁹ Oosterveld, ‘Constructive Ambiguity’ (n 10) 564.

⁸⁰ *Ibid*.

⁸¹ *Ibid* 565; Davis, ‘Dusting Off the Law Books’ (n 46) 8.

ground of persecution in the statute.⁸² Broadly, though the majority of states supported including gender throughout the Statute, some majority Catholic and Arab states did not.⁸³ As Oosterveld recalls, these groups ‘wished to limit the understanding of gender to the roles ostensibly naturally flowing from biological sex in their societies’, and ‘wished to exclude any consideration of sexual orientation as a gender consideration’.⁸⁴ More expediently, these states observed that the word ‘gender’ did not exist in every official UN language, and could therefore not be appropriately translated into legal texts.⁸⁵

While negotiations focused on other references to gender in the statute, the debate over gender as a ground of persecution was deferred.⁸⁶ As the conference days ticked over, ‘bilateral and corridor discussions’ revealed the only way to ensure gender remained in the statute was to define it, unlike any other ground of persecution.⁸⁷ A definition from the Beijing Conference was acceptable to most, though ‘too vague’ for the opposing bloc, who insisted it refer to ‘the two sexes, male and female’.⁸⁸ Supportive states countered that the definition must ‘reflect the social construction of identities in society, including different sexualities’.⁸⁹ The ultimate definition, drafted ‘under intense time pressures’, became art 7(3) of the *Rome Statute*:⁹⁰ ‘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’.⁹¹

Oosterveld called the definition ‘a study in constructive ambiguity’: consciously using ‘indefinite language ... to resolve disparate points of view’.⁹² Inherent in this strategy, and certainly understood by those at Rome, is accepting that it ‘leaves interpretation for another day or to other people’.⁹³ While this can be understood given the context of the negotiations, condemnation was nonetheless swift. Charlesworth and Chinkin viewed the definition as ‘present[ing] gender as primarily an issue of biology rather than one of social construction’.⁹⁴ Copelon herself observed that the definition was ‘peculiar and circular’.⁹⁵ Most scathingly, former ICTY Registrar Theo van Boven called it ‘the most puzzling and bizarre language ever included in an international treaty’.⁹⁶

⁸² Valerie Oosterveld, ‘The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law’ (2018) 24(3) *William & Mary Journal of Women and the Law* 443, 450 (‘ICC Policy Paper’).

⁸³ See Cate Steains, ‘Gender Issues’ in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International, 1999) 357, 372–5.

⁸⁴ Oosterveld, ‘ICC Policy Paper’ (n 82) 450.

⁸⁵ Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) 42.

⁸⁶ Oosterveld, ‘A Step Forward or Back’ (n 8) 62.

⁸⁷ *Ibid* 64; Askin, ‘Crimes Within the Jurisdiction of the International Criminal Court’ (n 38) 47.

⁸⁸ Oosterveld, ‘A Step Forward or Back’ (n 8) 63–4.

⁸⁹ Oosterveld, ‘Constructive Ambiguity’ (n 10) 567; Steains (n 83) 372–3.

⁹⁰ Oosterveld, ‘Constructive Ambiguity’ (n 10) 567.

⁹¹ *Rome Statute* (n 7) art 7(3).

⁹² Oosterveld, ‘Constructive Ambiguity’ (n 10) 564.

⁹³ *Ibid* 574.

⁹⁴ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Juris Publishing, 2000) 335.

⁹⁵ Copelon, ‘Gender Crimes’ (n 1) 236.

⁹⁶ Kelly D Askin, ‘International Criminal Law and the ICC Statute: Crimes against Women’ in Kelly D Askin and Doreen M Koenig (eds), *Women and International Human Rights Law* (Transnational, 1999) vol 2, 20.

Separately, art 21(3) had entered the statute, with a bearing on the gender definition. The article created an obligation on the entire Court to apply sources of law in the statute ‘consistent with internationally recognised human rights’, without distinction on grounds including gender.⁹⁷ As noted above, by 1998 international human rights law and practice was already interpreting gender as a socially constructed ground.⁹⁸ In prosecuting the crime of gender persecution, the OTP would have to wrangle with the ‘gender’ definition, but would have recourse to art 21(3).

The *Rome Statute* was adopted in July 1998, and for the ‘first time in black letter international criminal law’, gender was ‘an element of an international crime’.⁹⁹ Other sexual and gender-based crimes had also been adopted.¹⁰⁰ Simultaneously, the first jurisprudence from the ad hoc tribunals was emerging: from their ‘limited’ statute provisions, they were establishing ‘historic benchmarks’ in adjudicating gender-based crime, from *Prosecutor v Tadić*, *Prosecutor v Delalic*, *Prosecutor v Furundžija*, *Prosecutor v Kunarac* and *Prosecutor v Akayesu*.¹⁰¹ Just what the ICC might do with its Statute, which Sellers described as ‘resembl[ing] legal heaven, replete with dessert’ relative to the tribunals, must have been an exciting prospect.¹⁰² Speaking before the Court’s opening in 2002, Richard Goldstone, former Prosecutor at the ICTY and ICTR, expressed his ‘hope that the history of impunity for gender crimes under international criminal law will resolutely be replaced ... by accountability and deterrence and prevention’.¹⁰³ The following section will analyse current efforts by the OTP to do just that.

III PROSECUTING GENDER PERSECUTION

A From Disappointment to Policy to Practice

It was not until 2010 that the Prosecutor first used the gender persecution charge, having issued an arrest warrant for Rwandan Callixte Mbarushimana that included persecution on gender grounds.¹⁰⁴ Yet prior to the charge confirmation hearing, the Prosecutor reframed the persecution charge from gender to political

⁹⁷ *Rome Statute* (n 7) art 21(3).

⁹⁸ Grey et al (n 45) 966–8.

⁹⁹ Catharine A MacKinnon, ‘Creating International Law: Gender as Leading Edge’ (2013) 36 *Harvard Journal of Law & Gender* 105, 110 (‘Creating International Law’).

¹⁰⁰ *Rome Statute* (n 7) arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi).

¹⁰¹ Inder (n 2) 319; MacKinnon, ‘Creating International Law’ (n 99) 108; Copelon, ‘Toward Accountability for Violence against Women in War’ (n 66) 244–52; Patricia Viseur Sellers and Kaoru Okuizumi, ‘Intentional Prosecution of Sexual Assaults’ (1997) 7(1) *Transnational Law & Contemporary Problems* 45, 54.

¹⁰² Sellers, ‘Gender Strategy’ (n 55) 313.

¹⁰³ Richard Goldstone, ‘Prosecuting Rape as a War Crime’ (2002) 34 *Case Western Reserve Journal of International Law* 277, 285.

¹⁰⁴ *Prosecutor v Mbarushimana (Decision on the Prosecutor’s Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 28 September 2010) 10 [10] (Count 11) (‘*Mbarushimana Arrest Warrant*’). Mbarushimana was charged with five counts of crimes against humanity and eight counts of war crimes for his role in the Rwandan armed group ‘FDLR’ operating inside the Democratic Republic of the Congo. See generally Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) 160–6.

grounds, abandoning the gender ground without reason.¹⁰⁵ Soon after, the PTC dismissed the entire case, with its significant number of sexual violence charges.¹⁰⁶ This formed part of a wider trend of the OTP failing to competently charge sexual and gender-based crimes.¹⁰⁷ While the Prosecutor ably spoke the rhetoric,¹⁰⁸ ‘his early indictments indicate[d] a lack of commitment to and understanding of gender justice’.¹⁰⁹ As Copelon observed around this time, ‘legal texts ... are but a starting point. They guarantee neither enforcement nor deterrence’.¹¹⁰ The crime had been enforced elsewhere under universal jurisdiction provisions, with the national Court of Bosnia and Herzegovina entering convictions for the crime from 2006.¹¹¹ This however was of limited precedential value.

