



**Cour
Pénale
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**International
Criminal
Court**

Le Bureau du Procureur

The Office of the Prosecutor

Policy Paper on Sexual and Gender-Based Crimes

June 2014



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Use of Key Terms

The following reflects the understanding of the Office of the Prosecutor (“Office”) of the International Criminal Court (“ICC”, or “Court”) of certain key terms used in this policy paper.

Gender: “Gender”, in accordance with article 7(3) of the Rome Statute (“Statute”) of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.

Sex: “Sex” refers to the biological and physiological characteristics that define men and women.¹

Gender-based crimes: “Gender-based crimes” are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.

Sexual crimes: “Sexual crimes” that fall under the subject-matter jurisdiction of the ICC are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and described in the Elements of Crimes (“Elements”). In relation to “rape”, “enforced prostitution”, and “sexual violence”, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused 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. An act of a sexual nature is not limited to physical violence, and may not involve any physical contact – for example, forced nudity. Sexual crimes, therefore, cover both physical and non-physical acts with a sexual element.

Gender perspective: “Gender perspective” requires an understanding of differences in status, power, roles, and needs between males and females, and the impact of gender on people’s opportunities and interactions. This will enable the Office to gain a better understanding of the crimes, as well as the experiences of individuals and communities in a particular society.

¹ World Health Organization (WHO), [“What do we mean by ‘sex’ and ‘gender’?”](#).

Gender analysis: “Gender analysis” examines the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, this involves a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.

Policy Paper on Sexual and Gender-Based Crimes

Executive Summary

1. Over the past few decades, the international community has taken progressive steps to put an end to impunity for sexual and gender-based crimes. The Statute of the ICC is the first international instrument expressly to include various forms of sexual and gender-based crimes — including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence — as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts. The Statute also criminalises persecution based on gender as a crime against humanity. Sexual and gender-based crimes may also fall under the Court’s jurisdiction if they constitute acts of genocide or other acts of crimes against humanity or war crimes. The Rules of Procedure and Evidence (“Rules”) and the Elements consolidate important procedural and evidentiary advancements to protect the interests of victims and enhance the effectiveness of the work of the Court.
2. Recognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes, the Office elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015. The Office has committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities. It will increasingly seek opportunities for effective and appropriate consultation with victims’ groups and their representatives to take into account the interests of victims.
3. The Office recognises that sexual and gender-based crimes are amongst the gravest under the Statute. Consistent with its positive complementarity policy, and with a view to closing the impunity gap, the Office seeks to combine its efforts to prosecute those most responsible with national proceedings for other perpetrators.
4. The Office pays particular attention to the commission of sexual and gender-based crimes at all stages of its work: preliminary examination, investigation, and prosecution. Within the scope of its mandate, the Office will apply a gender analysis to all crimes within its jurisdiction, examining how those crimes are related to inequalities between women and men, and girls and boys, and the power relationships and other dynamics which shape gender roles in a specific context. In addition to general challenges to investigations conducted by the Office, such as security issues related to investigations in situations of ongoing conflict, and a lack of cooperation, the investigation of sexual and gender-based crimes presents its own specific challenges. These include the under- or non-reporting owing to societal, cultural, or religious factors; stigma for victims; limited domestic investigations, and the associated lack of readily available

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- evidence; lack of forensic or other documentary evidence, owing, *inter alia*, to the passage of time; and inadequate or limited support services at national level. The Office will pay particular attention to these crimes from the earliest stages in order to address such challenges. The establishment of contacts and networks within the community will be prioritised to the extent possible to support the operational activities of the Office, particularly with regard to augmenting its access to information and evidence.
5. Article 68(1) of the Statute obliges the Office to take various measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, particularly during its investigation and prosecution activities with regard to sexual and gender-based crimes and crimes against children. The Office will strive to ensure that its activities do not cause further harm to victims and witnesses.
 6. Experience has highlighted the importance of managing the expectations of victims and witnesses. The Office has an established practice with regard to keeping witnesses informed of, *inter alia*, the mandate of the Office, the procedures and options for protection, participation in proceedings, the possibility of being called to testify, the scope and impact of possible disclosure, developments in the case, and reparations, and seeks witnesses' views, as appropriate.
 7. The Office will ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges. It will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging such acts as forms of other violence within the competence of the Court where the material elements are met, e.g., charging rape as torture. The Office will seek to bring cumulative charges in order to reflect the severity and multifaceted character of these crimes fairly, and to enunciate their range, supported by the evidence in each case.
 8. In appropriate cases, the Office will charge acts of sexual and gender-based crimes as different categories of crimes within the Court's jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context. The Office will also seek to highlight the gender-related aspects of other crimes within its jurisdiction — for example, in the recruitment of child soldiers and enslavement, and, in the case of the latter, their manifestation as trafficking in persons, in particular women and children.
 9. Sexual and gender-based crimes may be committed, *inter alia*, as a result of implicit or explicit orders or instructions to commit such crimes; as a consequence which the individual is aware will occur in the ordinary course of events — during military operations directed against civilian populations, for instance; or because of an omission (e.g., a failure to order subordinates to protect civilians, or failure to punish similar crimes). The Office will consider the full range of modes of liability

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- and the mental element under articles 25, 28, and 30 of the Statute that may be applicable to each case, and will make a decision based on the evidence. The Office will charge different modes of liability in the alternative, where appropriate.
10. The Office will propose sentences which give due consideration to the sexual and gender dimensions of the crimes charged, including the impact on victims, families, and communities, as an aggravating factor and reflective of the gravity of the crimes committed.
 11. The Office supports a gender-inclusive approach to reparations, taking into account the gender-specific impact on, harm caused to, and suffering of the victims affected by the crimes for which an individual has been convicted.
 12. Effective cooperation is crucial to the Office and the Court in carrying out their mandate. The Office actively engages with States and other relevant stakeholders in order to improve the effectiveness of its actions, including with regard to sexual and gender-based crimes. It also includes a gender perspective in its public information activities which seek to maximise awareness and the impact of its work.
 13. The ICC is complementary to national efforts. Given jurisdictional and admissibility considerations, and its policy to prosecute those most responsible, the Office will be able to prosecute a limited number of persons. In an effort to close the impunity gap, it is therefore crucial that States comply with their primary responsibility to investigate and prosecute serious international crimes effectively, including sexual and gender-based crimes. The Office will support genuine national efforts, where possible.
 14. The Office also recognises the crucial role that civil society plays in preventing and addressing sexual and gender-based crimes. The Office will seek to support and strengthen cooperation with these organisations, particularly those which have experience in documenting sexual and gender-based crimes and working with victims of these crimes. The Office will enhance its institutional capacity to investigate and prosecute sexual and gender-based crimes with the assistance of its Gender and Children Unit (“GCU”) and the Special Gender Adviser to the Prosecutor. The Office recognises the need to strengthen its in-house expertise on sexual and gender-based crimes relating to women and girls, and men and boys, both in conflict and non-conflict situations. It will continue to recruit persons with the required expertise and experience in this field.
 15. Staff training on an ongoing basis is an essential component towards ensuring the effective investigation and prosecution of sexual and gender-based crimes. The Office will endeavour to ensure that team members and all other relevant staff members, including interpreters, have the necessary competencies to perform their functions effectively in relation to sexual and gender-based crimes.

16. The Office will constantly monitor its practices with regard to the investigation and prosecution of sexual and gender-based crimes. It will utilise its standardised and institutionalised lessons-learned process to identify, document, and implement best practice with regard to sexual and gender-based crimes. This will promote learning and the preservation of institutional knowledge gained from experience. This policy, together with the Operations Manual and other internal rules and procedures, will be regularly reviewed in order to incorporate best practice and other relevant developments, including jurisprudence.

17. The Office will monitor the implementation of this policy.

I. Introduction

1. Over the past few decades, the international community has taken many concrete steps in response to increasing calls to recognise sexual and gender-based crimes as serious crimes nationally and internationally. The statutes of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) both included rape as a crime against humanity.² At the Rome Conference, States agreed upon explicit provisions in the Statute of the ICC, recognising various forms of sexual and gender-based crimes³ as amongst the most serious crimes of concern to the international community. The Statute is the first instrument in international law to include an expansive list of sexual and gender-based crimes as war crimes relating to both international and non-international armed conflict. It also expands the list of sexual and gender-based crimes as crimes against humanity to include not only rape, but other forms of sexual violence, as well as persecution on the basis of gender.⁴ Sexual and gender-based crimes committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group may also constitute acts of genocide.
2. The Statute and the Rules contain various provisions designed to ensure the effective investigation and prosecution of sexual and gender-based crimes, and to protect the interests of victims and witnesses of these crimes. These are enhanced by provisions relating to the structure of the Court’s Organs, and the availability of relevant expertise.⁵ The Elements also consolidate important advancements with respect to the definition of these crimes.⁶

² The Charters of the post-World-War-II International Military Tribunals at Nuremberg and Tokyo contained no explicit provisions recognising sexual and gender-based crimes as war crimes or crimes against humanity, although Control Council Law No. 10 recognised rape as a crime against humanity. The ICTR Statute not only prohibited rape as a crime against humanity, but also, in article 4 applicable to non-international armed conflicts, included rape and enforced prostitution as forms of outrages upon personal dignity. The ICTY Statute contains no explicit reference to sexual violence as war crimes, and acts of rape and other acts of sexual violence as a war crime have been mostly prosecuted as a form of outrage upon personal dignity. See, for example, *Prosecutor v. Anto Furundžija*, Trial Judgement, [Case No. IT-95-17/1-T](#), 10 December 1998.

³ As discussed below, sexual crimes that fall under the subject-matter jurisdiction of the Court are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi), and elaborated upon in the Elements in relation to “sexual violence”. The Office considers “gender-based crimes” as those committed against a person, whether male or female, because of their sex and/or socially constructed gender roles.

⁴ See Section III(a)(ii) below.

⁵ See, for example, articles 21(3), 42(9), 54(1)(b), and 68(1) of the Statute.

