RECENT POLICY PAPER


On March 7, 2014, the International Criminal Court (ICC) issued a judgment in the case of Prosecutor v. Katanga.1 Germain Katanga was acquitted of rape and sexual slavery, charged as crimes against humanity and as war crimes.2 This verdict was the most recent failure of the Office of the Prosecutor (OTP) to secure a conviction in the ICC for sexual or gender-based crimes.3 As such, the judgment, and the OTP’s subsequent decision not to appeal it, engendered considerable criticism.4

In the wake of this decision, the OTP released a Policy Paper on Sexual and Gender-Based Crimes, in which it affirmed its commitment to the prosecution of these crimes.5 Seemingly responding to several criticisms levied against the OTP, the Paper outlines a series of policies through which it will “integrate[e] a gender perspective and analysis into all of its work”6 and thereby maximize deterrence, challenge gen-

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2 Case Information Sheet, supra note 1, at 2. Katanga was found guilty, however, of other counts of murder, attacking a civilian population, destruction of property, and pillaging. Id. at 1.

3 Gender-based crimes “are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles.” THE OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES 3 (2014) [hereinafter POLICY PAPER], http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf [http://perma.cc/86TU-R6NJ]. Sexual crimes “cover both physical and non-physical acts with a sexual element.” Id. They occur where a “perpetrator . . . commit[s] an act of a sexual nature against a person, or . . . cause[s] another to engage in such an act, by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person’s incapacity to give genuine consent.” Id.


5 The OTP had “elevated this issue to one of its key strategic goals in its Strategic Plan 2012–2015.” POLICY PAPER, supra note 3, ¶ 5.

6 Id.
dered societal hierarchies, and vindicate the lived experiences of individual victims. 7 While the magnitude of the Paper’s impact remains to be seen and will certainly depend on the extent to which the OTP is able to implement these policies, the Paper’s development of a policy package that addresses the structural, societal, and experiential import of its prosecutions is significant, and likely impactful, in itself.

The ICC’s authority to prosecute sexual and gender-based crimes is born of its constituting instrument, the Rome Statute. 8 Unique among international instruments, the Rome Statute characterizes sexual and gender-based crimes both as war crimes and as crimes against humanity. 9 The Statute pioneers a provision that makes prosecution on the basis of gender an independent offense when it occurs in conjunction with another crime within the ICC’s jurisdiction. 10 It is also the first international instrument to designate explicitly particular sexual and gender-based crimes as potential underlying acts for other charges, like genocide. 11 The OTP has repeatedly affirmed its commitment to prosecution under all of these provisions. 12 Despite the Statute’s flexibility and the ICC’s commitment to prosecution, however, the OTP has yet to secure a conviction of a defendant charged with sexual or gender-based crimes. 13

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7 See, e.g., id. ¶¶ 10, 20, 22, 23, 47.
8 See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute gives the ICC the authority to prosecute these crimes as war crimes and crimes against humanity. See id. arts. 7(1)(g), 8(2)(b)(xiii), 8(2)(e)(vii). These crimes formerly had been prosecuted internationally only by ad hoc tribunals, if they were prosecuted at all. See, e.g., Kelly D. Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles, 21 BERKELEY J. INT’L L. 288, 288 (2003). Before the advent of these tribunals in the 1990s, there was little to no prosecution of these crimes. See Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law, 40 MCGILL L.J. 217, 220 (2000).
9 POLICY PAPER, supra note 3, ¶¶ 1, 25 & n.21. The OTP considers these criminal categories broadly. See id. ¶¶ 15–20.
10 See Rome Statute, supra note 8, art. 7 § 1(b) (providing for the prosecution of such crimes insofar as they constitute persecution on the basis of gender); see also Mark Ellis, Breaking the Silence: Rape as an International Crime, 38 CASE W. RES. J. INT’L L. 225, 241–42 (2006–2007).
11 POLICY PAPER, supra note 3, ¶ 25. Acts like rape, the Paper notes, may be “integral component[s],” id. ¶ 20, of a pattern of genocidal acts intended to “destroy a national, ethnic, racial, or religious group,” id. ¶ 31.
This failure, the OTP asserts in its recent Paper, is not the result of inattention. Indeed, the OTP begins its Paper by affirming again that it “pays particular attention” to sexual and gender-based crimes. The Paper asserts that the OTP actually views all crimes under the ICC’s jurisdiction as possibly gendered. The OTP’s goal is to deter these crimes by prosecuting them in every case where it is able to collect evidence sufficient to allow it to do so.