Under the leadership of the Court’s second Prosecutor, the OTP’s 2014 *Policy Paper on Sexual and Gender-Based Crimes* (‘2014 SGBC Policy Paper’) marked a symbolic turning point in how it would prosecute the crime.¹¹² The paper committed to utilising gender persecution ‘to the fullest extent possible’.¹¹³ It explained its understanding of the ‘gender’ definition, consistent with its international human rights law obligations under art 21(3), acknowledging ‘the social construction of gender, and the accompanying roles, behaviours, activities and attributes’ assigned to women, men, boys and girls.¹¹⁴ The policy also tentatively engaged with intersectionality and its relationship to discrimination, noting ‘it is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another’.¹¹⁵ It also endeavoured to apply ‘a gender analysis to all crimes within its jurisdiction’.¹¹⁶ However, its

¹⁰⁵ *Mbarushimana Notice of Charges* (n 11) 47 (Count 13).

¹⁰⁶ *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) (‘*Mbarushimana Charge Confirmation Decision*’) 129, 149; Niamh Hayes, ‘Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court’ in William A Schabas, Yvonne McDermott and Niamh Hayes (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Routledge, 2016) 7, 36–8 (‘Sisyphus Wept’).

¹⁰⁷ See generally Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) ch 4; Hayes, ‘Sisyphus Wept’ (n 106); Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2015) ch 4; Valérie Suhr, *Rainbow Jurisdiction at the ICC: Protection of Sexual and Gender Minorities under the Rome Statute* (Springer, 2022).

¹⁰⁸ Luis Moreno-Ocampo, ‘The Place of Sexual Violence in the Strategy of the ICC Prosecutor’ in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 151, 151–7.

¹⁰⁹ Copelon, ‘Toward Accountability for Violence against Women in War’ (n 66) 254.

¹¹⁰ *Ibid.*

¹¹¹ Organization for Security and Co-Operation in Europe, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges*, (Report, February 2014) 58–62.

¹¹² Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes* (Policy Paper, 20 June 2014).

¹¹³ *Ibid* 28 [67].

¹¹⁴ *Ibid* 3, 12 [15].

¹¹⁵ *Ibid* 16 [27] n 25.

¹¹⁶ *Ibid* 5 [4].

impact was not immediately obvious, and the OTP still did not use the gender persecution charge.¹¹⁷

From 2017, the policy manifested into practice. The OTP used the charge in preliminary investigations in Afghanistan and Nigeria, and in the pre-trial stages of their cases in *Al Hassan*, *Abd-Al-Rahman* and *Said*.¹¹⁸ Significantly, from 2019 the PTC confirmed the gender persecution charge in each of the three cases.¹¹⁹ Collectively it confirmed the charge using gender as a social construction for females and males; with sexual and non-sexual acts underlying the charge; and using multiple, intersecting grounds to analyse the discrimination. Consequently, each case was set down for trial before the Trial Chamber. Today, judgment is pending in *Al Hassan*, while the *Abd-al-Rahman* and *Said* cases are at various stages of trial. From the OTP barely using the crime to litigating three trials simultaneously in 2022, these have been rapid-fire legal developments.

While these judicial decisions have been positively received, less observed is the OTP's role in putting forth a sophisticated framing of the charge. Below, I argue that the OTP's shift in charging practice consistent with the *2014 SGBC Policy Paper*, combined with a receptive PTC, is creating a nascent jurisprudence around the crime. I focus primarily on the *Al Hassan* and *Abd-al-Rahman* cases, the *Said* gender persecution charge largely mirroring *Abd-al-Rahman*. As a result of these decisions, the legal mechanics of persecution based on gender, persecution *because* of one's gender, are beginning to 'surface', giving visibility and legitimacy to 'gender ... as a relevant category of victimization'.¹²⁰

B *Al Hassan: Establishing the Normative Framework*

In 2018, the Prosecutor issued an arrest warrant for Al Hassan for 13 charges, including one count of persecution on gender and religious grounds.¹²¹ The warrant related to his role as de facto chief of the Islamic police during Timbuktu's 2012 occupation by two Islamist groups, Ansar Dine and Al Qaeda in the Islamic Maghreb.¹²² The OTP's charge confirmation brief, filed in mid-2019, was its first legal submission articulating the elements of gender persecution. It identified that the group that was the subject of the religious persecution was the whole population of Timbuktu, while the group that was the subject of the gender persecution was the female population of Timbuktu and its region.¹²³ It argued

¹¹⁷ In May 2023, the OTP announced a public consultation to update this policy. See Office of the Prosecutor, 'The Office of the Prosecutor Launches Public Consultation to Renew Policy Paper on Sexual and Gender-Based Crimes', *International Criminal Court* (Web Page, 12 May 2023) <<https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-sexual-and-gender-based>>, archived at <<https://perma.cc/D82D-8N7J>>.

¹¹⁸ Grey et al (n 45) 958.

¹¹⁹ *Al Hassan Charge Confirmation Decision* (n 12) 324–5 [707]; *Abd-Al-Rahman Charge Confirmation Decision* (n 13) 69, 70; *Said Charge Confirmation Decision* (n 13) 60–1.

¹²⁰ Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' (n 3) 207.

¹²¹ *Prosecutor v Al Hassan (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 27 March 2018) 3 [1], ('*Al Hassan Arrest Warrant*').

¹²² *Ibid* 4 [7].

¹²³ *Prosecutor v Al Hassan (Document Containing the Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 11 May 2019) 353 [882], 384 [945], 461 [1088] ('*Al Hassan Document Containing Charges*').

that in addition to the religious persecution, women and girls were ‘particularly targeted ... because of their gender’:¹²⁴

Such targeting was based on gender grounds within the meaning of article 7, paragraph 3 ... as it was motivated by the discriminatory views of members of the [Islamist] groups and individuals on the role and behaviour of women and girls.¹²⁵

It noted that the Islamist groups ‘imposed strict controls on almost every aspect of their lives’, and that such controls ‘aimed at forcing them to conform to these discriminatory gender roles’.¹²⁶ This framing, with its emphasis on the roles and behaviours assigned to women and girls, reflected the OTP’s understanding of gender as described in its *2014 SGBC Policy Paper*.

The OTP articulated the mens rea such that it could ably interrogate the accused’s specific intent to discriminate on gender grounds. It submitted that it was the ‘perpetrator’s perception of the group that defines its contours’, strategically highlighting the subjective discriminatory intent underlying the persecution.¹²⁷ The OTP then delineated the gender grounds from the targeted group, correctly using the gender ground to ‘describe the reasons for the targeting, rather than the identity of the targeted group’.¹²⁸ The OTP’s careful application allowed each concept to speak to an integral aspect of the crime.

The OTP took an expansive approach both to the underlying persecutory acts and the fundamental rights violated. It outlined three categories of underlying persecutory acts, including acts beyond sexual violence: first, how the perpetrators controlled women’s daily lives, including how they dressed and with whom they associated;¹²⁹ secondly, the violent and inhumane application of those rules, including being imprisoned and whipped;¹³⁰ thirdly, acts of sexual violence, including rape, sexual slavery and forced marriage.¹³¹ The OTP then linked these underlying acts to a wide range of fundamental rights violations, far broader than it had previously. It listed sixteen such rights, including the right to education, due process and freedom of association, cultural rights relating to banning traditional costumes and festivals, and the prohibition on gender discrimination.¹³² As Brady and Liss observed, the OTP’s charging of persecution had previously been based on ‘more ‘traditional’ violations of fundamental rights’, namely the right to life (for murder), and the right to physical integrity (for sexual violence).¹³³

In tandem, the OTP drew on sources of fundamental rights it had not previously used, including from the *International Covenant on Economic, Social and Cultural Rights*, the *African Charter on Human and Peoples’ Rights* and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.¹³⁴ By looking to sources beyond the *UDHR* and the *International*

¹²⁴ Ibid 384 [947].

¹²⁵ Ibid 384 [948].

¹²⁶ Ibid 385 [949].

¹²⁷ Ibid 364 [901].

¹²⁸ Grey et al (n 45) 976.

¹²⁹ *Al Hassan Document Containing Charges* (n 123) 389–93 [960]–[962].

¹³⁰ Ibid 393–7 [963]–[968].

¹³¹ Ibid 397–8 [969]–[970].

¹³² Ibid 399–400 [972].

¹³³ Brady and Liss (n 9) 547.