⁶ See, for example, the elements of the war crime of rape under articles 8(2)(b)(xxii) and 8(2)(e)(vi), which are drafted in a gender-neutral way, and which reflect the understanding that the invasion of the body might be committed not only by force, but also by threat of force or

3. Notwithstanding the progress in the integration of sexual and gender-based crimes into international criminal law, justice still eludes many victims. There are many challenges and obstacles in the way of the effective investigation and prosecution of such crimes.⁷
4. Recognising these challenges, and mindful of the purposes of the Statute and the mandate of the Office, as set out in the Statute, the Prosecutor has, on various occasions since her election in December 2011, expressed her commitment to paying particular attention to the investigation and prosecution of sexual and gender-based crimes, and to enhancing access to justice for victims of these crimes through the ICC.⁸
5. In line with its stated commitment, the Office has elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015.⁹ The Office has committed to integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities. This policy paper aligns with, and will contribute to, the achievement of the strategic goals contained in the Strategic Plan.
6. The objectives of the policy are to
 - Affirm the commitment of the Office to paying particular attention to sexual and gender-based crimes in line with Statutory provisions;
 - Guide the implementation and utilisation of the provisions of the Statute and the Rules so as to ensure the effective investigation and prosecution of sexual and gender-based crimes from preliminary examination through to appeal;
 - Provide clarity and direction on issues pertaining to sexual and gender-based crimes in all aspects of operations;
 - Contribute to advancing a culture of best practice in relation to the investigation and prosecution of sexual and gender-based crimes; and

coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power.

⁷ See para. 50.

⁸ See, for example, Statement of the Prosecutor-elect of the International Criminal Court, Mrs. Fatou Bensouda, “[Gender Justice and the ICC: Progress and Reflections](#)”, 14 February 2012.

⁹ Strategic goal 3 is to “enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender-based crimes and crimes against children”. [Strategic Plan, June 2012-2015](#) (ICC-OTP 2013), p. 27.

- Contribute, through its implementation, to the ongoing development of international jurisprudence regarding sexual and gender-based crimes.
7. Bearing in mind the importance that the drafters of the Statute attached to the relevance of gender in the commission of crimes under the Statute, this policy will guide the Office in its work relating to sexual and gender-based crimes. Given jurisdictional and admissibility considerations, and its policy to prosecute those most responsible,¹⁰ the Office will be able to prosecute a limited number of those responsible. In an effort to close the impunity gap, it is therefore crucial that States comply with their primary responsibility to investigate and prosecute serious international crimes effectively, including sexual and gender-based crimes. The Office will support genuine national efforts, where possible.
 8. Whilst sexual and gender-based crimes in the context of armed conflict or mass violence fall within the jurisdiction of the Court, they are not unique to these contexts. The work of the Court may guide national jurisdictions and other actors to address such crimes in any context, whenever they occur, including by conducting effective investigations and prosecutions.
 9. Accountability for, and the prevention of, sexual and gender-based crimes require unified action, commitment, and dedicated efforts by all relevant actors. In issuing this Policy, the Prosecutor further demonstrates her commitment to this endeavour.
 10. This paper sets out the Office's policy in relation to sexual and gender-based crimes. It is based on the Statute, the Rules, the Regulations of the Court, the Regulations of the Office, the Office's Prosecutorial Strategies, and other related policy documents. It draws on the experiences and lessons learned during the first decade of the work of the Office, and relevant jurisprudence from the ICC and the international *ad hoc* tribunals.¹¹
 11. This policy document focuses on strategic approaches of the Office, and does not detail guidelines and standards for operations, which are regulated by the Operations Manual, a confidential internal manual. This policy document does not itself give rise to legal rights, and is subject to revision.
 12. Policy papers of the Office are made public in the interest of promoting transparency and clarity, as well as predictability in the application of the legal

¹⁰ See para. 23.

¹¹ The Office also took into account the best-practices manual of the *ad hoc* tribunals. See, for example, [ICTY Manual on Developed Practices](#), 2009; and [Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda](#), 2014. See also *Prosecuting Mass Atrocities – Lessons from the International Tribunals: A Compendium of Lessons Learned and Suggested Practices from the Offices of the Prosecutors* (2013), suggested practices 11-12, 118-124, 196, 212, 264-267. The Compendium is accessible to members of the International Association of Prosecutors only.

framework. It is hoped that such clarity may facilitate the harmonisation of the efforts of other actors (States, including national judicial authorities, international institutions, conflict managers and mediators, non-governmental organisations, and advocacy groups) with the legal framework. It would also assist in promoting cooperation, increasing accountability for sexual and gender-based crimes, and enhancing the preventive impact of the Statute through the work of the Court in relation to these crimes.

13. The Office adopted an inclusive approach in developing this policy, consulting with staff at headquarters, and with field staff via video conference, and working closely with the Special Gender Adviser. The Office also sought the input of, and considered that received from, external experts, representatives of States, international organisations, and civil society.

II. General Policy

14. The Office pays particular attention to the commission of sexual and gender-based crimes. It will seek to enhance the integration of a gender perspective and analysis at all stages of its work.
15. Article 7(3) of the Statute defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.¹² The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3).
16. The Office considers gender-based crimes as those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. These crimes may include non-sexual attacks on women and girls, and men and boys, because of their gender, such as persecution on the grounds of gender.¹³
17. Sexual crimes falling under the subject-matter jurisdiction of the Court are listed under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) of the Statute, and are described

¹² See, *inter alia*, M. Boot, revised by C.K. Hall, “Article 7 Paragraph 3: Definition of Gender”, and M. McAuliffe deGuzman, “Article 21 Paragraph 3”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Court: Observer’s Notes, Article by Article*, 2nd ed., C.H.Beck/Hart/Nomos, 2008, §§ 135, 136, and 24, respectively; V. Oosterveld, “The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?”, *Harvard Human Rights Journal*, vol. 18, pp. 55-84.

¹³ Article 7(1)(h) of the Statute.

in the Elements. In relation to “rape”, “enforced prostitution”, and “sexual violence”, the Elements require the perpetrator to have committed an act of a sexual nature against a person, or to have caused 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.¹⁴ An act of a sexual nature is not limited to physical violence, and may even not involve any physical contact — forced nudity is an example of the latter.¹⁵ Sexual crimes, therefore, cover both physical and non-physical acts directed at a person’s sexual characteristics.

18. Other crimes such as torture, mutilation, persecution, inhuman acts, and outrages upon personal dignity,¹⁶ may also have a sexual and/or gender element.
19. Both sexual and gender-based crimes may be motivated by underlying inequalities, as well as a multiplicity of other factors, *inter alia*, religious, political, ethnic, national, and economic reasons.
20. Within the scope of its mandate, and in a manner consistent with article 54(1)(a) of the Statute, the Office will apply a gender analysis to all of the crimes within its jurisdiction. This involves an examination of the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes. In the context of the work of the Office, it requires a consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.¹⁷ The approach by the Office will also encompass an understanding of

¹⁴ The Elements of Crimes of “sexual violence” under articles 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) also include that, “[s]uch conduct was of a gravity comparable to the other offences”. The Office will continue to present acts of genital mutilation or deliberate injuries to the genitalia as sexual crimes. In *Kenyatta et al.*, the Prosecution argued that acts of forcible circumcision against, and penile amputation of, Luo men constituted “other forms of sexual violence” pursuant to article 7(1)(g). Pre-Trial Chamber II found that the evidence before it did not establish the sexual nature of these acts; accordingly, it considered this conduct as forming part of the allegations of other inhumane acts (causing severe physical injuries). *Prosecutor v. Kenyatta et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-02/11-382-Red](#), 23 January 2012, paras. 264-266.

¹⁵ See, for example, M. Boot, revised by C. K. Hall, “Article 7, Paragraph 3: Definition of Gender”, and M. McAuliffe deGuzman, “Article 21 Paragraph 3”, in O. Triffterer (ed., *Commentary on the Rome Statute of the International Court: Observer’s Notes, Article by Article*, 2nd ed., C. H. Beck/Hart/Nomos, 2008, §53.

¹⁶ See articles 7(1)(f), 7(1)(h), 7(1)(k) 8(2)(a)(ii), 8(2)(b)(x), 8(2)(b)(xxi), 8(2)(c)(i), and 8(2)(c)(ii) of the Statute.

¹⁷ Gender analysis looks at the roles of females and males; the different patterns of involvement, behaviour, and activities that they have in economic, social, and legal systems; the constraints they face relative to one another; and available opportunities. The significance of this is that the lives and experiences of females and males, including their experience of the

the use of certain types of crimes, including acts of sexual violence, to diminish gender, ethnic, racial, and other identities.

21. The Office will strengthen the concrete steps it has taken to enhance the integration of a gender perspective and expertise into all aspects of its operations: during preliminary examinations; in the development of case hypotheses and investigation and prosecution strategies; in the analysis of crime patterns; in the screening, selection, interview, and testimony of witnesses; at the sentencing and reparation stages; and in its submissions on appeal and witness protection, including after the conclusion of proceedings. The Office will also increase its efforts to ensure that staff have the skills, knowledge, and sensitivity necessary to fulfil their functions and the mandate of the Office in relation to sexual and gender-based crimes. In particular, the Office will ensure that staff possess the required operational skills in applying a gender analysis to the work of the Office, sound knowledge of the statutory provisions regarding sexual and gender-based crimes, and well-developed skills regarding the possible effects of trauma in relation to these crimes.¹⁸

22. The Office will take a victim-responsive approach in its activities. Article 54(1)(b) of the Statute requires that the Prosecutor take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses. The Office will increasingly seek opportunities for effective and appropriate engagement and consultation with victim groups and representatives in order to take into account the interests of victims at various stages of its work.¹⁹ The Office understands that not all victims have the same interests or concerns, and will be careful to manage expectations.

23. The Office will generally investigate and prosecute those most responsible for the most serious crimes, based on the evidence collected during an investigation.²⁰ In certain circumstances, the Office will also prosecute middle- or even low-ranking officers or individuals, the extent of whose participation and responsibility for particularly serious or notorious crimes, including sexual and gender-based crimes, justifies prosecution, in order to give full effect to the object and purpose of the Statute and maximise the deterrent impact of the Court's work.

legal system, occur within complex sets of differing social and cultural expectations. See, for example, UN Women, [Gender on the Move: Working on the Migration-Development Nexus from a Gender Perspective](#), 2013; and United Nations Office on Drugs and Crime, [Gender mainstreaming in the work of UNODC](#), June 2013.

¹⁸ See Section VIII on Institutional Development.

¹⁹ See, for example, the policy paper on victims' participation, in which the Office stated that it "welcomes direct interaction with victims and victims' associations starting at the earliest stages of its work in order to take their interests into account when it defines the focus of its investigative activity". [Policy Paper on Victims' Participation](#) (OTP 2010), p. 7.

²⁰ This is applied as a general rule subject to the facts and circumstances of each case. See [Paper on some policy issues before the Office of the Prosecutor](#) (ICC-OTP 2003); [Report on Prosecutorial Strategy](#) (ICC-OTP 2006); [Prosecutorial Strategy 2009-2012](#) (ICC-OTP 2010).