This goal shapes each stage of the OTP’s prosecution process. To demonstrate its influence, the Paper walks chronologically through the progression of a case, beginning with the decision to bring charges. When a sexual or gender-based crime is alleged, the Paper begins, the OTP considers the ICC’s jurisdiction, the case’s admissibility, and the interests of justice. If a preliminary examination indicates that a sufficiently grave matter falls within the ICC’s jurisdiction and cannot or will not be prosecuted in genuine national proceedings, it will be considered a potential case. The OTP will then concurrently investigate potential sexual and gender-based crimes and other potential crimes.

Because investigations into sexual and gender-based crimes face “specific challenges,” such as “under- or non-reporting . . . owing to societal, cultural, or religious factors; stigma for victims . . . ; [and] limited domestic investigations, and the associated lack of readily available evidence,” the OTP commits to “consider[ing] specific means to address [such] challenges.” The Paper indicates that the OTP will explore creative means of collecting forensic, documentary, and other evidence. Evidentiary concerns will also be addressed through the increased use of incremental prosecutions — which build up from ini-

14 See, e.g., Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, to Mark the International Day for the Elimination of Violence Against Women (Nov. 25, 2013) (“[My Office has set a clear strategic priority to find innovative methods to boost investigations and prosecutions of sexual and gender-based crimes.”); Statement, Prosecutor-elect Fatou Bensouda, supra note 13 (“I have always placed a big emphasis on addressing and prosecuting sexual and gender crimes.”).

15 POLICY PAPER, supra note 3, ¶ 14.

16 Id. ¶ 10.

17 Id. ¶ 23.


20 POLICY PAPER, supra note 3, ¶ 49.

21 Id. ¶ 50.

22 Id. ¶ 53.

23 Id. ¶¶ 51, 65.
tial investigations of lower-level perpetrators to those most culpable — and the cultivation of accurate, reliable witnesses. 24

Wherever it determines that “there is sufficient evidence to support . . . charges” for sexual and gender-based crimes, the OTP affirms that it will bring them. 25 It will prosecute sexual and gender-based crimes both “explicitly as crimes *per se*,” and “as forms of other violence within the [ICC’s] subject-matter jurisdiction, . . . e.g., charging rape as torture, persecution, and genocide.” 26 The OTP will explore charges premised on the “full range of modes of liability and mental elements” 27 permitted by the Rome Statute. 28 When it elects to bring charges, the OTP will endeavor to do so cumulatively, “to reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case.” 29

Noting that witness testimony is often needed to prove liability and mens rea, the Paper outlines next its policies for witness protection. The Paper reinforces the OTP’s commitment to its statutory duty to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” 30 The OTP indicates that it will “take[e] into account the particular vulnerability of [each] witness and any additional concerns . . . regarding security, personal, and/or family or social repercussions,” 31 and “take all possible steps to prevent . . . harassment, intimidation, or retraumatisation.” 32

The OTP recognizes though that justice for many individual victims will not be provided by the ICC, and thus closes its policy exposition with a discussion of strategies to enhance cooperation between the OTP,

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24 *Id.* ¶¶ 51–52, 65–70.
25 *Id.* ¶ 71.
26 *Id.* ¶ 72.
27 *Id.* ¶ 83.

28 The Rome Statute gives the OTP broad power to prove responsibility and mens rea. Article 25 allows individuals to be held responsible, individually or together with others, for their role in sexual or gender-based crimes. See *Rome Statute*, *supra* note 8, art. 25; *POLICY PAPER*, *supra* note 3, ¶ 77. Article 28 imposes additional liability on military or nonmilitary commanders. *Rome Statute*, *supra* note 8, art. 28; *POLICY PAPER*, *supra* note 3, ¶ 77. Article 30 establishes a mens rea requirement, compelling the prosecution to show that a person charged with a sexual or gender-based crime committed the crime “with intent and knowledge.” *Rome Statute*, *supra* note 8, art. 30. The Paper indicates that it will consider creative new means to prove a defendant’s knowledge or intent, “such as patterns of prior or subsequent conduct or specific notice [that] may be adduced to prove an awareness . . . that such crimes would occur.” *POLICY PAPER*, *supra* note 3, ¶ 81.
29 *POLICY PAPER*, *supra* note 3, ¶ 72.
30 *Rome Statute*, *supra* note 8, art. 68 § 1.
31 *POLICY PAPER*, *supra* note 3, ¶ 87.
32 *Id.* ¶ 90. Such steps may include supporting the provision of reparations, *id.* ¶ 102, authorized in Article 75 of the *Rome Statute*, *Rome Statute*, *supra* note 8, art. 75. The OTP specifically expresses a desire to “promote reparations that are transformative and contribute to advancing gender equality.” *POLICY PAPER*, *supra* note 3, ¶ 102.
States, and other stakeholders. Here, the Paper highlights the OTP’s support for the domestic development of legislation consistent with the Rome Statute, victim-protective procedures, and improved investigative practices, all of which aim “to end impunity and to prevent the recurrence of [sexual and gender-based] crimes.” Ideally, the Paper posits, the ICC’s actions should complement those undertaken domestically.