¹³⁴ *Al Hassan Document Containing Charges* (n 123) 399 [972] n 2521.

Covenant on Civil and Political Rights, the OTP was taking unprecedented advantage of persecution's explicit link to international human rights law, with its focus on 'fundamental rights'.¹³⁵ The OTP's approach demonstrated a clear commitment to its art 21(3) obligations, as articulated in its *2014 SGBC Policy Paper*. By including these broad rights violations, the 'OTP open[ed] up a new realm of protection for women, girls and LGBTIQ+ people'.¹³⁶

Though the OTP acknowledged that women and girls were 'particularly targeted' because of religious and gender persecution, in its *Document Containing the Charges*, it largely analysed the two grounds separately.¹³⁷ Beringola positions this as a 'cumulative' approach to analysing discrimination, the two grounds viewed largely as 'separate compartments', rather than as intersectional.¹³⁸ Contextually, though, it was only in the months after the OTP filed this brief that a Chamber first endorsed charging persecution on multiple grounds, in the 2019 *Prosecutor v Ntaganda* judgment: in rendering the first persecution conviction at the ICC (on ethnic grounds), the Trial Chamber observed that 'one such ground will suffice, although a combination of more than one may equally form the basis for the discrimination'.¹³⁹ The OTP's somewhat conservative positioning of the two discriminatory grounds may be understood in this light.

In its response to the Prosecution brief, the Defence strongly refuted the gender persecution charge, using the instruments of international human rights law to do so. Echoing states' concerns from the Rome negotiations, it noted persecution's purposefully 'restrictive' definition, arguing the discriminatory acts fell well short of the required threshold.¹⁴⁰ It characterised the allegations as possible 'violation[s] of human rights law [failing] to rise to the level of a crime against humanity', emphasising that 'the ICC is not a human rights court writ large'.¹⁴¹ In support, it highlighted the significant number of reservations made to CEDAW, entered not only by Islamic countries.¹⁴² It cited European Court of Human Rights jurisprudence to highlight the 'wide margin of appreciation' states have in determining 'local needs and conditions', including regulating marriage and

¹³⁵ Hayes, 'Understanding and Recognising Gender-Based Persecution' (n 44).

¹³⁶ UN Women, *Comments on the Development of a Policy on the Crime against Humanity of Gender Persecution: Submission from UN Women to the Office of the Prosecutor at the International Criminal Court* (Brief, March 2022) 2.

¹³⁷ *Al Hassan Document Containing Charges* (n 123) ss 8.6.2, 8.6.3.

¹³⁸ Ana Martín Beringola, 'Intersectionality and Sexual and Gender-Based Violence: Applicability and Benefits for International Criminal Law' (PhD Thesis, Ulster University, 2022) 131.

¹³⁹ *Prosecutor v Ntaganda (Trial Judgment)* (International Criminal Court, Trial Chamber VI, Case No ICC-01/04-02/06, 8 July 2019) 457 [1009].

¹⁴⁰ *Prosecutor v Al Hassan (Defence Submissions for the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/12-01/18, 9 July 2019) 16–17 [31]–[37] ('*Al Hassan Defence Submissions*').

¹⁴¹ *Ibid* 7 [4], 16 [31].

¹⁴² *Ibid* 17–18 [33]–[34].

dress.¹⁴³ Broadly, it took a cultural relativist approach to defending the charge,¹⁴⁴ accusing the OTP of ‘inveigl[ing] the ICC into a clash of civilisations’ by positioning sharia law as ‘synonymous’ with crimes against humanity.¹⁴⁵

In September 2019, the PTC confirmed each count alleged by the Prosecution, delivering a comprehensive decision closely analysing gender persecution. Significantly, while not explicitly engaging in the definitional debate around ‘gender’, the Chamber endorsed gender as a social construction in several ways. It noted how people of the same group could be targeted ‘in different ways or by different forms of violence depending on their gender’, not limiting its analysis to women and girls.¹⁴⁶ In support, it acknowledged CEDAW’s General Recommendation 19, and cited the ICTY’s foundational *Kvočka* persecution jurisprudence, where men were singularly detained, starved, tortured and killed (gender not being an available persecutory ground).¹⁴⁷ It found that the women and girls of Timbuktu were treated as ‘objects’ and targeted for ‘sexist’ reasons.¹⁴⁸ As Grey notes, ‘this phrasing acknowledges that the women ... were not simply targeted because of their biological sex’.¹⁴⁹

The decision went further. It affirmed the OTP’s submission as to the victim’s group membership being ‘defined by the perpetrator’,¹⁵⁰ later cited with approval in the *Prosecutor v Ongwen* trial judgment.¹⁵¹ It rejected the Defence’s ‘cultural relativism’ argument, observing that the ‘international community has come out in favour of a single law on crimes against humanity’,¹⁵² later endorsed by the Appeals Chamber.¹⁵³ It ‘alluded to the concept of intersectionality’,¹⁵⁴ not only acknowledging that women were persecuted on religious and gender grounds, but also that women with darker skin were targeted disproportionately, as were pregnant and elderly women.¹⁵⁵ This analysis of the intersecting axes of discrimination ably demonstrated how these ‘multiple forms of discrimination interact together in the enactment of crimes and oppression’.¹⁵⁶ It endorsed the wide pool of ‘internationally recognized human rights’ available under art 21(3),

¹⁴³ Ibid, citing *SAS v France* [2014] III Eur Court HR 341; *M v Italy* (European Court of Human Rights, Section II, Application No 40020/03, 31 July 2012) 43 [161].

¹⁴⁴ Grey et al (n 45) 977; Public International Law & Policy Group, Comments on the International Criminal Court Office of the Prosecutor’s Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute, Submission to Office of the Prosecutor, *Public Consultation on 2014 OTP Policy Paper on Sexual and Gender-Based Crimes* (March 2022) 19.

¹⁴⁵ *Al Hassan Defence Submissions* (n 140) 7 [5].

¹⁴⁶ *Al Hassan Charge Confirmation Decision* (n 12) 306–7 [667].

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 306–7 [667], 308 [700].

¹⁴⁹ Grey et al (n 45) 977.

¹⁵⁰ *Al Hassan Charge Confirmation Decision* (n 12) 306 [665], 308 [671].

¹⁵¹ *Prosecutor v Ongwen (Trial Judgment)* (International Criminal Court, Trial Chamber IX, Case No ICC-02/04-01/15, 4 February 2021) 958 [2739].

¹⁵² *Al Hassan Charge Confirmation Decision* (n 12) 78 [181].

¹⁵³ *Prosecutor v Ongwen (Appeal Judgment)* (International Criminal Court, Appeals Chamber, Case No ICC-02/04-1/15 A, 15 December 2022) 520 [1426].

¹⁵⁴ Grey et al (n 45) 977.

¹⁵⁵ *Al Hassan Charge Confirmation Decision* (n 12) 271 [572]; Gregor Maučec, ‘On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court’ (2021) 21(3) *International Criminal Law Review* 534, 551.

¹⁵⁶ Davis, ‘Dusting Off the Law Books’ (n 46) 52–3.

and took an expansive view of what constituted a ‘fundamental right’.¹⁵⁷ Overall, the PTC comprehensively engaged with the law relating to the charge, as positioned by the OTP, providing the ICC’s first nascent jurisprudence on the crime. More than twenty years after the need to explicitly criminalise the conduct had been met, a PTC had deemed the charge worthy of adjudication before a Trial Chamber, finding there were ‘substantial grounds to believe’ that Al Hassan was ‘criminally responsible’ for the crime against humanity of gender persecution.¹⁵⁸ Gender as envisaged by Copelon was starting to ‘surface’ before the ICC.

On 14 July 2020, against the backdrop of the pandemic, the Prosecutor delivered her opening address. The gender persecution charge was central to her opening, articulating that ‘overall, the targeting and persecution of women was such that it became emblematic of the physical and moral violence inflicted on all residents of Timbuktu’.¹⁵⁹ Over the following 18 months of the OTP’s case, women gave powerful evidence of how they were targeted based on their gender: of being arrested and forced into a car by armed men because of a fallen veil;¹⁶⁰ of being flogged for being greeted by a man other than their husband; of being taken from their homes, forcibly married, and held as sexual slaves.¹⁶¹ The victims’ evidence in the courtroom was, at long last, speaking to a crime on the indictment.