24. In the context of its core activities, the Office will also continue its efforts to encourage — where possible under its mandate — complementary efforts by States and other stakeholders to stop, prevent, and punish sexual and gender-based crimes. Steps that the Office may take include promoting ratification of the Statute, encouraging domestic implementation, participating in awareness-raising activities on the Court's jurisdiction, exchanging lessons learned and best practice to support domestic investigative and prosecutorial strategies, and assisting relevant stakeholders to identify pending impunity gaps.

III. The Regulatory Framework

(a) *The Statute*

25. The Statute is the first international criminal law instrument that explicitly recognises rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence as distinct types of war crimes.²¹ It also expands the list of sexual and gender-based crimes constituting crimes against humanity to include not only rape, but also other forms of sexual violence, as well as persecution on the basis of gender. It is the first international instrument expressly to include various forms of sexual and gender-based crimes as underlying acts of crimes against humanity or war crimes committed during international and non-international armed conflicts. In addition, the Statute authorises the Court to exercise jurisdiction over sexual and gender-based crimes if they constitute acts of genocide or other underlying acts of crimes against humanity or war crimes.²² In the case of genocide, these crimes could be an integral part of the pattern of destruction inflicted upon targeted groups. The Office will take steps to ensure a consistent approach in giving full effect to these provisions enunciated within the Statute, the Elements, and the Rules.
26. The inclusion of article 21(3) in the Statute is particularly important, as it mandates that the application and interpretation of the Statute be consistent with internationally recognised human rights, and without any adverse distinction founded, *inter alia*, on gender or "other status". The Office will take into account the evolution of internationally recognised human rights.²³

²¹ As mentioned in the introduction, the statutes of the ICTY and ICTR include only rape as a crime against humanity. The ICTR Statute includes rape and enforced prostitution as a form of the war crime of outrages upon person dignity. While the ICTY Statute includes no explicit reference to sexual violence as a war crime, acts of rape and other acts of sexual violence have been mostly prosecuted as a form of the war crime of outrages upon personal dignity.

²² For example, rape as a form of torture.

²³ See the Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No. 30, noting that, "International criminal law, including, in particular, the definitions of gender-based violence, in particular sexual violence must also be interpreted consistently with the Convention and other internationally recognized human rights instruments without adverse distinction as to gender." CEDAW, General

27. Pursuant to article 21(3), the Office will

- Ensure that it applies and interprets the Statute in line with internationally recognised human rights, including those relating to women’s human rights and gender equality;²⁴
- Consider not only acts of violence and discrimination based on sex, but also those related to socially constructed gender roles;
- Understand the intersection of factors such as gender, age, race, disability, religion or belief, political or other opinion, national, ethnic, or social origin, birth, sex, sexual orientation, and other status or identities which may give rise to multiple forms of discrimination and social inequalities;²⁵
- Avoid any gender discrimination in all aspects of its work, including its investigative and prosecutorial activities; address any adverse distinction on the basis of gender, should such distinctions arise as a result of the work of other parties or other organs of the Court; and
- Positively advocate for the inclusion of sexual and gender-based crimes and a gender perspective in litigation before the Chambers.

recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, [CEDAW/C/GC/30](#), 18 October 2013, para. 23. See also, for example, the efforts of the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) to put an end to violence and discrimination on the basis of sexual orientation or gender identity: The Free & Equal Initiative of the OHCHR at <https://www.unfe.org/> and statement of 26 September 2013 by the High Commissioner for Human Rights, Navanethem Pillay, and several world leaders to end violence and discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons at <https://www.unfe.org/en/actions/ministerial-meeting>.

²⁴Reference can be made to relevant human rights instruments such as [the 1979 Convention on the Elimination of All Forms of Discrimination against Women](#), the [1993 Vienna Declaration and Programme of Action](#), and the [1995 Beijing Declaration and Platform for Action](#) when interpreting the provisions of the Statute.

²⁵ It is important to view different types of discrimination as a totality, and not in isolation, as they can overlap with one another. See, for example, the Committee on the Elimination of Discrimination against Women (CEDAW) General recommendation No. 28, which notes that, “The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.” [CEDAW, General recommendation No. 28](#) on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 18. See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), para. 191, “Under Article 21(3) of the Statute, reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status.”

28. Article 54(1)(b) of the Statute imposes on the Prosecutor the duty to take appropriate measures to investigate and prosecute crimes within the Court's jurisdiction effectively, respecting "the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health", and taking into account "the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children".²⁶ In this regard, the Office will take steps to ensure the effective investigation and prosecution of these crimes by also being sensitive to the interests and circumstances of victims and witnesses, and by taking a mainstream approach to dealing with sexual and gender-based crimes. This includes

- The integration of these issues in all relevant policy documents, including the Strategic Plan and the Operations Manual of the Office;²⁷
- The provision of training for team members and all other relevant staff members to ensure the effective investigation and prosecution of sexual and gender-based crimes, including in the collection and analysis of evidence, the relevant legal framework, cultural issues, and other considerations related to a situation;
- Timely involvement of the Executive Committee regarding the approaches taken to sexual and gender-based violence within the investigation process, and the prosecutorial strategies developed by the teams in relation to these crimes; and
- Exploring avenues and networks in order to better understand the interests and concerns of victims.

29. The following crimes fall under the subject-matter jurisdiction of the Court.²⁸ The Office will apply a gender analysis to the contextual elements of the crimes, as well as the elements of the underlying acts. As set out below, sexual and gender-based crimes could be prosecuted under several provisions of the Statute.

²⁶ The Office will develop a policy paper specifically addressing children's issues.

²⁷ The Operations Manual is a confidential internal practice manual which addresses all aspects of OTP operations. It is regularly updated to ensure continuous improvement, incorporating lessons learned, new strategies, and opportunities to strengthen the practices of the Office.

²⁸ In addition to the crimes mentioned below, the Court may exercise jurisdiction over the crime of aggression one year after the 30th ratification of the relevant amendment to the Rome Statute adopted at the Kampala Review Conference (2010), and a further vote of the Assembly of States Parties, and no earlier than 2017: see [RC/Res.6](#) (28 June 2010); and articles 15 *bis* and 15 *ter* of the Statute.

(i) Article 6 – Genocide

30. In relation to article 6 of the Statute, all the underlying acts, such as killings, causing serious bodily or mental harm, and imposing measures intended to prevent births within the group, may have a sexual and/or gender element. If committed with intent to destroy a national, ethnic, racial, or religious group, in whole or in part, such acts may amount to genocide.²⁹
31. In view of the serious bodily or mental harm (and potential social stigma) associated with rape and other forms of sexual violence amongst targeted groups, such acts can cause significant and irreversible harm to individual victims and to their communities. The Office position is that acts of rape and other forms of sexual violence may, depending on the evidence, be an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide.

(ii) Article 7 – Crimes against humanity

32. Articles 7(1)(g) and (h) of the Statute set out explicit sexual and gender-based crimes which may constitute crimes against humanity, including rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, other forms of sexual violence of comparable gravity, and persecution on the grounds of gender.³⁰ Under article 7, sexual and gender-based crimes may be charged as crimes against humanity when they are committed “as part of a widespread or systematic attack directed against civilian populations” and “pursuant to or in furtherance of a State or organizational policy to commit such attack”.³¹ It is not required that each act, such as rape, be widespread or systematic, provided that

²⁹In the *Akayesu* judgment, delivered on 2 September 1998 by the Trial Chamber of the ICTR, the Chamber emphasised that rape and sexual violence constituted genocide in the same way as any other act, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber I Judgement, [ICTR 96-4-T](#), 2 September 1998, para. 731.

³⁰ Article 7(2) of the Statute provides definitions for some of these acts. They are further elaborated in the Elements. In its [Resolutions 1820 \(2008\)](#) and [1888 \(2009\)](#), the Security Council reaffirmed that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, could significantly exacerbate situations of armed conflict, and might impede the restoration of international peace and security.

³¹ According to the Elements of Crimes, the “policy to commit such attack” requires that the state or organisation “actively promote or encourage such an attack against a civilian population”. Pre-Trial Chamber II has confirmed that non-State actors may qualify as an “organisation” for the purpose of article 7(2)(a). See, for example, *Situation in Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19](#), 31 March 2010, para. 92; *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, [ICC-01/09-01/11-373](#), 23 January 2012, paras. 184-185.

the act forms part of a widespread or systematic attack against a civilian population.³²

33. Article 7(1)(h) of the Statute criminalises “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.”³³ The crime against humanity of persecution is an important recognition within the Statute that will help confront the issue of impunity for systematic persecutions on the basis of gender³⁴ or “other grounds” that are universally recognised as impermissible under international law.
34. Under the crime of enslavement, the Statute explicitly recognises trafficking in persons, in particular women and children.³⁵ In addition, other crimes, including enslavement, deportation or forcible transfer of population, torture, and murder,

³² *Prosecutor v. Tadić*, Appeals Judgement, [IT-94-1-A](#), 15 July 1999, n.311 to para. 248, citing *The Prosecutor v. Mile Mrksić et al.*, Trial Chamber I, “Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence”, [IT-95-13-R61](#), 3 April 1996, para. 30: “[A]s long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above.”

³³ An act of sexual violence may qualify as persecution if the victim was targeted on the basis of one of the listed grounds. The ICTY Appeals Chamber has recognised that “personal motive does not preclude a perpetrator from also having the requisite specific intent”, and emphasised that “the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component”. *Prosecutor v. Đorđević*, Judgement, [IT-05-87/1-A](#), 27 January 2014, para. 887.

³⁴ There are valuable precedents of law and practice about persecutions on the basis of gender in refugee law from various national systems which the Office may take into account when interpreting this provision. See, *inter alia*, United Nations High Commissioner for Refugees, [Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A\(2\) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees](#); and V. Oosterveld, “[Gender, persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-based Persecution](#)”, *Duke Journal of Comparative & International Law* (Vol. 17:49, 2006), pp. 49-89.

³⁵ According to the Elements, one of the elements of enslavement as a crime against humanity under article 7(1)(c) is that “[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.” According to footnote 11 attached to this provision, “[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.” The same footnotes appear in relation to the elements of sexual slavery as a crime against humanity and a war crime under articles 7(1)(g), 8(b)(xxii), 8(2)(e)(vi), and

may also have a sexual and/or gender element. Sexual and gender-based crimes can also constitute torture or other inhumane acts of a similar character intentionally causing great suffering, or serious injury, to body or to mental or physical health.³⁶ The Office will take this into account when selecting appropriate charges.

