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Gender(ed) perspectives: An analysis of the 'gender perspective' in the Office of the Prosecutor of the ICC's Policy Paper on Sexual and Gender-based Crimes

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PART I
Introduction

In June 2014, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) launched its Policy Paper on Sexual and Gender-Based Crimes[1] (hereinafter the Policy Paper). The Policy Paper rearticulates the sexual and gender-based crimes in the Rome Statute, while laying out gendered specificities as they pertain to preliminary examinations, investigations, and prosecutions, including victim-sensitivity, staff training, and cooperation. One of the key focuses of the Policy Paper is a self-conscious attempt at institutionalising the 'gender perspective' that has been central to Chief Prosecutor Fatou Bensouda's tenure into the OTP's work.[2] The Policy Paper has been incorporated into the OTP's 2015–2018 strategy and it is intended to guide the Office's work and its approach to gender and to sexual and gender-based crimes.[3] It is also intended to guide national jurisdictions, and, in its position as a key international document addressing gender, its 'gender perspective' has already, and has potential, to inform debates outside of the ICC on gender and gender-based violence.[4]

This policy brief analyses the gender perspective in the Policy Paper. In Part I, the brief discusses the contributions of the Policy Paper, particularly as it pertains to institutionalising an approach that eschews the marginalisation of sexual and gender-based crimes in light of the historical neglect of these crimes in international law. Part II turns to the content of the gender perspective. Here, it argues that the Policy Paper has made significant progress in eroding some of the more violent and exclusionary aspects of the Rome Statute's definition of gender, including through its explicit inclusion of the social construction of gender, and its explicit reference to sexual orientation. However, it argues that despite this, the Policy Paper has not surmounted the tethering of gender to biological sex, and thus offers a limited iteration of the social construction of gender. Additionally, the treatment of both gender and assigned sex in binary 'man versus woman' terms precludes a genuine consideration of the construction of gender, while the treatment of assigned sex as fixed and immutable is at odds with much scientific, medical and feminist literature on the ways in which assigned sex is itself a construct. The brief thus suggests that the Policy Paper leaves many outside of its remit, while reproducing narratives about gender that are tethered to power and exclusion. Parts III and IV consider the legal and socio-political ramifications of the gender perspective as it is currently articulated. In Part III,

the brief considers some of the legal implications of the Policy Paper's developments and exclusions, noting that, particularly in its approach to article 21(3) of the Rome Statute, it is possible, but not certain, that a broader remit for gender is inculcated legally.

Part IV moves beyond the law, to consider the ICC as an agent of norms and legibility about violence and identity and discusses the broader narratives potentiated and reproduced by the Policy Paper. In this respect, it is argued that, in light of the ICC's broader normative role, and the claims by it and the epistemic communities surrounding it to broader possibilities for justice, as well as its self-conscious approach to improving international justice's approach to gender, the omissions participate in a globalised marginalisation, which must be rectified to eliminate the kinds of discrimination on the basis of gender actuated through binary and cisnormative approaches. Finally, Part V offers concluding thoughts on broader languages of gender and justice.

In Sara Ahmed's prolific *Living a Feminist Life*, she notes, '[t]here is no guarantee that in struggling for justice we ourselves will be just. We have to hesitate, to temper the strength of our tendencies with doubt; to waver when we are sure, or even because we are sure.'[5] It is in this spirit that this appraisal is offered. Many at the ICC, and especially in the OTP, are tirelessly working for justice. Many around it are perplexed and obsessed with the scourge of sexual and gender-based violence, and are committed to addressing it. In this context, I hope to think through some of the ways in which struggles for justice might be tethered to either singular conceptions of justice, and erroneous and violent approaches to gender. I hope through this to think through how we might be better. In a similar spirit, taking Kapur's directive[6] to situate the self within the research seriously, I note here that I am a white, cisgendered, middle-class woman who has never lived through 'armed conflict'. I bring this positionality to all my endeavours, and I am humbled by how little I can know. I note the limitations of this work in this regard, remain open to critique, and most profoundly, at no point do I claim to speak for anyone. Being critical of the homogenisation of experience engendered by international criminal law, I seek very self-consciously to avoid doing the same.

PART II
The inclusion of a gender perspective at all stages of investigation and prosecution

One of the key outcomes of the Policy Paper is an attempt at institutionalising a 'gender perspective' into the OTP's work. The OTP has frequently stated that, specifically with the tenure of Chief Prosecutor Fatou Bensouda, it has inculcated a gender perspective into all aspects of its functioning, including through its work to '[present] gendered aspects of conflict in connection with the contextual elements of the crimes as defined by the Rome Statute,'[7] its establishment of the Gender and Children Unit at the OTP, which is 'comprised of advisers with legal and psychosocial expertise, to deal specifically with gender and children issues',[8] and its appointment of Special Gender Advisers to the Prosecutor to assist in '[integrating] a gender perspective into all areas of the OTP's work'.[9] In almost all addresses about the Policy Paper by the OTP, its gender perspective is emphasised.[10]

The Policy Paper defines its gender perspective in the following way:

> *'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.*[11]

In terms of the scope of what is considered as regards the perspective it is clear that the OTP's gender perspective attempts to include both the specifies of sexual and gender-based violence, and gender-sensitive approaches to victims and witnesses, as well as gendered approaches at all stages of examinations, investigations and prosecutions. Bell has argued that it goes beyond a simple 'gender mainstreaming',[12] which often involves superficial box-ticking of gender in such ways that frequently see gender marginalised rather than elevated,[13] and often sees gender treated in isolation as opposed to as one of several intersecting identities that may produce complex oppressions in their interactions, overlaps and tensions.[14]

The articulation of an internal institutionalised approach to taking sexual and gender-based violence seriously is a key contribution of the Policy Paper especially in light of the historical neglect of sexual and gender-based violence in conflict. Despite much rhetorical and policy attention to accountability for conflict-related sexual and gender-based violence[15] and moments of prosecutorial development (such as, for example, the *Akayesu* case at the ICTR[16] which considered for the first time rape as an act of genocide, or the *Bemba* case,[17] the ICC's first conviction for sexual and gender-based crimes), actual prosecution of sexual and gender-based violence in international justice has been slow.