Throughout the trial, the Defence continued to attack the gender persecution charge. It heavily cross-examined the credit of victims and NGO workers, suggesting they were exaggerating their accounts including for financial gain.¹⁶² In its own case, it called witnesses who testified that forced marriage existed prior to the occupation,¹⁶³ and that while the Islamists ‘gave advice’ about how to dress, the rules were not enforced.¹⁶⁴ Though it heavily defended the charge, it did not take issue with the OTP’s construction of gender. While this does not preclude the Trial Chamber from doing so, this lack of resistance to the OTP’s framing of the charge must surely be considered a victory for the development of gender jurisprudence.

¹⁵⁷ *Al Hassan Charge Confirmation Decision* (n 12) 116–17 [243]–[245].

¹⁵⁸ *Ibid* 450 [1011] (Count 13).

¹⁵⁹ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 14 July 2020) 53.

¹⁶⁰ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 15 March 2021) 19.

¹⁶¹ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 29 October 2021) 46; Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 30 November 2021) 29–37.

¹⁶² Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 2 March 2021) 27–32; Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 3 March 2021) 19–42 (‘Al Hassan Transcript (3 March 2021)’); Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 16 March 2021) 5–8; Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 9 February 2022) 36–56.

¹⁶³ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 21 June 2022) 13.

¹⁶⁴ *Ibid* 31; Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 15 June 2022) 51.

Throughout April and May 2023, the parties filed their closing briefs and delivered their closing statements. While the Prosecution argued that women ‘were hunted down in the streets, in the schools, in hospitals and, sometimes, even in their own homes’,¹⁶⁵ the Defence responded that women were not specifically targeted as ‘modesty rules and dress code applied equally to both sexes, as did the rules on punishment for extramarital sex and adultery’.¹⁶⁶ The Defence maintained that the Prosecution had not proved the mens rea, arguing that the specific intent of Al Hassan ‘cannot be imputed from general patterns of human rights violations’.¹⁶⁷ This tension between human rights violations and persecution as a crime remained throughout, from opening to closing addresses. No doubt, the Trial Chamber will address this and more in its first judgment adjudicating gender persecution at the ICC.

C *Abd-Al-Rahman: Advancing the Normative Framework*

In 2007, the OTP was granted an arrest warrant for former ‘Janjaweed’ commander Abd-Al-Rahman, for his role in the atrocities committed against Darfuri civilians in 2003–2004.¹⁶⁸ The warrant included persecution charges, though none on gender grounds. Only in 2020 was he arrested, triggering the charge confirmation process, and providing the OTP with an opportunity to re-evaluate its charges. In the intervening thirteen years, not only had the OTP released its *2014 SGBC Policy Paper*, but the *Al Hassan* decision had just been delivered, confirming the OTP’s approach to charging the crime.

In its brief filed in early 2021, the OTP included gender in two of its persecution charges, encapsulating its change in charging practice since the initial arrest warrant.¹⁶⁹ Not only did it reflect those changes, it significantly advanced them. It identified the targeted groups as Fur males at two locations within Darfur, Mukjar and Delieg, each location the basis of a separate charge. These males were targeted on gender grounds because of the ‘socially-constructed gender role presuming males to be fighters’.¹⁷⁰ In support, it cited the PTC’s findings in *Al Hassan*, and the *Ntaganda* reparations order, handed down only months prior, discussing gender in the context of gender-inclusive reparations.¹⁷¹ At the charge confirmation hearing, the OTP reiterated *Al Hassan* as precedent, arguing ‘it’s important to know that the case law of the ICC already supports this type of

¹⁶⁵ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 23 May 2023) 48.

¹⁶⁶ *Prosecutor v Al Hassan (Third Corrigendum to Final Defence Brief)* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 4 August 2023) 223 [586].

¹⁶⁷ *Ibid* 221–2 [581].

¹⁶⁸ *Prosecutor v Abd-Al-Rahman (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007) (*‘Abd-Al-Rahman Arrest Warrant’*).

¹⁶⁹ *Prosecutor v Abd-Al-Rahman (Second Corrected Version of ‘Document Containing the Charges’)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/20, 22 April 2021) 24–5 [93] (Count 21); 35 [136] (Count 31) (*‘Abd-Al-Rahman Document Containing Charges’*).

¹⁷⁰ *Ibid*.

¹⁷¹ *Prosecutor v Abd-Al-Rahman (Prosecutor’s Pre-Confirmation Brief)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/20, 21 May 2021) 45 [129] (*‘Abd-Al-Rahman OTP Pre-Confirmation Brief’*).

charging in the context of gender'.¹⁷² The OTP identified the underlying acts as torture, murder and cruel treatment.¹⁷³ No act was of a sexual nature. Though gender crimes as distinct from sex crimes had been discussed at the Rome negotiations, talk of the socially constructed role of males as fighters had not been the primary focus. This was a novel construction, with the OTP deploying the developments in *Al Hassan* to expand the parameters of the charge.

This time, the OTP explicitly positioned the grounds as intersectional. It argued the victims' Fur ethnicity, combined with the socially constructed gender role presuming males to be fighters, underpinned the perpetrators' perception of them as 'rebels or rebel sympathisers'.¹⁷⁴ It noted that 'these multiple intersecting discriminatory grounds best describe and fully capture all aspects of the discriminatory targeting'.¹⁷⁵ Again at the charge confirmation hearing, it quoted directly from international human rights case law as to the multiple intersecting discriminatory grounds being 'analytically inseparable because the experience of discrimination cannot be disaggregated into [separate] reasons'.¹⁷⁶ As Beringola observed, the OTP's engagement with intersectionality represented a 'positive' evolution, applied beyond sexual violence against women and girls.¹⁷⁷

In July 2021, the PTC confirmed each count, a significant development for recognising the gendered victimisation of males within mass atrocity.¹⁷⁸ The relatively brief decision did not engage with the elements of gender persecution, nor did it comment on the OTP's intersectional positioning of the grounds. It nonetheless adopted its framing of the charge, utilising the same language of 'socially-constructed gender role[s] presuming males to be fighters'.¹⁷⁹ In turn, the PTC in *Said* confirmed the charge on an almost identical basis,¹⁸⁰ the OTP also having framed the charge around the socially constructed role of men and boys as fighters; on multiple intersecting grounds; and with no underlying acts of sexual violence.¹⁸¹ Only a decade earlier in *Prosecutor v Muthaura* (the *Kenyatta* case), the PTC had disagreed with the OTP that forcible circumcisions and penile amputations amounted to the crime against humanity of 'other acts of sexual

¹⁷² Transcript of Proceedings, *Prosecutor v Abd-Al-Rahman* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/20, 24 May 2021) 87 ('Abd-Al-Rahman Transcript (24 May 2021)').

¹⁷³ *Abd-Al-Rahman Document Containing Charges* (n 169) 25 [94], 35 [137].

¹⁷⁴ *Ibid* 24–5 [93], 35 [136].

¹⁷⁵ *Abd-Al-Rahman OTP Pre-Confirmation Brief* (n 171) 45 [128].

¹⁷⁶ *Abd-Al-Rahman Transcript* (24 May 2021) (n 172) 90–1, quoting *Gonzales Lluy et al v Ecuador (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 298, 1 September 2015) [11] (Judge Ferrer Mac-Gregor Poisot).

¹⁷⁷ Beringola (n 138) 127.

¹⁷⁸ *Abd-Al-Rahman Charge Confirmation Decision* (n 13) 67–70; Rosemary Grey, 'Gender-Based Persecution against Men: The ICC's Abd-al-Rahman Case', *Opinio Juris* (Blog Post, 13 May 2021) <<http://opiniojuris.org/2021/05/30/gender-based-persecution-against-men-the-iccs-abd-al-rahman-case/>>, archived at <<https://perma.cc/TBE3-BZD7>> ('Gender-Based Persecution against Men').