(iii) *Article 8 – War crimes*

35. Sexual and gender-based crimes are often committed in the context of, and in association with, an international or non-international armed conflict. They may fall under the Court's jurisdiction as war crimes under article 8 of the Statute. These include acts of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence also constituting a grave breach of the Geneva Conventions or a serious violation of Common Article 3. All other types of war crimes, including intentionally directing attacks against the civilian population, torture, mutilation, outrages upon personal dignity, or the recruitment of child soldiers, may also contain sexual and/or gender elements. The war crime of torture requires that the perpetrator inflicted pain or suffering for several purposes, including any reason based on discrimination of any kind.³⁷ This allows the Office to charge the infliction of severe physical or mental pain or suffering, driven by discriminatory grounds "of any kind", as the war crime of torture. Bearing the above in mind, the Office will be vigilant in charging sexual and gender-based crimes as war crimes, to the full extent the Office deems possible under article 8.³⁸

³⁶ See, for example, *Prosecutor v. Kunarac et al.*, Appeals Judgement, [IT-96-23& IT-96-23/1-A](#), 12 June 2002, para. 150, holding that: "Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture."

³⁷ See element 2 of the elements of the war crime of torture under articles 8(2)(a)(ii) and (c)(i) in the Elements.

³⁸ In the *Katanga/Ngudjolo* case, Pre-Trial Chamber I accepted that forcible nudity constitutes an outrage upon personal dignity, and found sufficient evidence that militia members under the command of the Accused committed these crimes. However, it declined to confirm the charge owing to insufficient evidence that the commission of such crimes was intended by the Accused as part of the common plan to "wipe out" Bogoro village, or that, as a result or part of the implementation of the common plan, these facts would occur in the ordinary course of events. *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, [ICC-01/04-01/07-717](#), 30 September 2008, paras. 570-572. In the *Bemba* case, the Prosecution included in the charges the crime of outrages upon personal dignity under article 8(2)(c)(ii) through acts of rape or other forms of sexual violence, in addition to the crime of rape and other form of sexual violence under article 8(2)(vi). Pre-Trial Chamber II declined to confirm the charge of outrages upon personal dignity on the grounds, *inter alia*, that "most of the facts presented by the Prosecution reflect in essence the constitutive elements of force or coercion in the crime of rape; and the count of outrages upon personal dignity is fully subsumed by the count of rape, which is the most appropriate legal characterisation of the conduct presented". *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a)

(b) Rules of Procedure and Evidence

36. The Rules include important principles of evidence in cases of sexual violence, consolidate procedural protection for witnesses and victims of these crimes, and allow for the use of special measures to facilitate, *inter alia*, the testimony of victims of sexual violence.³⁹

(c) The Prosecutorial Strategy

37. In its previous prosecutorial strategies, the Office committed to enhancing its investigations and prosecutions of sexual and gender-based crimes.⁴⁰ In its Strategic Plan 2012-2015, the Office elevated this issue to one of its strategic goals, namely to enhance the integration of a gender perspective in all areas of its work, and continue to pay particular attention to sexual and gender-based crimes and crimes against children.⁴¹ In its strategy, the Office commits to integrating a gender perspective in all areas of its work, being innovative in the investigation and prosecution of these crimes, training staff adequately, and giving special attention to the manner in which staff interact with victims. The Office will take steps to prevent re-traumatisation, and address any secondary traumatisation, as appropriate.

IV. Preliminary Examinations

38. The Office conducts a preliminary examination of all situations that are not manifestly outside the jurisdiction of the Court on the basis of information available in order to determine whether there is a reasonable basis to initiate an investigation. The Prosecutor shall reach such a determination after having considered the factors set out in articles 53(1)(a)-(c) of the Statute: jurisdiction (temporal, subject-matter, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice.⁴²

and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, [ICC-01/05-01/08-424](#), 15 June 2009, paras. 307-313.

³⁹ See, for example, rules 70, 71, and 72, discussed below.

⁴⁰ [Report on Prosecutorial Strategy](#) (ICC-OTP 2006), p. 7. In its Prosecutorial Strategy 2009-2012, the Office also confirmed its commitment to “work with external actors, *inter alia*, with regard to sexual and gender crimes to constantly update prosecutorial techniques”. [Prosecutorial Strategy: 2009-2012](#) (ICC-OTP 2010), p. 8.

⁴¹ [Strategic Plan, June 2012-2015](#) (ICC-OTP 2013), p. 27.

⁴² The Office’s policy and practice in the conduct of preliminary examinations are described in detail in its [Policy Paper on Preliminary Examinations \(ICC-OTP 2013\)](#). Rule 48 of the Rules requires that the Prosecutor consider the factors set out in article 53(1)(a)-(c) of the Statute in determining whether there is a reasonable basis to proceed with an investigation under

39. During the process of the preliminary examination of a situation, the Office analyses information on crimes potentially falling within its jurisdiction.⁴³ In so doing, the Office will also examine the general context within which the alleged sexual and gender-based crimes have occurred, and assess the existence of local institutions and expertise, international organisations, non-governmental organisations, and other entities available as potential sources of information and/or of support for victims. Such an assessment will support any investigation that may be opened at a later stage.
40. Where crimes within the jurisdiction of the Court – including sexual and gender-based crimes – have been identified, the Office will consider the issue of the existence of genuine and relevant national proceedings, and, where such proceedings exist, whether they relate to potential cases being examined by the Office. In this context, the Office will consider the factors relevant for the assessment of the admissibility of potential cases.⁴⁴ This determination is case-specific. It requires an examination of whether the national proceedings encompass the investigation and/or prosecution of the same person(s) for the same conduct as that which forms the basis of the preliminary examination.⁴⁵ There is no requirement that the crimes charged in the national proceedings have the same legal characterisation as those before the ICC. The test developed by the Appeals Chamber requires that the Court be satisfied that the case at the national level

⁴³In accordance with article 15 of the Statute, the Office may receive information on such crimes, and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources.

⁴⁴[Policy Paper on Preliminary Examinations](#) (ICC-OTP 2013).

⁴⁵*Prosecutor v. Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, [ICC-01/09-01/11-307](#), 30 August 2011, paras. 1 and 47; *Prosecutor v. Kenyatta et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, [ICC-01/09-02/11-274](#), 30 August 2011, paras. 1 and 46. See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, [ICC-01/04-01/06-8-Corr](#), 24 February 2006, para. 31: “[I]t is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court”; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, [ICC-01/11-01/11-466-Red](#), 11 October 2013, para. 66: “[F]or the Chamber to be satisfied that the domestic investigation covers the same ‘case’ as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court. [...] [T]he determination of what is ‘substantially the same conduct as alleged in the proceedings before the Court’ will vary according to the concrete facts and circumstance of the case and, therefore, requires a case-by-case analysis.”

concerns the same person and substantially the same conduct as that which would have been heard before the ICC.

41. The absence of genuine national proceedings will be assessed by the Office in light of such indicators as are listed in the Office's Preliminary Examination Policy Paper.⁴⁶ Barriers to genuine proceedings, which the Office will consider in its admissibility assessment, might include: discriminatory attitudes and gender stereotypes in substantive law, and/or procedural rules that limit access to justice for victims of such crimes, such as inadequate domestic law criminalising conduct proscribed under the Statute; the existence of amnesties or immunity laws and statutes of limitation, and the absence of protective measures for victims of sexual violence. Other indicators of an absence of genuine proceedings may be the lack of political will, including official attitudes of trivialisation and minimisation or denial of these crimes; manifestly insufficient steps in the investigation and prosecution of sexual and gender-based crimes, and the deliberate focus of proceedings on low-level perpetrators, despite evidence against those who may bear greater responsibility.
42. If there are investigations or prosecutions that relate to potential cases being examined by the Office, an assessment will be made into whether such national proceedings are vitiated by an unwillingness or inability to carry out genuine proceedings.
43. The complementarity assessment is made on the basis of the underlying facts as they exist at the time of the determination, and is subject to ongoing revision based on a change in circumstances.
44. Although crimes falling within the Court's jurisdiction are in and of themselves serious, article 17(1)(d) of the Statute requires that as part of the admissibility determination, the Court assess whether a case is of sufficient gravity to justify further action by the Court. Factors relevant in assessing the gravity of the crimes include their scale, nature, manner of commission, and impact.⁴⁷ The nature of the crimes refers to the specific elements of each offence, such as killings, rapes, and other crimes involving a sexual and/or gender element.
45. The Office recognises that sexual and gender-based crimes are amongst the gravest under the Statute. In assessing the gravity of alleged sexual and gender-based

⁴⁶ [Policy Paper on Preliminary Examination](#) (ICC-OTP 2013), paras. 48-56.

⁴⁷ Regulation 29(2), Regulations of the Office. See, in concurrence with the Prosecution's submissions, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, [ICC-02/05-02/09-243-Red](#), 8 February 2010, para. 31; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 188; *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, [ICC-02/11-14](#), 3 October 2011, para. 204.

crimes, the Office will take into account the multi-faceted character and the resulting suffering, harm, and impact of such acts.

46. The Office will seek to encourage genuine national investigations and prosecutions by the State(s) concerned in relation to sexual and gender-based crimes.⁴⁸ It will also encourage relevant national authorities and other entities to address barriers to genuine proceedings, and to provide support for the victims of such crimes.
47. The Office will seek to react promptly to upsurges of violence, including sexual and gender-based crimes, by reinforcing early interaction with States and international and non-governmental organisations, in order to verify information on alleged crimes, to encourage genuine national proceedings and to prevent the recurrence of crimes. Where the Office has jurisdiction, it may also issue preventive statements to deter the escalation of violence and the further commission of crimes, to put perpetrators on notice, and to promote national proceedings.⁴⁹

V. Investigations

48. In accordance with the duties and powers of the Prosecutor set out in article 54 of the Statute, the Prosecutor will investigate both incriminating and exonerating circumstances relating to sexual and gender-based crimes in a fair and impartial manner to establish the truth.
49. The Office will, with due diligence, undertake investigations into sexual and gender-based crimes concurrently with its investigations into other crimes. This will ensure the efficient utilisation of resources, and provide an opportunity for a thorough investigation of sexual and gender-based crimes. This will also ensure sufficient time for the collection and analysis of evidence, strategic planning, and ongoing decision-making, including the identification and selection of witnesses.
50. In addition to general challenges such as conducting investigations in situations of ongoing conflict and a lack of cooperation, the investigation of sexual and gender-based crimes presents its own specific challenges. These include the under- or non-reporting of sexual violence owing to societal, cultural, or religious factors; stigma for victims of sexual and gender-based crimes; limited domestic investigations,

⁴⁸ In its Interim Report on the Situation in Colombia, for example, the Office highlighted amongst the five pending areas that will form the focus on the ongoing preliminary examination the need for the Colombian authorities to prioritise the investigation and prosecution of crimes of sexual violence. See [Situation in Colombia – Interim Report](#) (OTP, November 2012).