Part of this, of course, relates to the glacial pace of international justice.[18] In cases dealing with sexual and gender-based violence, international justice has often moved even more slowly.[19] When one considers the specific, often procedural ways in which gender-based violence has been neglected in international legal institutions, including by investigation and prosecution teams, as well as judicial benches, it is clear that at least part of the reason for this is related to the inadequacy of measures to ensure that sexual and gender-based violence is understood and taken seriously. Jarvis and Vigneswaran note that misconceptions about sexual and gender-based violence at the ICTY meant that sexual and gender-based crimes were sometimes subjected to a higher numerical threshold or differing analyses when compared to other crimes.[20] In other contexts, despite evidence of sexual violence, prosecutors have failed to bring charges related to sexual and gender-based crimes. In the *Akayesu* case at the ICTR, for example, sexual and gender-based crimes were not initially included in the charges, and it was predominantly through rigorous questioning by Judge Navanethem Pillay and the judges' subsequent invitation to the prosecution to investigate sexual violence and if appropriate to amend the indictment that Akayesu was convicted of rape as an instrument of genocide and a crime against humanity.[21] Similarly, at the ICC, the progress towards prosecution of sexual and gender-based violence has been remarkably protracted. Many critiqued the OTP's investigation and its failure to include charges for sexual and gender-based crimes in the *Thomas Lubanga-Dyilo* case despite testimony and documentation of sexual and gender-based crimes including sexual slavery.[22] The ICC saw its first conviction for sexual and gender-based violence in the *Jean-Pierre Bemba Gombo* case,[23] some 14 years after its establishment.

Of course, the minimisation of sexual and gender-based violence is not unique to international criminal justice; many factors and narratives related to globalised patriarchy coalesce to produce criminal justice systems that do not provide adequate justice for sexual and gender-based violence in domestic and international jurisdictions. However, as the experiences of the ICC and other international criminal tribunals suggest, institutionally, taboos, discomfort of personnel with sexual violence, unacceptable squeamishness of investigators, judges, and prosecutors, and other factors linked to patriarchal ideas often lead to inadequate addressing of sexual and gender-based crimes.[24] In light of this, the institutionalisation of perspectives and practices that take sexual and gender-based violence seriously at all stages of examination, investigation and prosecution and in all interactions with witnesses is a critical contribution (or concretisation) of the Policy Paper and is important in pursuing accountability that moves beyond expanded rhetoric.

To this effect, it appears that the OTP has put in place internal mechanisms by which to promote compliance, and the Policy Paper has been incorporated into the OTP's 2016–2018 strategy.[25] Of its nine strategic goals, Goal Two is to 'continue to integrate a gender perspective in all areas of the Office's work and to implement the policies in relation to sexual and gender-based crimes…and crimes against children.'[26] In this regard, it speaks specifically to implementation of the Policy Paper, and to including staff training, innovative investigation and prosecution, and to 'paying special attention to' interaction with witnesses and victims, and adopting a gender perspective and gender analysis in all of its work.[27] It further appears that the OTP is instituting specific measures to push back against the neglect of sexual and gender-based violence. It has, for example, introduced a policy whereby, should a team take a decision not to pursue sexual violence charges, reasons for that decision are recorded in writing and brought to the attention of the Executive Committee.[28] Processes such as these reflect an attempt to act against approaches internally which undermine the experience and existence of sexual and gender-based violence. The creation, thus, of processes as embodied by the Policy Paper, to take sexual and gender-based violence seriously and to work against the negation of gendered harms, is significant.

PART III
Definitions of sex, gender, and gender perspective: social construction within binaries?

While the existence and articulation of a gender perspective in the OTP's work is important, it is equally important that the content of that gender perspective and its conceptualisations of gender, sex, and sexual orientation, and relationships between them do not produce and reproduce exclusion and violence. The Rome Statute defines gender as '[referring] to the two sexes, male and female, within the context of society'[29] and stipulates that '[t]he term "gender" does not indicate any meaning different from the above.'[30] The definition has been the subject of extensive feminist critique with acute reference to the way it 'presents gender as primarily an issue of biology, rather than one of social construction',[31] and its potential to exclude sexual orientation.[32] In a 2000 report of the Report of the UN Special Rapporteur on violence against women, its causes and consequences to the Commission on Human Rights, then Special Rapporteur, Ms Radhika Coomaraswamy noted

that '[the Rome Statute's definition of gender] by re-emphasising the biological differentiation between men and women, prevents approaches that rely on the social construction of gender'.[33] Indeed, the Rome Statute's definition is both binary, and dangerously conflates assigned sex and gender.