The OTP’s Paper lays out broad but nuanced policies that operationalize its commitment to the prosecution of sexual and gender-based crimes. Critics of the OTP have attacked its past prosecutorial approach on all fronts — as excessively and unsuccessfully instrumental, and as insufficiently victim-centric. The OTP, in its Paper, appears to respond to each of these critiques, making a broad commitment to a gender-conscious analysis of crime and outlining policies that at once endeavor to maximize deterrence, challenge and change patriarchal societal norms, and provide individual victims with safety and support.

An instrumental approach has long dominated the international treatment of sexual and gender-based crimes. The ICC’s first Prosecutor, Luis Moreno-Ocampo, adopted this model, apparently preferring streamlined indictments and expeditious prosecutions to indictments that more comprehensively reflected the full range of crimes committed.
Most infamously, in *Prosecutor v. Lubanga*, Prosecutor Moreno-Ocampo chose not to bring charges for gender-based crimes though many believed there was sufficient evidence to support his doing so. This approach, critics claimed, precluded possible prosecutions of sexual and gender-based crimes and afforded only selective justice.

The Paper addresses this critique with its commitment to more comprehensive prosecutions. In the Paper, the OTP commits to charging sexual and gender-based crimes more broadly, utilizing all possible categories of crime and modes of liability. It indicates that it will consider a larger body of evidence to satisfy the Rome Statute’s mens rea requirements. Further, the OTP notes that it will, as needed, utilize incremental prosecutions. These steps mark an important shift in the OTP’s policies and should allow the OTP to better account for the full range of sexual and gender-based crimes committed.

A policy of broadened charging, however, is in tension with a second critique — that charging sexual and gender-based crimes more broadly, as subsets of other crimes, will undermine societal understandings of their independent gravity and nature. Critics raising this point took issue with the OTP’s focus on streamlined prosecutions not simply because the OTP neglected to prosecute difficult sexual and gender-based crimes, but because it did so to no end. Deterrence and retribution, they argued, cannot be achieved in the absence of systemic change that addresses not only the crimes committed, but also the patriarchal societal norms that underlie and perpetuate them. Ideally, the OTP’s prosecutions should “function not only to prevent atrocities in identified

40 See Pritchett, supra note 36, at 288 (discussing critiques levied by human rights advocates in a Joint Letter to the Chief Prosecutor of the ICC (Aug. 1, 2006), http://www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern [http://perma.cc/P99E-XB6S]); see also id. at 292 (“In the case of Lubanga, a streamlined indictment means that rather than exercising prosecutorial patience and trying all charges for which evidence exists, including crimes of gender-based violence, the Prosecutor instead has pressed ahead with the limited charges relating to child soldiers in order to expedite the case.”).
41 See id. at 292 (“A Prosecutorial strategy of efficiency and streamlined indictments has proven that when timelines are pressing, budgets are stretched, and security situations are challenging, charges of gendered violence are abandoned for ‘easier’ or ‘more obvious’ crimes.”).
42 POLICY PAPER, supra note 3, ¶¶ 79–83.
43 Id. ¶ 52 (noting that the OTP will “follow a strategy of gradually building cases up from mid- and high-level perpetrators, and even up from low-level notorious perpetrators, to the most responsible.”).
44 See Ellis, supra note 10, at 247 (“Prosecuting rape as a subset of another crime may, in fact, seem to make the crime of rape less distinctive.”).
45 See Dixon, supra note 36, at 703–04 (“Recognizing a crime against women as a crime against an entire community rests . . . on an understanding of the [crime’s] meaning . . . in the context of patriarchal family and society. Rape is effective as genocide in a patriarchal society because it renders female victims socially infertile . . . .”); see also Pritchett, supra note 36, at 270 (“[F]ar from being a gender-neutral, normative moral order, international law and prosecution are products of a particular socio-historical context of elite men and Western-state supremacy.”).
conflict situations, but also to sharpen the popular understanding of the atrociousness of sexual and gender violence and persecution and the relation between torture in intimate relationships and atrocities in the context of war."46 Therefore, though there are clear advantages to charging sexual crimes as they comprise a larger genocidal campaign, for example,47 doing so is problematic insofar as it reinforces, rather than challenges and changes, patriarchal societal norms.