⁴⁹ See, for example, [ICC Prosecutor confirms situation in Guinea under examination](#) (14 October 2009); [ICC Deputy Prosecutor: We are keeping an eye on events in Guinea](#) (19 November 2010); [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea](#) (27 September 2013).

and the associated lack of readily available evidence; lack of forensic or other documentary evidence owing, *inter alia*, to the passage of time; and inadequate or limited support services at national level.

51. The Office will consider specific means to address these challenges, such as paying particular attention to these crimes from the earliest stages, and, in addition to witness statements, to the collection of different types of evidence, including forensic (e.g., clinical examinations, forensic epidemiology, and autopsies), documentary evidence (video footage, formal and informal notices to perpetrators, and reports of experts, etc.), and indirect or circumstantial *indicia* of the commission of the crimes. The Office notes that these types of evidence are not legally required as corroboration to prove the crimes.⁵⁰ It will, however, endeavour to collect such evidence to strengthen the case, including to prove other aspects of the case, for example, the responsibility of the accused. Analysis techniques such as database design, statistics, and mapping will also assist in identifying the relevant patterns of crime and organisational structures. Bearing in mind the specific challenges faced in obtaining evidence in respect of sexual and gender-based crimes, the Office will apply lessons-learned and best-practice standards to ensure the effectiveness of investigations into such crimes.⁵¹
52. In the Strategic Plan 2012-2015, the Office adopted a new approach to pursue more in-depth, open-ended investigations while maintaining focus, so that more evidence from diversified sources might be collected.⁵² Where necessary, the Office 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.⁵³ This approach is intended to assist in addressing the challenge of establishing the individual criminal responsibility of persons at the highest levels for the commission of sexual and gender-based crimes.

(a) Initiation of an investigation

53. All staff from the various Divisions involved in the investigation shall be responsible for integrating a gender perspective within the investigations, and for ensuring that sexual and gender-based crimes are thoroughly addressed at each stage of the investigative process. The Office recognises the importance of considering diversity and local knowledge in the composition of a team. Teams will be proactive in making recommendations to the Executive Committee, which will monitor, and ensure proper implementation of, this practice.

⁵⁰ Rule 63(4) of the Rules provides, “[w]ithout prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

⁵¹ See footnote 11.

⁵² [Strategic Plan, June 2012-2015](#) (ICC-OTP 2013), p. 6.

⁵³ *Ibid.*

54. In the course of developing its case hypothesis, the Office will carefully consider the report produced during the preliminary examination stage, as well as in-depth additional research and analysis, and any investigations, insofar as they also relate to sexual and gender-based crimes.⁵⁴ The initial case hypothesis and investigation plan will be regularly reviewed, and may be amended on the basis of the additional analysis of evidence collected.

(b) Preparation

55. In order to build networks which are crucial for the effective investigation of sexual and gender-based crimes, the Office will consider the information obtained during the preliminary examination stage relating to local communities and the existence of civil-society organisations. The establishment of contacts and networks within the community will be prioritised to the extent possible to support the operational activities of the Office, in particular to augment its access to information and evidence and to create a referral base in support of victims and witnesses.⁵⁵ The Office will strive to ensure that its activities do not cause further harm to victims and witnesses. In the absence of local support, it will take into consideration the need for the Court to provide the necessary assistance.

56. The Office will identify individuals who may be selected as intermediaries in order to support the conduct of effective investigations.⁵⁶ All such intermediaries who are likely to engage with victims and witnesses of sexual and gender-based crimes will be specifically briefed to ensure that they have an understanding of the possible effects of trauma in relation to both these particular crimes and to the investigative process. The Office will continuously monitor and evaluate the performance of intermediaries. Where the performance of intermediaries is unsatisfactory, or where the integrity of intermediaries is called into question, the team will immediately reconsider their continued engagement, and take any other necessary action, as appropriate. The selection, tasking, and supervision of intermediaries are regulated in detail in the Operations Manual.

57. Staff will receive briefings on relevant cultural issues, traditional and religious practices, and other considerations relevant to the investigation. In the course of preparations for missions, relevant staff are required to familiarise themselves with

⁵⁴ Regulation 34(2) of the Regulations of the Office provides: "In each provisional case hypothesis, the joint team shall aim to select incidents reflective of the most serious crimes and the main types of victimisation — including sexual and gender violence and violence against children — and which are the most representative of the scale and impact of the crimes."

⁵⁵ See WHO, [Ethical and safety recommendations for researching, documenting and monitoring sexual violence emergencies](#), 2007 ("WHO Ethical and safety recommendations"), recommending, *inter alia*: "Basic care and support for survivors/victims must be available locally before commencing any activity that may involve individuals disclosing information about their experiences of sexual violence," at p. 9.

⁵⁶ Court-wide [Guidelines Governing the Relations between the Court and Intermediaries](#), together with a [Code of Conduct for Intermediaries](#), were adopted by the heads of Organs on 17 March 2014.

local traditions, customs, and cultural issues, including the status of females and males within this context, and any other factors that may impact on the investigation mission and the interview process.

58. The interview team and interpreters will undertake specific preparation in relation to the interview process. This may include familiarisation with euphemisms and other verbal and non-verbal communication which may be used by witnesses to refer to acts of sexual violence within the specific context of the investigation. They will also receive briefings and glossaries in order to familiarise themselves with the appropriate and accurate terms to describe acts of sexual violence and parts of the body. The interview team will verify, and be sensitive to, the witness's preference regarding the gender and other profile factors of interpreters and interviewers.

(c) Investigation practices

59. In conflict situations, acts of sexual and gender-based crimes rarely occur in isolation from other crimes. The victim's experience should therefore be understood and documented in a comprehensive manner, as well as with a specialised focus on sexual or gender-based crimes, where relevant. The Office will ensure that alongside the investigation of explicit acts of sexual and gender-based crimes, the gender dimensions of other crimes will also be adequately considered.
60. As required by article 68(1) of the Statute, the Office takes various measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses, particularly during its investigation and prosecution activities with regard to sexual and gender-based crimes.
61. Potential victim-witnesses with respect to sexual and gender-based crimes shall be subject to preliminary psychosocial and security assessments and screenings. The psychosocial assessment is mandatory for all witnesses of sexual and gender-based crimes.⁵⁷ It will be conducted by a psychosocial expert, who will consider the welfare of the witnesses, and their ability both to undergo an interview process and testify without undue personal or psychological harm. The expert may be present during the interview itself in order to monitor the interview and advise the interviewer. The expert or an accompanying person may also provide support to the witness, as requested.
62. The screening will focus on assessing the individual's personal circumstances, willingness to assist the investigation, evidentiary value, and working towards establishing a relationship of trust and respect.

⁵⁷Regulation 36(3) of the Regulations of the Office provides: "The physical and psychological well-being of persons who are questioned by the Office and are considered vulnerable (in particular children, persons with disabilities and victims of gender and sexual crimes) shall be assessed by a psychology, psycho-social or other expert during a face-to-face interview prior to questioning. This assessment shall determine whether the person's condition at that particular time allows him or her to be questioned without risk of re-traumatisation."

63. The screening of witnesses of sexual and gender-based crimes will generally be conducted during a face-to-face meeting, with the necessary support for the witnesses provided. In the event that remote screening is necessary, the Office will seek to ensure that support is available to the witness, bearing in mind the prevailing situation, and the need to ensure that the witness is not exposed to any risk as a result of activities related to the screening.
64. The security assessment will be conducted with a focus on specific risks and the available protection measures. The Office will proceed with an interview, subject to positive assessments regarding their psychosocial condition, investigative needs, and security.
65. The Office is mindful that victims of sexual and gender-based crimes may face the additional risks of discrimination, social stigma, exclusion from their family and community, physical harm, or other reprisals. In order to minimise their exposure and possible retraumatisation, the Office will enhance its efforts to collect other types of evidence, where available, including insider testimony, the statistical or pattern-related evidence from relevant experts, medical and pharmaceutical records, empirical research and reports, and other credible data produced by States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources.
66. In the development and implementation of investigative strategies, the Office will bear in mind that victims and witnesses of sexual and gender-based crimes may also be witnesses to other crimes, and *vice versa*, and plan accordingly. This will be reflected in the specific investigative strategies developed by the teams within the context of each criminal investigation.
67. As noted above at paragraph 33, the provision relating to persecution on the basis of gender — an innovation in the Statute — will be utilised to the fullest extent possible. The investigation will take into consideration various *indicia*, including discriminatory policies, violent acts selectively targeting a particular gender, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect's background, and prior conduct that are indicative of relevant intent and adverse gender biases in the response of suspected groups or authorities to the crimes.
68. Best practices related to the management of, and the interaction and relationship with, victims and witnesses of sexual and gender-based crimes, have been incorporated into the Operations Manual. Specific questionnaires and guidelines have been developed to support sound practices in this area.
69. In the course of its work, the Office will be mindful of and consider both the existence of adverse gender biases that may affect different sources of information and the possibility of under-reporting or misrepresentation of the truth about

sexual and gender-based crimes. Evidence will be subject to impartial evaluation regarding its credibility.

70. In the selection of witnesses, all teams will take into account considerations relating to any security, social, and psychological risks, as well as any possible healing effect which may be associated with providing evidence of sexual and gender-based crimes.⁵⁸ The Office recognises that witnesses of sexual and gender-based crimes may want to testify in support of judicial proceedings, and may regard it as a component of their own recovery process. In its selection of witnesses, the Office will, on the basis of, *inter alia*, any psychosocial and security assessments, give careful consideration to whether taking evidence from a specific witness will be of benefit or harm to the individual. Experience has highlighted the importance of managing the expectations of victims and witnesses. The Office takes particular care in this regard, and has an established practice with regard to keeping witnesses informed of, *inter alia*, the mandate of the Office, the procedures for protection, participation in the proceedings, the possibility of being called to testify, the scope and impact of possible disclosure, developments in the case, and reparations. Explanations will also be provided about the role of Registry's Victims and Witnesses Unit ("VWU")⁵⁹ on matters related to assistance, including medical and psychosocial assistance, support, and protection, and the role of the Office in these areas. The Office will liaise with the VWU on all such matters, and will thereafter inform victims and witnesses of the possible options and measures in this regard, and seek their views.

VI. Prosecutions

(a) Charging

(i) Crimes charged

71. Building on the preliminary examination and the substantive and detailed investigations and collection of evidence, the Office will ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges.

72. In principle, the Office will bring charges for sexual and gender-based crimes explicitly as crimes *per se*, in addition to charging these acts as forms of other

⁵⁸ See [WHO Ethical and safety recommendations](#), recommending, *inter alia*, "The benefits to respondents or communities of documenting sexual violence must be greater than the risks to respondents and communities." at pp. 9-11.