The remainder of this policy brief examines how the Policy Paper has addressed some of the failures of the Rome Statute's definition. On the one hand, it argues that reference to the social construction of gender in the Policy Paper provides some clarity on how the OTP has interpreted 'within the context of society' in the Rome Statute, suggesting that it has read it to include the social construction of gender, thus providing a clearer articulation thereof than is present in the Rome Statute, while eschewing an interpretation of 'within the context of society' that might exclude sexual orientation on the basis of societal norms. It further argues that explicit reference to sexual orientation in the Policy Paper goes some way towards discounting homoantagonistic interpretations, but fails to surmount its heteronormative framing. Despite some improvements however, it argues that the Policy Paper's approach still rests on flawed notions of gender and focuses on four interrelated articulations of these. First, despite the explicit referencing of the social construction of gender, the ways in which the construction is discussed in relation to sex and gender indicates that there remains a substantial remnant of conflation thereof. Second, the Policy Paper consistently treats gender in binary terms, with repeated use of a woman versus man or girl versus boy dichotomy, thus erasing the multiplicity of gendered identities. Third, the Policy Paper consistently treats sex as a binary between 'male' and 'female', thus excluding the variations in biological sex. Finally, relatedly, the Policy Paper fails to include consideration of the ways in which sex is socially constructed, treating 'biological sex' as immutable and fixed despite substantial variations in biological sex and sexed identities.

This policy brief argues that these assumptions collectively suggest that the Policy Paper's developments vis-à-vis the Rome Statute mean while some trans women and trans men might be included in the remit of the gender perspective in light of the acknowledgement of the social construction of gender, transgender and non-transgender individuals who do not subscribe to a gender binary, intersex individuals, gender nonconforming individuals, gender fluid or gender queer individuals, or any individuals whose gender identities do not conform to the man versus woman or male versus female binary evoked in the Policy Paper are excluded. This, it is argued, causes grave harm in invisibilising gender-based violence that happens on the basis of gender or sexual identities not encompassed by the Policy. At the same time, in light of the broader role of the ICC and the global socio-cultural effects of the law, it contributes to a globalised marginalisation of individuals from sexual and gender minorities through the violence of exclusion. Ultimately, it argues that in light of the OTP's demonstrable interest in broadening approaches to gender, these concerns ought to be explicitly and urgently addressed to efface spaces for the violence of ambiguity around the humanity of individuals outside of the scope of the Policy Paper.

Sexual orientation and 'in the context of society'

In the aftermath of the Rome Conference, one of the key concerns raised by feminist scholars was that the definition of gender in the Rome Statute excluded sexual orientation. Chinkin argues that the definition '[excludes] issues of sexuality.'[34] Much feminist critique pivoted on the use of the phrase 'within the context of society' in the definition which, while some argued might be interpreted as a reference to socially constructed gender roles,[35] some argued it might also be interpreted to mean that sexuality or sexual orientation be excluded if the norms of particular societies were homoantagonistic.[36] This line of critique reflects the fact that a group of states and lobby organisations at the Rome Conference was intent on excluding sexual orientation from the definition of gender.[37] Oosterveld notes that at the Rome Conference, the definition of gender was a compromise between organisations and states on the one hand, who sought reference to the inclusion of gender at various points in the Statute as well as reference to the social construction thereof, and organisations and states on the other hand, who sought at some points to exclude the term gender wholly from the statute, and later to link it closely to biological sex, while advocating against its possible use in the protection of rights based on sexual orientation.[38] While the latters' view is a confusing and violent conflation of gender identity and sexual orientation, the lack of explicit reference to sexual orientation in the Rome Statute, coupled with the ambiguity of the definition and the explicit intent of some actors at the Rome Conference to exclude sexual orientation, means that a nebulous reading has prevailed and at times been instrumentalised in support of homoantagonistic objectives.[39] The Holy See, for example, has used the Rome Statute's narrow definition of gender in various international forums to advocate for exclusionary approaches to sexual orientation and gender.[40]

The Policy Paper has provided some clarity on the inclusion of sexual orientation. The Policy Paper, unlike

the Rome Statute, explicitly includes sexual orientation as a possible ground for adverse discrimination under article 21(3) (which states that '[the] application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights'.)[41] In its discussion of article 21(3) the Policy Paper notes that the OTP will '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'[42] [emphasis added]. In contrast, the Rome Statute, in article 21(3) not only excludes sexual orientation, but redirects to its restrictive definition, noting that '[t]he application and interpretation of law pursuant to this article must be…without any adverse distinction founded on grounds such as *gender as defined in article 7, paragraph 3*, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'[43] [emphasis added]. It is clear, then, that the drafters of the Policy Paper were attempting to move away from the potential homoantagonism of the Statute's definition and viewed article 21(3) as the vehicle for this. In the same discussion on article 21(3), in footnotes, the Policy Paper includes a direct reference to LGBT rights in its discussion of international human rights norms, citing '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', and a 2013 statement by then High Commissioner for Human Rights, Navanethem Pillay, and several world leaders to end violence and discrimination against lesbian, gay, bisexual, and transgender persons.[44] It appears thus, that while there is still significant heteronormativity in the document, the Policy Paper rejects the interpretation of the Rome Statute as excluding sexual orientation.