¹⁷⁹ *Abd-Al-Rahman Charge Confirmation Decision* (n 13) 36 [80], 49 [116].

¹⁸⁰ *Said Charge Confirmation Decision* (n 13) 58, 60–1.

¹⁸¹ *Prosecutor v Said (Pre-Confirmation Brief)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/14-01/21, 8 December 2021) 70–1 [193].

violence’ (instead reframing them as ‘other inhumane acts’ in confirming the charge).¹⁸²

Though the crime remained largely dormant for the two decades following the 1998 Rome Conference, it has taken on a particular momentum since the 2019 *Al Hassan Charge Confirmation Decision*. This section has demonstrated how the legal building blocks of each case are coalescing into emerging jurisprudence consistent with the Court’s art 21(3) obligations. These developments over the last five years have established an emerging framework for prosecuting the crime at the ICC. The following section will critically assess the cumulative impact of these cases and conclude with brief observations as to the future of the charge.

IV IMPLICATIONS AND EMERGING TENSIONS OF PROSECUTING GENDER PERSECUTION

A *Understanding Gender, Seeing Persecution*

In reflecting on why the gender persecution charge remained relatively untouched for almost two decades, Special Advisor to the ICC on Gender Persecution Lisa Davis has observed a ‘fundamental uncertainty about what the crime entails’.¹⁸³ Hayes highlights the general lack of understanding and recognition of gender as a concept, noting that the term only entered the anglophone human rights vernacular in the 1990s (and with no direct translation in other languages, as flagged during negotiations at Rome).¹⁸⁴ More specifically, Davis identifies other conceptual challenges with gender persecution: what ‘gender-based persecutory acts look like during atrocities, apart from sexual violence’; and how to identify a perpetrator’s ‘intent to discriminate against a group based on their gender’.¹⁸⁵ As a result, recent UN and civil society resources have been developed entirely to explain the crime.¹⁸⁶

1 *Al Hassan: A ‘Gateway’ Case to Understanding Gender Persecution*

Amidst these layers of uncertainty, the *Al Hassan* and *Abd-Al-Rahman* cases unfold, with gender persecution at last visible in the courtrooms of the ICC. I suggest that the two cases serve as valuable counterparts, together serving to illustrate what the crime looks like, and the specific harm it captures. Given the continued uncertainty about what the crime is, this is normatively a most

¹⁸² *Prosecutor v Muthaura (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012) 93–8 [260]–[280].

¹⁸³ Adrienne Ringin, ‘In Conversation: The Crime of Gender Persecution at the International Criminal Court’ (2023) 29(2) *Australian Journal of Human Rights* 394, 395; Conversation with Lisa Davis (Rosemary Grey, Sydney Law School, The University of Sydney, 1 March 2023) <https://www.youtube.com/watch?v=MUBAhepSL9s&ab_channel=SydneyLawSchool> (‘Gender Persecution: New Frontiers in International Criminal Law’).

¹⁸⁴ Hayes, ‘Understanding and Recognising Gender-Based Persecution’ (n 44). See generally Indira Rosenthal, Valerie Oosterveld and Susana SáCouto, ‘What Is “Gender” in International Criminal Law?’ in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022) 41.

¹⁸⁵ Davis, ‘Dusting Off the Law Books’ (n 46) 2, 10.

¹⁸⁶ See UN Women, *Identifying Gender Persecution in Conflict and Atrocities: A Toolkit for Documenters, Investigators, Prosecutors and Adjudicators of Crimes against Humanity* (Report, December 2021).

significant moment. Davis has described certain forms of gender persecution as ‘easy to spot’.¹⁸⁷ I suggest that *Al Hassan* is one such case, providing a soft entry point to understand what the crime is and what it can do. Its target group is women and girls, providing a conceptually neat overlap with the discriminatory ground of gender.¹⁸⁸ This target group does not disrupt ICL’s gender binary approach of conceiving of gender as synonymous with females,¹⁸⁹ nor the ‘male perpetrator/female victim paradigm’.¹⁹⁰ Its use of uniformly heteronormative women subject to sexually violent atrocity crime also falls within this trope, in no way displacing ‘patriarchy’s heteronormative view of women’.¹⁹¹

Yet crucially, the persecution extends further to include non-sexual aspects of the charge, with its ‘enforc[ed] systems of oppression’ regulating how women and girls must dress, behave, fraternise and more.¹⁹² Conceptually, this is still familiar territory, yet it has moved beyond the limited gender binary of women and sexual violence.¹⁹³ These aspects reveal how the targeted group is victimised, regardless of whether they obey or violate the ‘prescribed gender narrative’.¹⁹⁴ The same charge is then able to capture the holistic impact of more specific gender crimes, such as forced marriage and enslavement, where the ‘crime itself is the narrative’.¹⁹⁵ This appears to be the embodiment of Copelon’s initial conception: a single crime that captures the full extent of the gendered criminality.¹⁹⁶ Cumulatively then, I suggest that the OTP has viewed the persecution at least equally through the lens of gender, rather than, as Buss critiqued, gender being at the periphery of another form of persecution.¹⁹⁷ This lens appears to have ‘open[ed] up’ rather than ‘occlud[ed]’ the complex dimensions of gender-based violence, ably positioning the Trial Chamber to understand gendered harm beyond the ‘tightly scripted dominant narratives of the conflict’.¹⁹⁸ By using the gender binary but also stepping beyond it, *Al Hassan* provides us with an illustrative ‘gateway’ case to understand the myriad acts and behaviours encompassed by gender persecution.

2 *Abd-Al-Rahman: Less Obvious, More Revealing*

By contrast, Davis describes other conduct that is at first glance harder to identify as gender persecution.¹⁹⁹ I suggest *Abd-Al-Rahman* is one such case, as it

¹⁸⁷ Davis, ‘Gender Persecution: New Frontiers in International Criminal Law’ (n 183).

¹⁸⁸ Hayes, ‘Understanding and Recognising Gender-Based Persecution’ (n 44).

¹⁸⁹ Beringola (n 137) 5; Charlesworth (n 68) 14–16.

¹⁹⁰ Miranda Alison, ‘Wartime Sexual Violence: Women’s Human Rights and Questions of Masculinity’ (2007) 33(1) *Review of International Studies* 75, 75.

¹⁹¹ Beringola (n 138) 5.

¹⁹² Davis, ‘Dusting Off the Law Books’ (n 46) 37.

¹⁹³ Sellers, ‘Gender Strategy’ (n 55) 304.

¹⁹⁴ Davis, ‘Dusting Off the Law Books’ (n 46) 37; Copelon, ‘Toward Accountability for Violence against Women in War’ (n 66) 250.

¹⁹⁵ Davis, ‘Dusting Off the Law Books’ (n 46) 6.

¹⁹⁶ Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 208.

¹⁹⁷ Doris Buss, ‘Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law’ in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge Cavendish, 2009) 105, 118.

¹⁹⁸ Buss, ‘The Curious Visibility of Wartime Rape’ (n 6) 5, 22.

¹⁹⁹ Davis, ‘Gender Persecution: New Frontiers in International Criminal Law’ (n 183).

presents an immediately less obvious form of gender persecution, absent women, and absent sexual violence. Yet when the perpetrators' discriminatory intent is interrogated, as specifically positioned by the OTP, the gender aspect of the charge begins to surface.²⁰⁰ As Beringola observes, to recognise sexual and gender-based violence against men 'requires a social understanding of how men's gender identities are constructed in armed conflict in relation to the group attacked'.²⁰¹ The bodies of the executed victims at Mukjar and Deleig were not randomised, but limited to Fur men and boys of a particular age who could or might be fighters. As Leddy notes, Fur women of a similar age and physical fitness 'were not perceived as being combatants because of this perceived gender role'.²⁰² The perpetrators' perception of the men and boys as fighters was intricately interwoven with their perception of them as rebel sympathisers: the three grounds intersecting to surface the discriminatory intent driving the atrocity. Combined, they appear to be 'making visible the systemic aspects of violence and inequality', potentially starting to remedy earlier critiques of how international criminal law has viewed gender.²⁰³

The gender ground then becomes a necessary and clarifying component to capture the complex discrimination processes underlying the violence.²⁰⁴ So too is the intersectional analysis, allowing a more nuanced, comprehensive assessment of the 'nature, scope and outcome of discrimination'.²⁰⁵ In addition, both the OTP and victims' representatives have applied a perceptive 'gender lens' to the charge, rather than focusing narrowly on the persecuted males. One victims' representative noted that 'a large number of women were left alone to care for their children', and 'others lost the ability to ever have children'.²⁰⁶ This has allowed the consequences of the persecution to be captured from the outset of the trial, creating a more accurate, multi-dimensional portrayal of the conflict for the judiciary. Less clear is whether the OTP has adduced expert evidence on the social understanding of male gender identities in Darfur, likely integral to the judiciary's fulsome understanding of the charge. Also unclear is the potential impact of the over 15-year delay from investigation to trial, the initial investigation conducted

²⁰⁰ Davis, 'Dusting Off the Law Books' (n 46) 27.