⁵⁹ In accordance with article 43(6) of the Statute, the Registrar has set up a Victims and Witnesses Unit within the Registry, with a mandate to provide, in consultation with the Office, protective measures and security arrangements, counselling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.

violence within the Court's subject-matter jurisdiction, where the material elements are met, e.g., charging rape as torture, persecution, and genocide. The Office will seek to bring cumulative charges in order to reflect the severity and multi-faceted character of these crimes fairly, and to enunciate their range supported by the evidence in each case.

73. Where supported by the evidence, the Office will also charge acts of sexual and gender-based crimes as different categories of crimes within the Court's jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context.⁶⁰

74. The Office will also seek to highlight the gender-related aspects of sexual and other crimes within its jurisdiction, e.g., domestic labour and "household" duties in the context of sexual slavery or enslavement.

(ii) *Mode of liability and mental elements*

75. The situations and cases before the Court have tended to show that rape and other sexual and gender-based crimes against both females and males are often widespread, and/or used systematically as a tool of war or repression.⁶¹ These crimes may be committed, *inter alia*, as a result of explicit or implicit orders or instructions to commit such crimes; as a consequence which the individual is aware will occur in the ordinary course of events during military operations directed against civilian populations, for instance; or because of an omission (e.g., a failure to order subordinates to protect civilians, or failure to punish similar crimes committed in prior operations). These crimes may also be caused by a combination of other relevant factors at all levels of an organisation, such as a culture of tolerance.

⁶⁰ For example, in the *Katanga/Ngudjolo* case, the Office charged the Accused with sexual slavery and rape both as crimes against humanity and war crimes under articles 7(1)(g) and 8(2)(b)(xxii). The same approach has been taken in various other cases, including *Harun/Kushayb*, *Bemba*, *Mbarushimana*, *Hussein*, *Mudacumura*, and *Ntaganda*, where the Office considered that there was sufficient evidence establishing contextual elements of both types of crimes.

⁶¹ In the *Bemba* case, the Office included in the charges rapes committed against both females and males, and called not only female victims, but also two men in positions of authority who were victims of rape to testify at trial. See *Prosecutor v. Bemba*, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, [ICC-01/05-01/08-395-Anx3](#), 30 March 2009, alleging, *inter alia*, that, "Women were raped on the pretext that they were rebel sympathizers. Men were also raped as a deliberate tactic to humiliate civilian men, and demonstrate their powerlessness to protect their families." In the *Kenyatta* case, the Office included in the charges acts of forcible circumcision against, and penile amputation of, men perceived to be supporters of the opposition party. See *Prosecutor v. Kenyatta*, Public Redacted Version of the Corrigendum of the Second Updated Document Containing the Charges, [ICC-01/09-02/11-732-AnxA-Corr-Red](#), 10 May 2013, p. 34.

76. In order to ensure accountability in the diversity of scenarios, the Statute provides for various modes of liability under articles 25 and 28, and standards required to satisfy the mental element are set out in article 30.
77. Under article 25 of the Statute, individuals, including military commanders or non-military superiors, may be responsible for sexual and gender-based crimes that they commit as individuals, or jointly with or through another person, or if they order, solicit, induce, aid, abet, otherwise assist in, or in any way contribute to, the commission or attempted commission of those crimes. In the case of military commanders or non-military superiors, they can also be held responsible under article 28 on the basis of command⁶² or superior responsibility.
78. In order to encourage military commanders and non-military superiors to deal effectively with the commission of these crimes by their forces or subordinates,⁶³ the Office will, as appropriate, increasingly explore the potential of bringing charges on the basis of article 28 as well as article 25. Under article 28, military commanders or non-military superiors may be held accountable not only where they intended the specific conduct or consequence of sexual and gender-based crimes, but also where they knew, or should have known about, or consciously disregarded information regarding, the commission of such crimes, and failed to take all necessary and reasonable measures within their power to prevent or repress such commission, or to submit the matter to the competent authorities for investigation and prosecution.
79. Pursuant to article 30 of the Statute, the Office must establish that the person under investigation or the accused committed the crime with intent and knowledge, unless the Elements specify a mental element for any particular conduct, consequence, or circumstances listed therein.⁶⁴
80. According to article 30(2) of the Statute, “[f]or the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that

⁶² See, for example, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Amended Document containing the charges filed on 30 March 2009, [ICC-01/05-01/08-395-Anx3](#), 30 March 2009. This is the first case before the ICC in which a military commander is being prosecuted on the basis of command responsibility for alleged crimes, including rape, committed by forces under his effective command and control.

⁶³ See, for example, the statement of the former UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Margot Wallström, that, “[W]ar-time sexual violence is a crime that can be commanded, condoned or condemned. Once we better understand these dynamics, I am convinced that prevention is within our power.” [Security Council Open Meeting on “Women, Peace and Security: Sexual Violence in Situations of Armed Conflict”: Statement by UN Special Representative of the Secretary-General, Margot Wallström](#), 27 April 2010.

⁶⁴ For example, article 25(3)(c) of the Statute requires a specific mental element, *viz.*, the “purpose of facilitating the commission of such a crime”, for aiding, abetting, or otherwise assisting.

consequence or is aware that it will occur in the ordinary course of events.” Article 30(3) provides that “‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.

81. The experience of the ICC and other international tribunals demonstrates that there is often no evidence of orders to commit sexual or gender-based crimes.⁶⁵ In such circumstances, evidence such as patterns of prior or subsequent conduct or specific notice may be adduced to prove an awareness on the part of the accused that such crimes would occur in the ordinary course of events, which would satisfy the mental element under article 30(2)(b). The Office will explore the full potential of this provision.
82. The Office will also seek to present other types of evidence, such as witness testimony and contemporaneous public reports on the crimes,⁶⁶ to establish the intent and knowledge of the accused.
83. The Office will consider the full range of modes of liability and mental elements under articles 25, 28, and 30 of the Statute for charging in cases of sexual and gender-based crimes, and will make a decision based on the existing evidence. The Office will charge different modes of liability and mental elements in the alternative, where appropriate.

(b) Witness Preparation

84. The Office will consistently seek approval from Chambers to prepare witnesses for the purpose of promoting efficient and accurate testimony.⁶⁷ Bearing in mind the

⁶⁵ For example, the ICTY Trial Chamber in *Krstić* held that while it was not convinced beyond reasonable doubt that the murders, rapes, beatings, and abuses committed against the refugees at Potočari were part of an objective agreed upon amongst the members of the joint criminal enterprise, there was no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign. See *Prosecutor v. Krstić*, Judgement, [IT-98-33-T](#), 2 August 2001, para. 616. In *Prlić et al.*, Trial Chamber III found four out of six Accused guilty of some crimes, including rape, sexual violence, and looting on the grounds that the Accused could have reasonably foreseen that such crimes would be committed as a consequence of the implementation of the joint criminal enterprise, and that they nevertheless accepted and assumed that risk, including by taking no measure to prevent the commission of further crimes. *Prosecutor v. Prlić et al.*, Judgement, [IT-04-74-T](#), 29 May 2013, paras. 72, 284, 437, 834, and 1014.

⁶⁶ For example, in the *Charles Taylor* case, the Trial Chamber of the Special Court for Sierra Leone relied heavily on contemporary documentary evidence contained in the reports of international organisations and NGOs on, and media coverage of, the crimes committed in Sierra Leone in finding beyond reasonable doubt that the former President of Liberia was aware of the crimes committed in Sierra Leone by the RUF/AFRC forces against civilians, including rape. *Prosecutor v. Taylor*, Trial Chamber II Judgement, Case No. [SCSL-03-01-T](#), 18 May 2012, paras. 6815-6886.

⁶⁷ Departing from the practice in earlier cases, Trial Chamber V in the two Kenya cases decided to permit witness preparation, recognising that proper witness preparation not only helps ensure that the witness gives relevant, accurate, and structured testimony, but also

additional stigma as well as the social and other consequences of sexual and gender-based crimes, the Office considers witness preparation, particularly in such cases, to be highly desirable in supporting the psychological well-being of witnesses, diminishing the intimidation of the court-room environment, and facilitating the complete provision of evidence pertaining to sexual and gender-based crimes.⁶⁸ This process will be carefully conducted in accordance with any guidance that may be issued by the Chamber, as well as the Office's internal guidelines, in order to ensure that the fairness and integrity of the proceedings are not compromised in any manner.

(c) *Measures to protect the safety and physical and psychological well-being of witnesses*

(i) *General obligations during proceedings*

85. Article 68 of the Statute is the central article with regard to the protection of victims and witnesses throughout the proceedings, and is binding for all Organs of the Court.⁶⁹ The Office will fulfil its statutory duty in ensuring that all appropriate measures are taken during the investigation and prosecution of sexual and gender-based crimes. The Office has established the Protection Strategies Unit ("PSU") and the Operations Support Unit ("OSU"): these deal with the protection and support of witnesses, their families, and other persons at risk on account of their interactions with the Office. In order to ensure a holistic approach to witness management (physical, psychological, and social well-being, provision of information, prompt resolution of issues), responsibilities have been redefined within the Office between OSU, PSU, GCU, and the Planning and Operations Section ("POS").

86. The VWU of the Registry is the unit primarily responsible for the provision of protective measures, counselling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Office also has statutory obligations with

enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying. *Prosecutor v. Ruto et al.*, Decision on witness preparation, [ICC-01/09-01/11-524](#), 2 January 2013, paras. 4, 37, and 51; *Prosecutor v. Kenyatta et al.*, Decision on witness preparation, [ICC-01/09-02/11-588](#), 2 January 2013, paras. 4, 41, and 52. Witness preparation has been widely practised by the *ad hoc* international criminal tribunals to facilitate the presentation of testimonial evidence.

⁶⁸ See *Prosecutor v. Ruto et al.*, Decision on witness preparation, [ICC-01/09-01/11-524](#), 2 January 2013, para. 37.

⁶⁹ According to article 68(1) of the Statute, "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

regard to protection. The Office and the VWU have accordingly concluded a joint protocol on witness protection which sets out responsibilities.⁷⁰ In accordance with the protocol, the Office, in particular the PSU, will cooperate with the VWU on matters of protection and support, including by sharing any relevant information, and providing any assistance in the implementation of protective measures and support where necessary and appropriate. The Office is mindful of the need for timely intervention, and will facilitate the provision of the required assistance where necessary to maintain the physical and psychological welfare of witnesses, particularly victims of sexual and gender-based crimes. The Office will also work with States and other relevant actors in order to give full effect to this provision.