Thus, the OTP must consider its cases as they function not only to provide justice through successful prosecutions, but also to effect foundational social change.48 The OTP’s prosecutions should aim to “end impunity for gender-based crimes, heighten[] the profile of gender-motivated violence in the international community, [and] challenge[] gender relations and hierarchies that perpetuate discriminatory practices . . . .”49 Charging sexual and gender-based crimes primarily “as forms of other violence” over which the ICC has jurisdiction, like torture,50 could inhibit the achievement of these goals by signaling that the crimes are not important in and of themselves. Broadened charging of underlying crimes must then supplement, not supplant, the charging of sexual and gender-based crimes per se, both internationally and domestically. The OTP’s affirmation of continued per se prosecution51 and domestic collaboration52 is thus as important as its novel commitment to broad charging.

Yet, in all of this, additional critics posit, the OTP cannot lose sight of the lived experience of the actual victims of sexual and gender-based crimes. Where charging is motivated by a desire to “obtain[] convictions against the most legally and morally culpable, for the worst possible crimes, in the shortest possible time, with the fewest possible witnesses,” too little room is left “for stopping to listen and acknowledge what [a sexual crime] has meant for a particular victim.”53 An instrumental focus puts at risk the provision of justice to individual victims of sexual and gender-based crimes and undermines the potentially restorative value of prosecution.54 Critics in this camp thus call for a recentering of international law in “women’s experience and pain.”55

46 Copelon, supra note 8, at 240.
47 See Ellis, supra note 10, at 247 (“[I]ncluding [rape] as a subset of crimes against humanity, genocide, or war crimes draws attention to the heinous nature of the crime.”).
48 See, e.g., Pritchett, supra note 36, at 297.
49 Id.
50 See Policy Paper, supra note 3, ¶ 72.
51 See id.
52 See id. ¶ 3, 109.
53 Dixon, supra note 36, at 703.
55 Dixon, supra note 36, at 703.
To address this issue, the Paper advocates an approach centered on individual victims. Partly, this end is served by broadened prosecutions, which vindicate the lived experiences of a broader collection of victims. However, a more victim-centric model must also be sensitive to the needs of victims prior to convictions. Thus, the Paper details plans for the provision of victim support services. The Paper recognizes, for example, the possibilities of “re-traumatisation” and indicates that the OTP will take steps to avoid such a bad effect. The Paper repeatedly indicates that the OTP will always take individual “personal circumstances” into account when it acts.

Admittedly, there is no guarantee that, even if it fully commits to the policies it outlines in its Paper, the OTP will be able to execute them in practice. The OTP has long insisted that it is committed to ending impunity for sexual and gender-based crimes, but its failure to secure the convictions of defendants charged with such crimes has persisted. Indisputably, the magnitude of the Paper’s impact will depend on the OTP’s implementation of the policies that it outlines.

That the OTP’s Paper will have an impact, however, seems less arguable. In its operationalization of a gender-conscious approach to prosecution, the Paper marks an important moment in the history of the international prosecution of sexual and gender-based crimes. The mere publication of this new path forward is significant. This significance will only be heightened if the policies that the Paper articulates are properly executed. These policies could increase the number of cases brought before the ICC and in strengthened domestic courts; empower the OTP to secure the convictions of perpetrators charged with sexual or gender-based crimes; provide justice to more victims through retribution, reparation, and recognition; and, in time, change societal norms regarding these crimes in communities across the world.

56 POLICY PAPER, supra note 3, ¶ 37.
57 See, e.g., id. ¶ 22 (generally); id. ¶ 62 (initial screenings); id. ¶ 87 (disclosures); id. ¶ 97 (expert consultations); id. ¶ 99 (sentencing).
58 Indeed, there are those who believe that the OTP will never be able to do so. See, e.g., Dixon, supra note 36, at 705 (“[T]he potential to recognize the specific and gendered harms suffered by the victims of war crimes and crimes against humanity is inherently limited within the international criminal process.”). To the extent that this criticism is valid, however, it seems mitigated by the OTP’s support of domestic prosecutions and supplements to its own prosecutions.
59 The OTP is not without opportunities to put its new policies into practice. For example, the ICC recently affirmed charges against Bosco Ntaganda, a defendant involved in the same situation as Germain Katanga. Case Information Sheet, ICC (July 3, 2014), http://www.icc-cpi.int/iccdocs/PIDS/publications/NtagandaEng.pdf [http://perma.cc/N7KV-ZgDS].