²⁰¹ Beringola (n 138) 31, citing Valorie Vojdik, 'Theorizing Violence against Men' (Conference Paper, A Workshop on Geographies of Violence: Place, Space and Time, Emory University School of Law, 2014) 25, 31; Chris Dolan, 'Into the Mainstream: Addressing Sexual Violence against Men and Boys in Conflict' (Briefing Paper, Overseas Development Institute, 14 May 2014) 9 <https://reliefweb.int/attachments/1cd3abcd-d0a4-3633-b7fa-78542d5ece9d/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf>, archived at <<https://perma.cc/75SD-UXFY>>.

²⁰² Nicholas Leddy, 'Investigative and Charging Considerations for International Crimes Targeting Individuals on the Basis of Sexual Orientation and Gender Identity' (2022) 20(4) *Journal of International Criminal Justice* 911, 928.

²⁰³ Buss, 'The Curious Visibility of Wartime Rape' (n 6) 22.

²⁰⁴ Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38(4) *Signs: Journal of Women in Culture and Society* 1019, 1023-4.

²⁰⁵ Elizabeth Odio-Benito, 'Foreward' in Indira Rosenthal, Valerie Oosterveld and Susana SáCouto (eds), *Gender and International Criminal Law* (Oxford University Press, 2022) ix.

²⁰⁶ Transcript of Proceedings, *Prosecutor v Abd-Al-Rahman* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/20, 25 May 2021) 14, 45.

at a time when OTP investigations were heavily criticised for lacking gender sensitivity.²⁰⁷

3 Together, the Potential and the Critique

Combined, the cases reveal the ‘potential breadth of conduct’ that can come within the ambit of gender persecution.²⁰⁸ In so doing, they begin to unravel the persistent trope in international criminal law of equating gender with female victims of sexual violence. Once gender persecution is properly understood, it equips us with a critical lens to see what more the charge can do. In *Al Hassan*, with its parallel focus on the civilian population of Timbuktu subject to religious persecution, we see that the targeted group need not be limited by gender. Theoretically, the charge could also have included men in the targeted group, as they too were violently punished for violating prescribed gender regulations regarding how they could dress, who they could have relationships with and who they could accompany.²⁰⁹ Indeed the OTP appear cognisant of this potential, having found in its preliminary examination in Nigeria a ‘reasonable basis to believe that Boko Haram’s specific targeting of both females and males’ constituted gender persecution, noting the impact of gender separation on ‘both females and males, and in particular children’.²¹⁰ Others have observed this potential in the Afghanistan situation, the targeted group potentially including not just women and girls but anyone victimised for engaging in activities at odds with the Taliban’s ideology, such as educating girls and women.²¹¹ Separately, the cases bode well for shaping domestic justice mechanisms, with the *Al Hassan* decision already being used as precedent in Germany in convicting an ISIS member of gender and religious persecution for enslaving Yazidi women and girls.²¹²

In turn, this critical lens also leads us to query why the OTP has not used the charge where the facts otherwise seem fitting. For example, in *Abd-Al-Rahman*, sexual crimes committed against women were charged as persecution on political and ethnic grounds, not gender grounds.²¹³ The victims’ representative specifically asked the OTP to expand the scope of the gender persecution charge to include women, observing that this ‘tiny slice of accountability leaves so many women excluded’.²¹⁴ However, the OTP did not revise the charge. Grey observes

²⁰⁷ Inder (n 2) 326; Hayes, ‘Sisyphus Wept: Prosecuting Sexual Violence at the ICC’ (n 106) 25–43.

²⁰⁸ Rosenthal, Oosterveld and SáCouto (n 184) 30.

²⁰⁹ Transcript of Proceedings, *Prosecutor v Al Hassan* (International Criminal Court, Trial Chamber X, Case No ICC-01/12-01/18, 4 December 2020) 62; *Al Hassan* Transcript (3 March 2021) (n 162) 63.

²¹⁰ Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities 2019* (Report, 5 December 2019) 49 [186].

²¹¹ Hayes, ‘Understanding and Recognising Gender-Based Persecution’ (n 44); Grey et al (n 45) 969.

²¹² Oberlandesgericht Düsseldorf [Higher Regional Court of Düsseldorf], 7 StS 3/19, 16 June 2021, [711]; Silke Studzinsky and Alexandra Lily Kather, ‘Will Universal Jurisdiction Advance Accountability for Sexualized and Gender-Based Crimes? A View from Within on Progress and Challenges in Germany’ (2021) 22(5) *German Law Journal* 894, 906.

²¹³ *Abd-Al-Rahman Document Containing Charges* (n 169) 16 [57]–[58]; Grey, ‘Gender Persecution Submission’ (n 53) 15.

²¹⁴ *Abd-Al-Rahman* Transcript (24 May 2021) (n 172) 21.

the oddity of gender being ‘listed as a ground of persecution for the massacres of Fur men, but not the sexual assault of Fur women’.²¹⁵ A similar criticism arises in *Said*, where despite the OTP averring to widespread sexual violence inflicted on women and girls, no war crimes or crimes against humanity charges have been laid.²¹⁶ Such discrepancies draw us back to critical questions around the invisibility of violence against women within mass atrocity.²¹⁷ From a prosecutorial perspective, charge selection is an inherently complex task, and observers are not privy to the many internal considerations that determine whether a charge is pursued.²¹⁸ Yet, as Copelon argues, charge consistency is intricately bound up with promoting deterrence and accountability.²¹⁹ Having ‘seen’ gender persecution, it is unsatisfying to see it charged apparently inconsistently.

B *Gender as a Social Construct: Now a Norm in ICL?*

Since the gender definition was first negotiated, scholars have noted the importance of a Trial Chamber determining the parameters of the crime.²²⁰ I posit that this once critical question has fallen away somewhat, it being unlikely that a Trial Chamber today would render a narrow construction of ‘gender’. Beyond the emerging case law canvassed in Section II, the OTP have continued to frame gender as a social construction in its Nigeria and Afghanistan preliminary investigations.²²¹ In turn, the PTC has continued to authorise investigations on this basis.²²²

Moreover, developments external to the ICC suggest a broad understanding of ‘gender’ in international law. In 2015, the text proposed by the ILC for the draft crimes against humanity treaty largely reflected that of the *Rome Statute*, including the art 7(3) ‘gender’ definition.²²³ In 2019, it invited comments on the draft.²²⁴ An extensive collection of voices lobbied for the definition to be removed, including a joint letter from 24 UN special rapporteurs and experts.²²⁵ The normative significance of their submission was immense. They called on the ILC to remove the ‘outdated and opaque definition’, noting it had ‘never been adopted in any subsequent human rights instrument nor cited in tribunal jurisprudence’.²²⁶

²¹⁵ Grey, ‘Gender-Based Persecution against Men’ (n 178).

²¹⁶ Adrienne Ringin, ‘Gender Persecution Again a Focus for ICC in the Said Trial’, *Opinio Juris* (Blog Post, 29 September 2022) <<https://opiniojuris.org/2022/09/29/gender-persecution-again-a-focus-for-icc-in-the-said-trial/>>, archived at <<https://perma.cc/5BUJ-EUW4>>.

²¹⁷ Buss, ‘The Curious Visibility of Wartime Rape’ (n 6) 12.