(ii) Disclosure of evidence

87. The Office will exercise due diligence in ensuring that it meets its statutory requirements in relation to the disclosure of evidence in a timely and professional manner. If the disclosure of identity would expose victims and witnesses, including those of sexual and gender-based crimes, to the risks of physical and psychological harm, which may not be addressed by other protective measures, the Office may request authorisation for redactions to their identities pursuant to rule 81(4) of the Rules, or use summaries of witness statements prior to trial, in accordance with articles 61(5) and 68(5) of the Statute. Prior to an interview, the Office will fully inform witnesses of its disclosure obligations in relation to witness statements, taking into account the particular vulnerability of the witness and any additional concerns witnesses of sexual and gender-based crimes may have regarding security, personal, and/or family or social repercussions.

(iii) In-court measures

88. Article 68(2) of the Statute provides that as an exception to the principle of public hearings, the Chambers may conduct any part of the proceedings *in camera*, or allow the presentation of evidence by electronic or other special measures to protect victims and witnesses. In particular, such special measures are mandatory in the case of a victim of sexual violence, or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

89. Where necessary to protect a victim or witness of sexual and gender-based crimes, the practice of the Office is to request a Chamber to order measures pursuant to rule 87. These include redacting the name of a person and any identifying information from the public records of the Chamber; prohibiting the parties and the participants to the proceedings from disclosing the name and any identifying information of a person to a third party; presenting evidence by electronic or other special means, including by image or voice alteration, video-conferencing, and

⁷⁰ A Prosecution-Registry Joint Protocol on the Mandate, Standards, and Procedure for Protection was concluded in March 2011, and is currently under revision.

closed-circuit television, or the exclusive use of sound media; using pseudonyms; and conducting proceedings, or parts thereof, in closed session.

90. In the case of witnesses who may face an increased risk of psychological harm and/or psychological or physical difficulties which may affect their well-being and ability to testify, the Office will request the Chamber to take special measures with a view to minimising the risk of retraumatisation and facilitating their testimony.⁷¹ Such special measures may include the use of screens to prevent direct visual contact between the witness and the accused; the provision of evidence via video-link; and the presence of an accompanying support person or in-court assistant, such as a VWU support assistant, a psychologist, or outside expert during the testimony.⁷² Depending on the risk assessment of the witness, steps will be taken to inform the witness of available protection measures that may be requested from the Chamber, and the preference of the witness sought. In order to manage expectations, care will be taken to ensure that the witness understands and accepts that the ultimate decision lies with the Chamber, and that the protection measure preferred by the witness may not necessarily be granted. The Office will pay particular attention to the manner of questioning of a witness or victim, especially with regard to sexual and gender-based crimes. It will take all possible steps to prevent any harassment, intimidation, or retraumatisation.⁷³

(d) Evidence

91. The evidence necessary for charging sexual and gender-based crimes, and the burden on the prosecution to prove its case, as a matter of law, should be no more substantial or onerous than for other crimes. The Office will ensure that this is reflected in its investigation and prosecution strategies, including in its litigation before Chambers.

⁷¹The first sentence of rule 88(1) of the Rules provides, "Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2."

⁷²For example, in the *Bemba* case, the Office sought authorisation for victims of sexual violence to be accompanied by persons of their choice during their testimony at trial, *inter alia*, to minimise possible trauma and any additional fear associated with participating in the proceedings. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to "Prosecution's Request for Protective and Special Measures for Prosecution Witnesses at Trial", [ICC-01/05-01/08-800-Corr-Red4](#), 6 July 2010, paras. 19 and 20.

⁷³Rule 88(5) of the Rules provides, "Taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence."

92. The Rules contain provisions that aim to protect witnesses/victims of sexual and gender-based crimes, in particular, with regard to the issues of corroboration, consent, and past behaviour.
93. Rule 63(4) of the Rules provides that corroboration is not required in order to prove any crime within the Court's jurisdiction, in particular, crimes of sexual violence. Within the limits of its mandate, the Office will contribute to the consistent application of this rule, while ensuring sufficient evidence to prove the charges.
94. Rule 70 outlines the principles of evidence in cases of sexual violence. Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force or coercion, or taking advantage of a coercive environment, undermined the victim's ability to give voluntary and genuine consent.⁷⁴ Similarly, consent cannot be inferred by reason of any words or conduct of a victim where the victim was incapable of giving genuine consent,⁷⁵ or by reason of silence or lack of resistance.⁷⁶ This includes, for example, where the victim engages in an act of a sexual nature as a result of fear of violence, duress, detention, psychological oppression or abuse of power.⁷⁷
95. According to rule 70(d), credibility, character, or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness. Rule 71 further provides that in light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69(4), evidence of the prior or subsequent sexual conduct of a victim or witness is generally inadmissible. These provisions provide an important disqualification of any attempt to undermine or discredit victims or witnesses of sexual violence based on their perceived or actual sexual conduct.
96. Rule 72 requires notification to the Court in the event of an intention to adduce evidence of consent by the victim. The Chamber is required to decide on the relevance and admissibility of the evidence after hearing the views of parties, the witness, and the victim or his or her legal representative *in camera*. In accordance with rules 70 and 71, the Office will, as appropriate, object to the admission of such evidence. The Office will take a proactive and rigorous approach to the application of this rule.
97. The Office will consult with experts, and, where appropriate, propose their testimony on different aspects, such as the socio-political, psychological, and medical aspects, of sexual and gender-based crimes. Such experts may also be useful in identifying patterns of sexual and gender-based crimes, the nature of

⁷⁴ Rule 70(a) of the Rules.

⁷⁵ Rule 70(b) of the Rules.

⁷⁶ Rule 70(c) of the Rules.

⁷⁷ See element 2 of the elements of the war crimes and crimes against humanity of rape and sexual violence in the Elements.

injuries and their consistency with victim testimony, and the personal and social consequences of the crime.⁷⁸

(e) *Post-testimony*

98. The Office maintains contact with witnesses post-testimony in order to keep them informed of developments in the case, including the sentence, and any appeal. It will also be responsive to issues relating to their safety and physical and psychological well-being that are related to their interaction with the Office.

(f) *Sentencing*

99. The Office will propose sentences which give due consideration to the sexual and gender dimensions of the crimes charged, including their impact on victims' families and communities, as an aggravating factor and reflective of the gravity of the crimes committed. In the determination of an appropriate sentence, the Court is required to take into account factors such as the gravity of the crime, and the individual circumstances of the convicted person.⁷⁹ Several factors, including the extent of the damage caused – in particular, the harm caused to the victims and their families, the nature of the unlawful behaviour, and the means employed to execute the crime – must also be considered by the Court.⁸⁰ Bearing this in mind, the Office will adduce evidence to propose appropriate sentences for sexual and gender-based crimes, and for related harm, including physical, psychological, and social damage to victims, their families, and communities. Where appropriate, the Office will adduce evidence of the impact of the sexual and gender-based crimes on the victims, their families, and the community as a whole, by way of victim or expert testimony and written statements.

⁷⁸ The Office will take into account precedents of expert testimony of this kind in the ICC, other international tribunals, and national jurisdictions. In the *Lubanga* case, the former Special Representative of the UN Secretary-General for Children and Armed Conflict, Ms Radhika Coomaraswamy, as well as a clinical psychologist, Dr. Elisabeth Schauer, testified about various aspects of sexual violence and gender-based crimes. In the *Bemba* case, the Office called Prof. André Tabo and Dr. Adeyinka Akinsulure-Smith as expert witnesses on the relevant pattern of sexual violence during the 2002-2003 conflict in the Central African Republic and its impact on the victims.

⁷⁹ Article 78(1) of the Statute provides, "In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."

⁸⁰ According to rule 145(1)(c) of the Rules, in its determination of the sentence, the Court shall, "In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person."

100. The commission of a crime with a motive involving discrimination, including on the grounds of gender, or where the victim is particularly vulnerable, in itself constitutes aggravating circumstances.⁸¹
101. Even where the evidence precluded the inclusion of sexual and gender-based crimes in the charges, the Office will give due consideration to any sexual or gender dimension involved in the crimes charged, which may be treated as an aggravating factor or as part of the gravity factor for the purpose of sentencing.

(g) *Reparations*

102. Article 75 of the Statute does not explicitly confer any role on the Prosecutor during the reparations stage. However, the Chamber may invite observations from the Office at this stage of the proceedings.⁸² Decisions about reparations will be determined by each Trial Chamber with due consideration of the specific facts of the case, the context and circumstances within which the crimes occurred, the interests of victims, and the harm and suffering experienced.⁸³ The Office supports a gender-inclusive approach to reparations, taking into account the gender-specific impact on, as well as the harm caused to, and suffering of, the victims affected by the crimes for which an individual has been convicted. The Office will also support consultation with the victims, and the carrying out of a gender analysis by an appropriate body in order to determine the most effective and appropriate forms of reparation within a particular community. This approach is intended to promote reparations that are transformative and contribute to advancing gender equality.

VII. Cooperation

103. Together with complementarity, cooperation is one of the two fundamental components of the Rome Statute system. Effective cooperation is crucial to the Office and the Court in carrying out their mandate. Accordingly, the Office actively engages with States and other relevant stakeholders in order to improve

⁸¹The aggravating circumstances set out under rule 145(2)(b) of the Rules include “Commission of the crime where the victim is particularly defenceless” (rule 145(2)(b)(iii)), and “Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3”, which includes gender (rule 145(2)(b)(v)).

⁸²Article 75(3) of the Statute provides, “Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.” In the *Lubanga* case, the Chamber invited the Office to file submissions on the principles and procedure to be applied to reparations. *Prosecutor v. Thomas Lubanga Dyilo*, Scheduling order concerning timetable for sentencing and reparations, [ICC-01/04-01/06-2844](#), para. 8.

⁸³*Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, [ICC-01/04-01/06-2904](#), 7 August 2012. Appeals against this decision, including the role of the Office during the reparations proceedings, are currently pending determination by the Appeals Chamber. The policy will be revised and updated as appropriate once the Appeals Chamber renders its judgment.

the effectiveness of its actions with respect to sexual and gender-based crimes. The Office also includes a gender perspective in its public information activities which seek to maximise awareness and the impact of its work.