Somewhat socially constructed: binaries and residues of sex/gender conflations

The Policy Paper appears to approach the term 'within the context of society' as encompassing the construction of gender. As indicated above, it does not seem to attach the term to the notion that persecution on the basis of sexual orientation is variable according to attitudes within individual societies. The failure to include the construction of gender has been the subject of some of the most vociferous critique of the Rome Statute's definition. Few feminist commentators have considered the definition satisfactory nor 'within the context of society' as an acceptable indicator of social construction.[45] Cossman has argued that 'within the context of society' potentially narrows definitions of gender. She notes, '[i]t is not entirely clear that it is even intended to include the more typical understanding of gender as socially constructed roles and values, although that may be the intention of the words "within the context of society"'.[46]

Throughout the Policy Paper, it appears that the OTP views the use of 'within the context of society' in the Rome Statute as including an understanding of gender as 'socially-constructed'. Its definition of gender in its use of key terms reads:

> *'Gender', in accordance with article 7(3) of the Rome 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, and attributes assigned to women and men, and to girls and boys*[47]

At face value, the Policy Paper echoes the Rome Statute's definition, which, it is of course not mandated to alter. However, the inclusion of 'this definition acknowledges the social construction of gender' after provision of the substantive parts of the Statute's definition, suggests a will to clarify the inclusion of the social construction of gender and to outline its understanding of gender accordingly. The latter is affirmed by references throughout the paper suggesting that social construction of gender will be considered as part of the OTP's gender analysis, including in assessing the gendered nature of crimes,[48] and in its discussion of policy as related to article 21(3) of the Rome Statute.[49] This is an important inclusion, as it suggests a broader purview of gender than one defined by assigned sex as is encompassed in the Rome Statute. In this regard, reference to the social construction of gender implies that trans* individuals who identify as men and women may be included within the realm of the OTP's consideration of men and women respectively. It further takes into account the consideration of the roles associated with the two genders it covers and the ways in which these might interact with identity, violence and persecution. There are two additional areas of divergence in the Policy Paper's understanding of gender that suggest a broader interpretation than the Statute's definition provides. First, while the Rome Statute refers in its definition of gender to '*the two sexes*, male and female…'[50] [emphasis added], the Policy Paper omits 'the two sexes', thus avoiding the blatant conflation of sex and gender embodied in the Statute. Second, the Policy Paper's omission of the Rome Statute's restrictive, 'this definition does not indicate any meaning from the above'[51] in its use

of key terms section[52] suggests a will to surmount constraining ambit of the Statute's definition.

Despite reference to the social construction of gender, significant concerns remain as regards the OTP's articulation of both gender and its social construction. First, while the OTP explicitly suggests that gender is socially constructed, and goes some way in rejecting the conflation of sex and gender, effectively, gender and sex are used interchangeably throughout the Paper. This is manifest in the Paper's failure to differentiate between 'male' and 'men', on the one hand, and 'female' and 'women' on the other. Where 'woman' and 'man' refer to two of the possible genders, 'female' and 'male', when used as nouns, refer to biological sex (albeit in problematic ways which preclude the social construction and non-binary nature of sex, as discussed below). When used outside of the adjectival form as a placeholder for 'man' or 'woman', they effectively equate gender with assigned sex, which contradicts the fact that sexual organs are not deterministic of gender, and that individuals should not be reduced to their reproductive functions, issues which, it seems, the Policy Paper is seeking to push back against. The conflation of the two is evident throughout the Paper. In the description of the policy's gender perspective, for example, it is stated that, it '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'[53] [emphasis added] and on modes of liability it notes that '…rape and other sexual and gender-based crimes against both *females and males* are often widespread...'[54] [emphasis added]. Essentially, thus, by resorting to this fairly common and problematic equation, overtures at social construction are accompanied by reduction of gender to assigned sex, reproducing biologically determinist notions of gender.

Second, the Policy Paper presents gender as necessarily binary; despite noting that gender is constructed, the only possible gender identities presented in the Policy Paper are 'man' and 'woman'. This excludes from purview the multiplicities of possible gender identities and excludes those whose gender identities do not conform to a cisnormative gender dichotomy. That is to say, it reproduces the idea that the norm is for individuals to identify as either men or women, and to frame those who identify differently as 'other'.[55] This binary gender construction is introduced in the definition of gender and repeated throughout the paper including, for example, on the nature of gender-based crimes ('[t]hey may include non-sexual attacks on women and girls, and men and boys, because of their gender')[56] and on expertise ('[t]he 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').[57] This means, then, that whatever space for social construction the Policy Paper provides for is linked to individuals' being gendered as either man or woman. While the inclusion of socially constructed gender roles and some oscillating distancing of gender and sex in excerpts above may (but as indicated above, not without ambiguity) provide for the inclusion of transgender and cisgender individuals who identify as men and women, the restriction of gender to a binary indicates that there is no provision for either cisgender or transgender individuals who do not identify as either men or women. This means that gender fluid, gender queer, or gender non-conforming individuals, essentially anyone who does not identify as 'man', 'woman', 'boy' or 'girl', are excluded.

Definitions of sex: immutable, binary and necessarily cissexual

It is worth turning, then, to the ICC's and the Policy Paper's definition and addressing of 'biological sex'. The Rome Statute itself does not define sex, but treats it as biologically-defined, deterministic of gender, and as a binary between male and female ('gender refers to the two sexes, male and female').[58] The Policy Paper, however, does define sex, as 'the biological and physiological characteristics of men and women'.[59] For this, the Policy Paper relies on a definition by the World Health Organization. This definition reflects a patriarchal, scientifically invalidated[60] definition of sex, which assumes a sex binary and negates the ways in which 'biological sex' is itself constructed and tethered to power.[61] In this regard, Charlesworth and Chinkin note, 'if we attend to the constitutive role of the law and society in forming the "naturally" sexed person, the concepts of "sex" and "biological difference" can be seen to have constructed, contingent and political elements'.[62] In contrast to its position on gender, the Policy Paper does not consider the ways in which assigned or biological sex is constructed. The omission from consideration of the construction of sex and the discussion of it in a male/female binary excludes intersex individuals, any individuals who for biological, personal, or political reasons do not subscribe to a sex binary, while situating sexed identities as objects of inquiry.