²¹⁸ Grey, *Prosecuting Sexual and Gender-Based Crimes* (n 1) 9.

²¹⁹ Copelon, ‘Toward Accountability for Violence against Women in War’ (n 66) 254.

²²⁰ Valerie Oosterveld, ‘Prosecuting Gender-Based Persecution as an International Crime’ in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, 2013) 57, 59.

²²¹ Leddy (n 202) 929.

²²² *Ibid.*

²²³ Grey et al (n 45) 959; Leila Sadat, ‘Little Progress in the Sixth Committee on Crimes against Humanity’ (2022) 54(1–2) *Case Western Reserve Journal of International Law* 89, 95–6.

²²⁴ Sadat (n 223) 97.

²²⁵ Davis and Bradley (n 5) 152.

²²⁶ Letter from Special Rapporteurs to the International Law Commission, 30 November 2018, 2 <<https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/comments-legislation-and-policy>>, archived at <<https://perma.cc/FA72-UBM7>> (‘Special Rapporteurs Letter’).

Alternatively, they suggested a new definition be drafted that reflected the ‘social construction of gender as it is widely recognized to be’.²²⁷ The submission cogently captured the vast array of international human rights law instruments and jurisprudence that recognised the social attributes of gender.

The ILC released its revised draft, absent the gender definition.²²⁸ Its commentary explaining the deletion echoed the special rapporteurs’ position, noting the significant international human rights law developments since the statute was negotiated that reflected ‘the current understanding’ of gender.²²⁹ As Davis argues, this ‘determination means that the ICC must also adopt this understanding, since it is obligated by the Rome Statute to interpret legal terms in light of evolving international law’.²³⁰ Faced with this explicit position from the ILC, any lesser interpretation would surely be appellable. Cumulatively, these developments suggest that the originally critical question of what the gender definition encompassed has receded.

C *Gender Persecution as Inclusive of Sexual Orientation and Gender Identity?*

This tension forecasts the next obvious challenge for the ICC in adjudicating gender persecution: how it will determine whether people targeted because of their perceived sexual orientation and gender identity come within the ambit of the crime. International criminal law has ‘not yet acknowledged’ that people may be targeted in this way.²³¹ Into this framework, in December 2022, the OTP released its first policy paper specifically on gender persecution. It explicitly included sexual orientation, gender identity and gender expression as falling within the ‘context of society’ aspect of the gender definition.²³² The policy was labelled a ‘quantum leap forward’, as was its recognition of the extent of gender persecution that LGBTQI+ people have experienced in conflict, despite lacking ‘visibility in historical records’.²³³ What the 2014 *SGBC Policy Paper* was for gender as a social construction, the 2022 paper may well do for sexual orientation and gender identity.

Whether the definition allows for such a construction is not simply a theoretical exercise, as the OTP’s current investigation in Myanmar/Bangladesh prompts such questions. In 2019, the PTC III authorised the OTP to open an investigation, finding there was a ‘reasonable basis to believe’ that transgender, intersex and

²²⁷ Ibid 6.

²²⁸ For a detailed history of this process, see Indira Rosenthal and Valerie Oosterveld, ‘Gender and the ILC’s 2019 Draft Articles on the Prevention and Punishment of Crimes against Humanity’ (2020) 6(2) *African Journal of International Criminal Justice* 214.

²²⁹ International Law Commission, *Draft Articles on Prevention and Punishment of Crimes against Humanity*, UN GAOR, 71st sess, UN Doc A/74/10 (2019) 45 [41].

²³⁰ Davis, ‘Dusting Off the Law Books’ (n 46) 10.

²³¹ Beringola (n 138) 5.

²³² Office of the Prosecutor, International Criminal Court, *Policy on the Crime of Gender Persecution* (Policy, 7 December 2022) 3, 18 (*‘Gender Persecution Policy’*).

²³³ Kevin Jon Heller, ‘On the Frontlines of Gender Justice: The New ICC Policy Paper on Gender Persecution’ (Online Conference, Outsummit, 14 December 2022) <https://www.youtube.com/watch?app=desktop&v=17_oJIHvX68>; Office of the Prosecutor, *Gender Persecution Policy* (n 232) 4. See also Yvonne Dutton and Milena Sterio, ‘Prosecuting Gender Persecution at the ICC: Definitions, Policies, and Practice’ (2023) 46(5) *Fordham International Law Journal* 575, 600.

third-gendered persons had been subject to sexual violence in the context of an underlying attack against the civilian population.²³⁴ As Leddy notes, this is the first time the ICC has ‘explicitly recognized’ these groups ‘as victims of such an attack’.²³⁵ The charge is currently framed as persecution on religious and ethnic grounds, circumventing the need to engage in a definitional dispute over ‘gender’.²³⁶ As the OTP did in *Abd-Al-Rahman and Said*, it could incorporate the gender ground at a later stage.²³⁷ Leddy views this manner of charging as an alternative avenue for accountability under the Statute, ‘reaffirm[ing] their membership in the broader civilian group’ while also providing a ‘holistic historical account of the contextual elements of the crimes committed’.²³⁸ Yet there would be something manifestly unsatisfying about the OTP prosecuting a persecution charge where it has alleged ‘6,097 sexual and gender based incidents’ that did not — or could not — include gender as a ground of persecution.²³⁹ Separately, in 2021 the Columbian Special Jurisdiction for Peace declared it had jurisdiction over the crime, finding that five LGBTQI+ people might have been persecuted on gender grounds by virtue of their sexual orientation.²⁴⁰ Though more of a preliminary assessment than a conclusive judgment, it does suggest how such a finding is legally possible within the existing statute.

1 *Who Does Persecution Protect?*

In turn, this raises broader questions about which subsets of victims are afforded protection under the crimes against humanity umbrella. The same group of special rapporteurs who commented on the ‘gender’ definition to the ILC provided an additional submission on the prohibited grounds of persecution. They called for the grounds of persecution to be expanded in the draft treaty to include a further twelve grounds, including sexual orientation and gender identity, age, disability and indigenous status.²⁴¹ Noting the ILC’s ‘progressive expansion of persecutory grounds spanning the last 70 years’, it argued that the ‘time has come again’ to recognise the ‘additional grounds driving perpetrators’ intent to commit heinous crimes against vulnerable groups ... because of their particular status’.²⁴² This time, the submission was not adopted.

Sellers raises a similar concern, querying how it came to be that the civilian population is offered protection from crimes against humanity while ‘under a subset of persecution, some civilians receive protection only when they fit into

²³⁴ *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/19, 14 November 2019) 39–40 [84]–[86] (*‘Bangladesh/Myanmar Situation’*).

²³⁵ Leddy (n 202) 930.

²³⁶ *Bangladesh/Myanmar Situation* (n 234) 50 [110].

²³⁷ Leddy (n 202) 930.

²³⁸ *Ibid* 931.

²³⁹ *Bangladesh/Myanmar Situation* (n 234) 39 [84].

²⁴⁰ Susann Aboueldahab, ‘Gender-Based Persecution as a Crime against Humanity: A Milestone for LGBTI Rights before the Colombian Special Jurisdiction for Peace’, *EJIL: Talk!* (Blog Post, 4 May 2021) <<https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/>>, archived at <<https://perma.cc/8SNU-ZXL8>>.

²⁴¹ Special Rapporteurs Letter (n 226) 2, 4.