(a) *External relations*

104. As part of its external relations strategy, the Office will enhance its efforts to identify, support, and engage with initiatives undertaken to respond to sexual and gender-based crimes, including the facilitation of contacts between various entities in this field. The Office contributes to, and highlights the need for, accountability for sexual and gender-based crimes through, *inter alia*, missions, public statements, the sharing of information, and participation in conferences and training sessions.
105. The Office encourages various initiatives and actions — most notably those by States Parties — to address sexual and gender-based crimes. These include efforts towards universal ratification and domestic implementation of the Statute, and cooperation with the Court; the adoption of domestic legislation which incorporates the conduct proscribed under the Statute, and procedures which would protect the interests of victims and facilitate the effective investigation and prosecution of such cases; support for domestic investigations and prosecutions for these crimes;⁸⁴ enhancement of cooperation for the execution of ICC arrest warrants; and strengthening political support to end impunity and to prevent the recurrence of such crimes.⁸⁵ These contributions are important to establish and

⁸⁴[Security Council Resolution 1820 \(2008\)](#) also calls upon Member States to comply with their obligations for prosecuting persons responsible for rape and other forms of sexual violence constituting a war crime, a crime against humanity, or a constitutive act with respect to genocide, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliations. The Security Council, in its [Resolution 2106 \(2013\)](#), encouraged Member States to include the full range of crimes of sexual violence in national penal legislation to enable prosecutions for such acts, and recognised that effective investigation and documentation of sexual violence in armed conflict is instrumental both in bringing perpetrators to justice and ensuring access to justice for survivors.

⁸⁵For example, the United Kingdom launched an initiative on preventing sexual violence in conflict, aimed, *inter alia*, at strengthening international efforts and coordination, and supporting states in building their national capacity to prosecute acts of sexual violence committed during conflict. See [the G8 Declaration on Preventing Sexual Violence in Conflict](#), 11 April 2013. The African Solidarity Initiative, a programme launched by the African Union (“AU”) in 2012 to mobilise support for post-conflict reconstruction, has also brought about consultations with the objective of formulating an AU-led strategic framework for the prevention of, and response to, sexual violence in Africa. See [the Concept Note on High-Level Consultation on Preventing and Responding to Sexual Violence in Conflict, Post-Conflict Countries and Beyond](#), 9-11 October 2013.

reinforce the normative framework of the Statute for the accountability of sexual and gender-based crimes.

106. The establishment of the United Nations Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (“SRSG-SVC”) was also a significant development in the fight against impunity for conflict-related sexual violence, as it strengthens the UN efforts in this area.⁸⁶ The Office of the SRSG-SVC also works on other aspects of prevention, protection, and assistance, including building the capacity of national governments. The Office consults periodically with, in particular, the Office of the SRSG-SVC, the Special Representative of the Secretary-General for Children and Armed Conflict, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and the Office of the High Commissioner for Human Rights.
107. The Office also recognises the crucial role that civil society plays in preventing and addressing sexual and gender-based crimes. International and local non-governmental organisations are often the first to respond to incidents of sexual and gender-based crimes, undertaking documentation of such crimes, and providing significant medical, psychosocial, material, and legal support to victims. The Office will seek to support and strengthen cooperation with these organisations, particularly those which have experience in documenting sexual and gender-based crimes and working with victims of these crimes. The Office will also continue to work actively towards building a network, and may seek advice from the Special Gender Adviser on how to undertake effective network building, including with grassroots organisations, in order to enlist their assistance and support in efforts to reach out more to the victims. Building partnerships, particularly with non-governmental organisations familiar with the ICC’s work, may also help promote community awareness and understanding of the activities and mandate of the Office and other Organs of the ICC.
108. Civil-society organisations also play a crucial role in transforming public attitudes towards gender equality, and addressing gender-based crimes; campaigning for and supporting the adoption of domestic rape and sexual violence legislation in line with the Statute; advocating for the ratification of the Statute and an adherence to international laws and human rights standards; and supporting an international norm of accountability for crimes, including sexual and gender-based crimes. Academia is also an important contributor in providing support, such as the research into, and analysis of, issues relevant to the work of the Court.

⁸⁶In February 2010, the UN Secretary-General announced the appointment of Ms Margot Wallström as his first Special Representative on Sexual Violence in Conflict. She was replaced by Ms Zainab Hawa Bangura in June 2012. See the UN Press releases announcing their appointments: [“Secretary-General appoints Margot Wallström of Sweden as Special Representative on Sexual Violence in Conflict”](#), 2 February 2010; [“Secretary-General appoints Zainab Hawa Bangura of Sierra Leone Special Representative on Sexual Violence in Conflict”](#), 22 June 2012.

109. The ICC is complementary to national efforts. Accordingly, consistent with its positive complementarity policy, the Office seeks to combine its own efforts to prosecute those most responsible with national proceedings for other perpetrators. It may, for example, engage with and support national authorities in their national proceedings, including in relation to sexual and gender-based crimes, provided that this does not compromise any future admissibility proceedings. This could include sharing evidence obtained in the course of an investigation to support national proceedings, subject to the existence of a credible local system of protection for witnesses and other security-related caveats.⁸⁷
110. As part of its positive complementarity approach, the Office encourages States to carry out their primary responsibility of investigating and prosecuting crimes, including sexual and gender-based crimes,⁸⁸ and supports them in this endeavour.

(b) Public information

111. In support of the policy to integrate a gender perspective into all aspects of its work, the Office's public information activities will include creating and seizing opportunities to highlight the impact of sexual and gender-based crimes, and increase awareness and contribute to the prevention of future crimes. The Office will utilise various platforms such as public events, media and social-media campaigns, media programmes on high-level missions, or documentary projects. Outreach initiatives are also very important in achieving these objectives. The Registry is responsible for, and leads on, the planning and implementation of outreach-related activities, in coordination with other Organs of the Court.⁸⁹ The Office will support the Registry and participate in outreach activities, as appropriate.

VIII. Institutional development

(a) Recruitment and institutional arrangements

112. The Office will enhance its institutional capacity to investigate and prosecute sexual and gender-based crimes more effectively. The Office established the

⁸⁷ Article 93(10) of the Statute provides for the possibility that the Court, upon request, cooperate with, and provide assistance to, a State conducting an investigation into, or trial in respect of, conduct which constitutes a crime within the Court's jurisdiction, or which constitutes a serious crime under the relevant national law, including the transmission of evidence obtained in the course of an investigation or a trial conducted by the Court.

⁸⁸ See, for example, [Security Council Resolution 1325 \(2000\)](#), emphasising the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those relating to sexual and other violence against women and girls, and in this regard stressing the need to exclude these crimes, where feasible, from amnesty provisions.

⁸⁹ [Integrated Strategy for External Relations, Public Information and Outreach](#).

Gender and Children Unit as one of the ways of ensuring that proper focus is put on the investigation and prosecution of these crimes.⁹⁰ This Unit is made up of staff with legal and psychosocial expertise,⁹¹ and supports all Divisions and teams in dealing with victims and witnesses, particularly those of sexual and gender-based crimes. The GCU provides advice to the Prosecutor, the Executive Committee, and staff in all areas related to sexual and gender-based crimes and crimes against children at all stages of the operations. The GCU is responsible for liaising with the Victims Participation and Reparations Section (“VPRS”) in the Registry, and also acts as the focal point with the VWU on support issues relating to victims and witnesses.

113. In addition, in accordance with article 42(9) of the Statute, the Prosecutor has appointed advisers with legal and other expertise on specific issues — including sexual and gender violence — to develop the capacity of the Office further, and expand the expertise available to advise on its work. To date, two Special Gender Advisers have been appointed.⁹²
114. Article 44(2) of the Statute requires that, in the employment of staff within the Office, the Prosecutor ensure the highest standards of efficiency, competency, and integrity, and have regard to considerations of the representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of women and men.
115. The Office recognises the need to strengthen its in-house expertise on sexual and gender-based crimes relating to women and girls, and men and boys, both in conflict and non-conflict situations. It will continue to recruit persons with the required expertise and experience in this field.
116. In February 2010, the Office adopted the Operations Manual, which sets out its operations in detail and incorporates best practices related to victims and witnesses of sexual and gender-based crimes.
117. The Staff Welfare Office of the Registry provides support to ICC staff to help prevent and manage stress and trauma. The Office will request that the Staff Welfare Office provide such support to its staff, particularly in relation to their work involving sexual and gender-based crimes. Managers will be expected to engage with staff regularly in this regard through support and supervision, and encourage staff to seek the assistance of the Staff Welfare Office.

⁹⁰ The GCU was established in 2003, shortly after the ICC’s first Prosecutor took office.

⁹¹ Regulation 12 of the Regulations of the Office.

⁹² Prof. Catharine MacKinnon served as the Special Gender Adviser between November 2008 and June 2012. In August 2012, Ms Brigid Inder was appointed as the new Special Gender Adviser. See the Press releases announcing their appointments: [“ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes”](#), 26 November 2008; [“ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Adviser”](#), 21 August 2012.

(b) *Staff training*

118. Staff training on an ongoing basis is an essential component to the effective investigation and prosecution of sexual and gender-based crimes against both males and females. As foreseen in the Court-wide revised strategy towards victims, training will be adjusted in accordance with new strategies and experiences.⁹³
119. The Office will endeavour to ensure that all team members, as well as all other relevant staff members, including interpreters, have the necessary competencies and support to perform their functions effectively in relation to sexual and gender-based crimes. In addition, the Office will provide ongoing technical and advanced training on methodologies in the collection and analysis of evidence of such crimes, the relevant legal framework, cultural issues, and other traditional and religious practices related to the situation and specific communities where the investigation is being conducted.⁹⁴ Training will also be provided on how properly to conduct Court examinations of vulnerable witnesses, as well as insiders/overview witnesses, to elicit relevant information regarding these crimes. The demonstration of awareness, knowledge, and best practice regarding the gender and cultural context of the investigations by all members of the investigation team will be supported and monitored by the team leadership.

(c) *Implementation of this policy*

120. The Office will constantly monitor its practices with regard to the investigation and prosecution of sexual and gender-based crimes. The Office will utilise its standardised and institutionalised lessons-learned process to identify, document, and implement best practice with regard to sexual and gender-based crimes. This will promote learning and the preservation of institutional knowledge gained from experience.
121. This policy, together with the Operations Manual and other relevant internal rules and procedures, will be regularly reviewed in order to incorporate best practice and other relevant developments, including jurisprudence.
122. The Office will monitor the implementation of this policy.

⁹³ Report of the Court on the Revised strategy in relation to victims: Past, present and future, [ICC-ASP/11/40](#), 5 November 2012, para. 58. See also para. 8: "In general, the Court has recognised that it must do more to make its personnel increasingly gender sensitive. The different organs and units dealing with particularly vulnerable groups, e.g. women victims, children and survivors of Sexual and Gender Based Violence (SGBV), are developing policies on gender and guidelines for relevant personnel."

⁹⁴ [WHO Ethical and safety recommendations](#), recommending, *inter alia*, "All members of the data collection team must be carefully selected and receive relevant and sufficient specialized training and ongoing support," at p. 9.