The idea that sex is fixed, negates the ways in which sex is assigned prenatally or at birth, itself an act of construction. Medically, this assignment most often does not reflect an assessment beyond a regarding of genitals or, in some cases, chromosomal testing.[63] Despite assumptions that there are two possible sexes, factors which coalesce to define sex – hormones,

internal sex structures, gonads and external genitalia – have significant variation among individuals and exist beyond a male versus female binary.[64] Factors such as phenotypes, assigned sex and self-identified sex also vary extensively among individuals.[65] Indeed, a survey of medical literature from 1955 to 2000 notes that despite assumptions about sex binaries, at least 2% of live births did not subscribe to the dimorphic male/female sex binary,[66] although numbers are irrelevant to the question of whether this is important. In this regard, intersex individuals are excluded from the male versus female dichotomy and fall outside the ICC's remit. Additionally, the binary, in tandem with the aforementioned tethering of gender and assigned sex permits the marginalisation of transgender and intersex individuals, whose 'biological sex' is presented as an object for scrutiny. Scientists and biologists have long been discussing the variability of sex, however, legal and policy spaces have not reflected this discussion and cling to binary and immutable notions of sex. As Claire Answorth, notes, '[b]iologists may have been building a more nuanced view of sex, but society has yet to catch up'.[67]

This dichotomous presentation reproduces an idea of sex premised on patriarchy. Binary assumptions about sex rest on an idea that positions as the norm men whose 'biological sex' is aligned to their gender identity from which those who do not align to this narration are considered abberations. Adjacent to this, the ways in which this binary is constructed, rely on patriarchal ideas about men and masculinities, and women and feminities. While sex is frequently framed as chromosomally determined (females present XX chromosomes, while males present XY chromosomes), if one examines the ways in which sex is medically 'reassigned' at birth for those whose genitals do not align with their chromosomes, it is clear that sex constructions rest on patriarchally-imbued notions about gendered roles. In this regard, Julie Greenberg, notes:

> *XY infants with 'inadequate' penises must be turned into girls because society believes the essence of manhood is the ability to penetrate a vagina and urinate while standing. XX infants with 'adequate' penises, however are assigned the female sex because society and many in the medical community believe that the essence of womanhood is the ability to bear children rather than the ability to engage in satisfactory sexual intercourse.*[68]

For author and biologist, Julia Serano, clinging to sex binaries reflects a societal predilection for essentialism, despite the malleability and variability of sex. Serano notes, '[p]eople tend to harbor essentialist beliefs about sex – that is, they presume that each sex category has an underlying "essence" that makes them what they are. This is what leads people to assume that trans women remain "biologically male" despite the fact that many of our sex characteristics are now female'.[69]

The Policy Paper thus implicitly erases intersex individuals, and equally may erase transgender individuals in turn, participating in a normalisation of cisnormative approaches to sex and suggesting that those whose sexual identities exist outside of this are not worthy of justice nor even linguistic inclusion. Read in conjunction with the discussions of gender above, it is clear that both gender and sex are conceptualised in the Policy Paper in ways, while moving some way from the constricting definition of the Rome Statute, still engender marginalisation. In this regard, of the four flawed notions introduced at the beginning of this section, only the assumption that biological sex determines gender has been partially, but inadequately, challenged by the Policy Paper. The assumptions that biological sex is immutable, and that gender and sex operate in man/woman and male/female binaries respectively remain unchallenged by the Policy Paper. The remainder of this section turns to a discussion of the legal and societal omissions engendered by these assumptions and their potential impacts both within and outside of ICC situations and cases.

Erasures in law and policy

The exclusions above mean that, in its current iteration, many individuals of sexual and gendered minorities fall outside of the scope of the OTP's consideration. This is dehumanising in and of itself. Moreover, in light of the fact that those with marginalised sexual and gendered identities are frequently victims of targeted physical, sexual, social, economic, and epistemic violence globally, in conflict and in 'peace', it is important to consider and to redress the violence of this omission. If this gender perspective excludes those who do not subscribe to flawed and often violent assumptions and impositions about sex, sexual orientation, and gender, then it is effectively marginalising many both within and outside of ICC situation countries. In the context of investigations and prosecutions, the inadequacy of language and policy means that those with marginalised sexual and gender identities are not explicitly included within the remit of what is considered gendered (and other intersecting) harms, and that the specific harms associated with marginalised sexual and gender identities can be excluded. This goes beyond the question of article 21(3) to the question of appropriate investigation and prosecution practices, victim sensitivity, and witness protection. All of the

process-centred aspects of the paper at this point, in light of the significant silences on gendered identities discussed above, omit from view those who do not subscribe to the identities described.

PART IV
Legal grounds

The discussion of sex and gender in essentialist and binary terms means that, in its current textual form, the Policy Paper does not provide for a plethora of possible victims of sexual and gender-based crimes. Revisiting the Policy Paper's definition of gender-based crimes, which states, '[g]ender-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',[70] it is clear that the applicability of the Rome Statute's protection for sexual and gender-based crimes is limited. On the one hand, read in conjunction with both the Policy Paper's inclusion of sexual orientation in its discussion of article 21(3) and the repeated delineations of the OTP's consideration of socially constructed gender roles, it is clear that transgender individuals and cisgender individuals who identify as men or women or boys or girls, regardless of their sexual orientation are recognised by the OTP as persons against whom gender-based crimes might be committed.