²⁴² *Ibid* 2.

very narrow groups'.²⁴³ She frames 'collective protection' as the 'doctrinal spinal cord of international criminal law', and calls for an international criminal law that requires 'subgroups to be per se included in the collectivity and unable to be excluded from them'.²⁴⁴ Sellers observes that 'we still have a way to go under crimes against humanity if the objective is to safeguard the civilian population'.²⁴⁵ Similarly, Luban argues that 'severe persecutions of *any* population should be treated as crimes against humanity', bluntly asking 'why should [international criminal law] give persecutors a free pass merely because the group they persecute consists of gays or intellectuals, rather than Jews or Tutsis?'²⁴⁶

D Circling Back to Gender Persecution as a Concept

Returning to Copelon's original idea of gender persecution, articulated only thirty years ago, we can at last see the concept playing out in the courtrooms of the ICC. *Al Hassan* speaks directly to this vision, with its focus on women as victims of sexual and gender violence, the charge surfacing the systems of oppression and discrimination bearing down on the female civilians of Timbuktu. In *Abd-Al-Rahman*, we see Copelon's vision extended, the charge surfacing the multi-layered relationship between gender as it relates to constructed notions of masculinities, violence, politics and ethnicity. These cases together allow us to better understand what it means to be persecuted on gender grounds, and to better understand gender in international criminal law. In turn, they demonstrate what more the charge can and should do in protecting civilians from persecution. Copelon articulates how persecution is 'capable of expanding to embrace new understandings'.²⁴⁷ The challenge for the ICC in its third decade will be in just how capable it is.

V CONCLUSION

Since witnesses began testifying in the Nuremberg trials, evidence of gender persecution has 'pour[ed] into' the courtrooms of international criminal tribunals.²⁴⁸ Yet no crime captured that harm.²⁴⁹ Though the ICC was equipped with the charge, it remained 'gathering dust' for the two decades after it entered the *Rome Statute*.²⁵⁰ Today at the ICC, victims are testifying about being persecuted because of their gender. For the first time, that evidence is speaking to a crime on the indictment. An emerging alignment is occurring between statute

²⁴³ Patricia Viseur Sellers, 'Gendered Intersections of Human Rights and International Criminal Law' (Speech, CIPDH International Course on Human Rights, 16 November 2020) 01:17:15–02:15:02 <<https://www.facebook.com/cipdhunesco/videos/live-keynote-speech-gendered-intersections-of-human-rights-and-international-cri/802737697228445/>>.

²⁴⁴ Ibid.

²⁴⁵ Patricia V Sellers and Louise Chappell, 'Gender, Conflict-Related Violence and Justice: Patricia V Sellers in Conversation with Louise Chappell' (2019) 25(3) *Australian Journal of Human Rights* 357, 367.

²⁴⁶ Luban (n 22) 106 (emphasis in original).

²⁴⁷ Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' (n 3) 207.

²⁴⁸ Grey, 'Gender Persecution Submission' (n 53) 2.

²⁴⁹ Ibid.

²⁵⁰ Davis, 'Dusting Off the Law Books' (n 46).

and case law, between what is criminalised and what is prosecuted as gender persecution in ICL. The ‘historical invisibility’ of gender violence is receding.²⁵¹

This article set out to explore how gender persecution is being litigated before the ICC and analyse its implications. It traced developments since the PTC first confirmed the charge in *Al Hassan*, arguing that a nascent jurisprudence is forming based on a sophisticated framing of the charge by the OTP, and a receptive PTC. From *Al Hassan* to *Abd-Al-Rahman* and *Said*, the jurisprudence is being applied and developed, from the ICC to the national courts of Germany and Colombia. The crime is now understood to include gender as a social construction, not only in international human rights law and the OTP’s 2014 *SGBC Policy Paper*, but in the practice to date of the ICC. The crime is now also understood to potentially apply to far more diverse situations than women being the subject of sexual violence. Additionally, the prohibited bases of persecution are now being analysed through an intersectional lens, allowing for more complex narratives of conflict to emerge. A significantly wider pool of international human rights and sources are being engaged, allowing different violations to be captured, beyond the right to life and physical integrity. In looking at how gender persecution has been litigated at the ICC, the answer is multi-layered and rapidly evolving.

Though much has been achieved, much more remains to be explored. The scope for charging gender persecution is ‘vast’:²⁵² from differing compositions of the targeted group; to utilising wider sources of human rights deprivations; to analysing additional intersecting prohibited grounds. The OTP’s 2022 gender persecution policy acknowledges this and more.²⁵³ It also acknowledges its role in the charge remaining dormant for so long, ‘leaving a gap in the development of international criminal jurisprudence’ and ‘contribut[ing] to the lack of visibility in historical records’.²⁵⁴ The policy is both aspirational and practical, from observing how accountability for the crime ‘can help contribute to sustainable peace’, to stipulating that investigatory teams will use a victim’s preferred pronouns.²⁵⁵ Yet the experience of the OTP’s earlier paper reminds us that the impact of a policy can take time. Whether the charge will be used to capture persecution of LGBTIQ+ people remains to be seen, as does whether it will be used to interrogate social and cultural norms beyond situations of occupation.²⁵⁶

In ‘Surfacing Gender’, Copelon expressed frustration at the ‘complete failure of the UN and the international community in general’ to recognise that persecution based on gender required ‘its own category of crimes against humanity’.²⁵⁷ Thirty years later, it is in the draft crimes against humanity treaty,

²⁵¹ Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 207.

²⁵² Shamiso Mbizvo, ‘Hidden in Plain Sight? Unpacking Conceptual and Implicit Impediments to Recognising and Charging Gender-Based Persecution as a Crime against Humanity’ (Speech, Adjudicating Gender-Based Persecution at the ICC & Beyond Conference, Northumbria University, 7–8 October 2021) <<https://www.northumbria.ac.uk/about-us/news-events/events/2021/10/adjudicating-gender-based-persecution/>>, archived at <perma.cc/FV4N-ZKMG>.

²⁵³ ICC, *Gender Persecution Policy* (n 232) 4, 12–18.

²⁵⁴ *Ibid* 4.

²⁵⁵ *Ibid* 5, 22.

²⁵⁶ Mbizvo (n 252).

²⁵⁷ Copelon, ‘Surfacing Gender: Reconceptualizing Crimes against Women in Time of War’ (n 3) 206.

unshackled by its *Rome Statute* definition: in MacKinnon's words, 'by any legal measure, the speed of light'.²⁵⁸ That draft treaty edges incrementally closer to adoption. From 10–14 April 2023, the UNGA's Sixth Committee held its 78th session, where it once again deliberated over the text of the draft treaty. Echoes of the conservative bloc from Rome 25 years ago remain. During the session, ICC State Party Gambia issued a statement indicating that the ILC's failure to include the gender definition was 'unacceptable', disagreeing that its meaning had evolved since 1998.²⁵⁹ It argued that the definition is 'nothing else other than man or woman' and 'goes to the root of creation of man and woman'.²⁶⁰ Cameroon, not a State Party, reiterated a similar position.²⁶¹ In late 2022, the Holy See stated that it 'regrets' the absence of the definition, arguing that 'adding or modifying the already agreed definition ... would not be conducive to a broad consensus'.²⁶² One can imagine what these states make of the OTP's recent policy arguing that the gender definition is inclusive of sexual orientation and gender identity. In considering what more the crime of gender persecution can do and who it should protect, these voices are a sobering reminder of the contestation that remains around gender today, from Afghanistan, Iran, Uganda, Russia and the United States. That gender persecution is at last being 'surfaced' before the ICC provides a measure of accountability that is of historical significance.

²⁵⁸ MacKinnon, 'Creating International Law' (n 99) 105.

²⁵⁹ Amadou Jaiteh, The Gambia, *Statement on Cluster 2: Definition and General Obligations*, 6th Comm, 77th sess, (11 April 2023) 1–2. See also UN GAOR, 6th Comm, 77th sess, 40th mtg, Agenda Item 78, UN Doc A/C.6/77/SR.40 (23 June 2023) 12 [65] ('*Sixth Committee 40th Meeting Record*').

²⁶⁰ Jaiteh (n 259) 1–2.

²⁶¹ Zacharie Nyanid, Cameroon, *Statement on Cluster 2: Articles 2, 3, 4*, 6th Comm, 77th sess, (11 April 2023) 2. See *Sixth Committee 40th Meeting Record*, UN Doc A/C.6/77/SR.40 (n 259) 2 [6].

²⁶² HE Archbishop Gabriele Caccia, Permanent Observer of the Holy See to the United Nations (Statement, Resumed Session of the Sixth Committee, 77th Session of the UNGA, 10 October 2022) 2. See also UN GAOR, 6th Comm, 77th sess, 11th mtg, Agenda Item 78, UN Doc A/C.6/77/SR.11 (11 April 2023) 10 [54].