However, in its current iteration, transgender and cisgender and intersex individuals who do not subscribe to a gender binary or to cisnormative approaches to gender and sex are excluded from this articulation. Moreover, the repeated use of terms delineating biological sex (male and female) to articulate gendered roles re-introduces ambiguity into the purview of the law's coverage, with respect to some transgender and intersex individuals. It becomes even more pointed when one considers that individuals of marginalised sexual and gendered identities are so devastatingly frequently victim to violence, sexual or otherwise on the basis of their gendered and sexed identities. These harms exist globally, and are often intensified in their intersections with race and class. In the United States, for example, consistent studies have shown deliberate attacks on transgender and gender non-conforming people, and particularly transgender and gender non-conforming people of colour, who are targeted on the basis of their gendered, racial and sexual identities, as well, very often, as the interactions of these identities with their classed identities. In 2016, of 28 LGBTQ and HIV-related homicides, 68% were transgender and gender non-conforming people.[71] Of the total number of homicides, 61% (17) were transgender women of colour.[72] Criminal justice systems globally consistently fail transgender individuals. A 2012 US study found that transgender survivors reporting incidents of violence to the police were 2.7 times more likely to experience police violence, and 6 times more likely to experience physical violence from the police compared to white cisgender survivors.[73] This emerges in the context of police targeting of transgender Americans, and particularly black transgender Americans[74] and assaults on the humanity of transgender individuals reflected in such abhorrent developments as discriminatory and transantagonistic bathroom bills.

These policies and acts of violence are a merely indicators, in one small example in a single context of the specificities of violence directed towards transgender and gender non-conforming individuals. They are examples of targeted attacks against individuals on the basis of their gendered identities and their intersections with racial and classed identities, and specifically because these identities include gender identities that are not cisnormative or heteronormative. It is necessary to consider how the conceptualisation of gender in the Policy Paper allows for the recognition of such attacks, and the extent to which it suggests the recognition of the victims as recognised groups for atrocity crimes as per the Rome Statute.

Gender is not included as a descriptor of the protected groups against which genocide can be carried out,[75] which is limited to 'a national, ethnical, racial or religious group,'[76] (itself a reflection of the enduring patriarchy of international law). In this regard, in current form, actions 'with intent to destroy, in whole or in part' a group of people on the basis of their gender are not covered. There is, however, scope for the expansion of this. Grady, drawing on legal history and recent jurisprudence has suggested that the definition may be expanded to include gender as a protected group.[77] Speaking specifically to transgender populations, Kritz has argued that the *Akayesu* case at the ICTR offers some possibility for expansion of the grounds on which genocide may be committed to include transgender populations, in light of the fact that despite the Court's difficulty in classifying the Tutsi as one of the four groups offered protection in the Genocide Convention and article 6 of the Rome Statute, it decided that the Tutsi were entitled to protection.[78] It remains to be seen whether the ICC will expand the recognised groups to include gender; if it did, the limitations of its current epistemic framing of gender do not provide for broader protection. In particular, the intersections of transantagonistic gendered and racialised violence, or what Krell has described as 'racialised transmisogyny'[79]

suggests that the neatly delineated categories cannot offer a full scope for the multiplicity of intersecting harms.

For crimes against humanity, which require acts committed 'as part of a widespread or systematic attack directed against any civilian population,'[80] a similar exclusion of gender does not exist. Indeed, the explicit inclusion of gender as a basis on which persecution can be committed is the source of much of the problematic framing of the Rome Statute as regards gender. Under article 7(1)(h), the Rome Statute criminalises '[p]ersecution 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 recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court'.[81] Similarly here, the Policy Paper's attention to the social construction of gender might thus be understood to include the persecution of individuals on the basis of their gendered identities, provided their gender identitites subscribe to a binary. Moreover, the Policy Paper's explicit exclusion of discrimination on the basis of sexual orientation in its discussion of article 21(3) implies that persecution on the basis of sexual orientation would equally fall under the remit of the OTP. Again, however, the oscillation on the social construction of gender, and the fidelity to a gendered and sexed binary means that textually, at least intersex individuals, genderqueer or gender non-conforming individuals and cisgender or transgender individuals who do not identify as men or women fall outside the Policy Paper's scope. Again, this is concerning in and of itself, but the specificity of persecution of individuals of marginalised gendered and sexed identities is such that this exclusion is all the more pertinent.

It is possible that article 21(3) of the Rome Statute, and its broadened reflection in the Policy Paper provide latitude for addressing this. In principle, the negation of such identities may be counteracted by the Policy Paper's stipulation that the OTP will '[u]nderstand the intersection of factors such as gender, age, race…, and other status or identities which may give rise to multiple forms of discrimination and social inequalities'.[82] This might be used to expand the understandings of the OTP and the Court to include gender minorities. In this regard, it appears that the OTP recognises some of the limitations of the gender definition and sees article 21(3) as a vehicle for addressing this. At a 2017 Symposium organised by the Institute for Justice and Reconciliation and the University of Pretoria, Senior Legal Advisor to the Prosecutor of the ICC, Shamila Batohi, highlighted a need to unpack existing definitions of gender and sexual violence at the ICC, arguing that the recognition of a 'third gender' and gender neutrality in India and Australia were crucial for the development of understandings of gender.[83] This is a critical and welcome development, and indeed, the OTP's receptiveness is important. At the same time, in light of the Policy Paper's intention to guide the work of its office, an unarticulated approach is potentially highly damaging. Indeed, if the parameters for investigators do not directly address the specificity of gendered harms experienced by those of marginalised gender identities, then it is not clear how investigators would be positioned to look for these specific harms in the course of their investigations, nor how the OTP is making specific provisions to provide for the psychosocial care and other forms of victim-sensitive approaches delineated as regards gender in the Policy Paper. As article 21(3) may be a legal vehicle for addressing the exclusions of the Rome Statute, so too should concomitant processes reflect broader understandings of gender.

PART V
Beyond the Law: Policy as Power

The potential of article 21(3), while feasibly a tool for legal inclusion, also embeds the effective relegation of gender minorities to 'other status or identities'; it is a literal othering. The ICC, and by extension (and indeed independently) the Policy Paper have ramifications beyond their legal remit to influence and on occasion be instrumentalised in legal, societal and political spheres. It is thus necessary to situate the omissions of the policy as they pertain to gender in broader societal perspective. The guiding premise of this analysis is that international criminal law, and law in general, exists within a process of social and political production. In this regard, the law, and in this case, the ICC, has the power to define ways in which violence is named, given attention, addressed and defined. It equally has the power to define what remedies are appropriate for redress and accountability, as well as who is responsible.[84] The ways in which the ICC defines itself, as well as advocates around it frame it, suggest that it is often viewed as normatively instructive as to what constitutes violence and harm. And indeed, its judgments, its actions and its policies have impact on the societies in which it is involved, as well as more broadly, globally, the way in which harms are framed.

The broader normative effect of the law was framed by Chief Prosecutor Fatou Bensouda, at an event at The Hague Academy:

> *I am confident that in time, through its deterrent and disciplining effect, the law will help alter archaic norms in this domain, establishing new*

norms of acceptable conduct. One of the most important measures of achieving justice and accountability for sexual and gender-based violence is effecting a change in attitude, not only among investigators, prosecutors, legislators and security personnel, but also among communities themselves.[85]

In this regard, while it may be true that the ICC deals with individual cases and indictees, its premising of its work on the power of deterrence, and attitudinal shift, suggests a broader scope of influence. If it is accepted then, that the law (and the ICC) has power to shift attitudes and approaches, the broader ramifications in terms of mediating what is considered harm ought to be considered. In this regard, Henry argues pointedly, '[i]nternational criminal law…produces, legitimates and mediates harm according to its internal and external mechanisms of legal governmentality. It authoritatively dictates which harms are "extraordinary" and who can speak about them.'[86] In this regard, the same argument that relies on the notion of the ICC as a deterrent, thus imbuing it with a power beyond its mandate in situations under investigation or prosecution, must articulate that it has equal power to enumerate who is outside of its scope, what violence is considered real, and whose experience is validated and whose effaced. This is particularly pertinent in the context of sexual and gender-based crimes, where, in all jurisdictions and societies, there is much operating against taking victims of sexual and gender-based violence seriously. So often victims and survivors are mistreated by justice systems, and their experiences invalidated by societies and globalised narratives surrounding respectability politics and misogyny.[87] In light of the law's social and cultural power, inclusions potentially engender broader protection, just as exclusions risk affecting not just those whose experiences are under investigation in particular situation countries, but broader emancipatory possibilities for justice.

If one takes this into account, then, while arguments around article 21(3) have effect legally, they have little effect in eroding the linguistic and potential for epistemic and physical violence actuated by the omissions. Indeed, in effectively sidelining some transgender, transsexual and intersex individuals, the Policy Paper risks silencing, and through silencing marginalising, in situating cisgender and cissexual individuals as the norm. As transfeminist academic and artist Sandy Stone notes,

What I am saying is that one of the ways that people justify oppressing people of any alternative gender or sexuality is by saying that the social norm is natural. That is, it originates in the authority of Nature itself. In other words, it comes from god, an authority to which to appeal. All of this is, in fact, a complete fabrication, a construction. There is no 'natural' sex, because 'sex' itself as a medical or cultural category is nothing more the momentary outcome of battles over who owns the meanings of the category. There is a great deal wider variation in genetics than most people except geneticists realise, but we make that invisible through language. The way we make it invisible through language is by having no words for anything except male and female. One of the ways our culture erases people is by not having words for them. That does it absolutely. When there's nothing to describe you, you are effectively invisible.[88]

Languages of exclusion are powerful producers of discrimination. Indeed, such languages are a form of gender-based violence. In presenting gender and assigned sex in binary terms, we risk reproducing precisely the same gendered narratives that produce gender-based violence towards transgender people. Talia Mae Bettcher notes the ways in which transphobic violence is centred on the notion that transgender individuals are viewed as representing a disconnect between gendered and sexed identities and are thus deemed 'deceivers' or 'pretenders'. For Bettcher, '[f]undamental to transphobic representations of transpeople as deceivers is an appearance-reality contrast between gender presentation and sexed body.'[89] Bettcher details the ways in which several incidents of violence towards transgender individuals were framed around exposure of transgender individuals, presented as deceiving their attackers and broader publics.[90] In this regard, juxtaposed with the Policy Paper's partial reconstellation of the view that sex and gender are the same and its binary presentation, it is clear that precisely the violence detailed by Bettcher is enabled by the Policy Paper.

Beyond its obvious exclusions, binaries and essentialism, are part of broader patriarchal productions of gender and power. The binary sex/gender system is itself a means of exercising power. For Lugones, 'biological dimorphism and heterosexual patriarchy are all characteristic of…colonial/modern organisation of gender. Hegemonically, these are written large over the meaning of gender.'[91] The assignment of fixed, dichotomous gendered and sexual identities is, in many ways historically linked to a process of colonial control.[91] Oyéwumi, for example notes, that 'gender was not an organising principle in Yoruba society prior to colonisation by the West'[93] and that gender definitions premised on 'female/woman' or 'male/man'

'were neither binarily opposed nor hierarchical'.[94] Historically, gender fluidity, and non-binary sex identities have existed in many contexts without the need for binary assignments. Fausto-Sterling, for example, details biblical regulations for 'people of mixed sex'.[95]

Lugones pointedly notes the tethering of dimorphic sex to colonialism, noting that 'sexual fears of the colonisers led them to imagine the indigenous people of the Americas as hermaphrodites or intersexed, with large penises and breasts overflowing with milk'.[96] Lugones draws on Gunn Allen to note that 'many Native American tribes were matriarchal, recognised more than two genders, recognised "third" gendering and homosexuality positively and understood gender in egalitarian terms rather than in terms of subordination that Eurocentred capitalism imposed on them.'[97] Singer directly links the attempt to subordinate two spirit people with the genocide of indigenous people in North America. For Singer, 'white supremacy through white solidarity and consensus has imposed its Western concept of sexuality and gender upon Indigenous peoples, seeking the destruction of the Two-Spirit. White supremacy through exclusivity, has defined white in ways incompatible with Indigenous life and therefore has sought the destruction of the Two-Spirit.'[98] These analyses indicate the ways in which, not only are both sex and gender constructed, largely along hegemonic Western understandings, but the proliferation of the binaries reproduces particular power relations that marginalise and embody violence. For Gosset, 'trans and gender nonconforming people are situated (like the violence of the gender binary which we oppose) within the theoretical and political coordinates of history and history's present tense – the afterlife of slavery and colonialism'.[99]

In reproducing cisnormative and binary gendered and sexed identities, there is thus a further reification of power relations which embody and exert violence. Dora Silva Santana speaks to the ways in which transitioning as a black trans woman in Brazil along a discourse of racial democracy, 'negates the experiences of black trans people, including the negation of the effects of race on a black trans body and the negation of one's gender due to racialised constructions of gender'.[100] In this regard, the Santana notes, that one of the materialisations of this is 'in the pathologising scrutiny of my body and story through my forced confession in order to convince the state to change my documents'.[101] In a similar vein, in situating a gender binary concomitant with a tethering of sex and gender as the norm, the Policy Paper is a product of and reproducer of narratives that invite scrutiny on the bodies and experiences of those outside the binary.

In and of themselves, these narratives embody violence, but, if we are to take the Policy Paper, and its intended reach seriously, the potential impact of these narratives is serious. While the primary objective of the Policy Paper is to guide the OTP's work, it is stated both within the Policy Paper[102] and in other forums, that the work of the ICC may guide domestic jurisdictions. At an address at The Hague Academy in 2015, Chief Prosecutor, Fatou Bensouda remarked,

> *It is our hope that my Office's Policy Paper on Sexual and Gender-Based Crimes will also serve as a guide for States and other relevant actors as they work towards combatting sexual and gender-based crimes more effectively. Our policy may assist national jurisdictions as a useful reference document in their efforts to adopt, formulate or amend domestic legislation and refine their practices where deemed necessary.*[103]

Such an ambitious objective places the exclusions and binaries in sharp relief.

As one of the only documents in international peace and justice to use the term 'gender perspective', the Policy Paper's reach exists in realms beyond the legal, making the impact of both its contributions and its limitations all the more profound. The recent study for UN Women assessing the use of gender perspectives in peace agreements cited above takes its starting point for what constitutes a 'gender perspective' from the ICC OTP's Policy Paper. The study lauds the Policy Paper for its transcendence of the narrow limitations of 'gender mainstreaming'. In this regard, Bell notes, 'this definition suggests that a gender perspective goes beyond a mainstreaming approach would involve "assessing policy" for its impact on women, with a focus on integrating women's concerns into policies and programmes, towards an approach which tries to understand the ways in which policies connect to questions of power relations between men and women.'[104] In this regard, the Policy Paper's fundamental understanding of gender in the way that it does can find expression in other forums.

Thus, perhaps, it is precisely because of two on the surface positive factors, that broader potential for marginalisation embeds itself in the Policy Paper. First, its uniqueness in an international legal and/or policy context in the explicit inclusion of a 'gender perspective', and second, relative to fairly conservative global approaches, a more 'progressive' approach to gender than is found, for example, in the Rome Statute, or some multilateral instruments. In this regard, the Policy Paper stands as an almost easily 'universalisable' standard for gender perspectives. Of course, if we take

this seriously, this has the potential to elevate and uplift many cisgendered women, and to consider the social realities attached to their gendered experiences. However, in occupying such a substantial space, both in its own right, and in its attachment to the ICC, and continuing to exclude gender minorities, it is precisely in its presentation as 'progressive' that its danger to omit, silence and marginalise is permitted. While the Rome Statute's definition is so obviously flawed that it can be easily castigated, the references to social construction of gender, and some of the more progressive aspects of the Policy Paper situate it as different and enlightened. In this regard, in light of its exclusions, it should not narrow frameworks for contestation.

PART VI
Conclusion

As the above analysis suggests, while the Policy Paper has evolved the Rome Statute's definition to incorporate both protection based on sexual orientation, and a partial inclusion of the role of social construction, countless individuals fall outside the scope of the ICC's vision of gender justice. Individuals whose gendered or sexual identities do not pertain to a fixed binary, nor a tethering of gender to biological sex, remain at best ambiguously covered and at worst, excluded. This is not only exclusionary to those who fall outside of this ambit, but equally reproduces problematic constructions of gender, entrenching power dynamics on the basis thereof. These exclusions and narratives become all the more apparent when one considers the broader power of both the ICC and the Policy Paper. Indeed, the ICC and the Policy Paper's approaches to gender respectively have been used to mobilise conservative and progressive notions of gender and justice, and have interacted with international and domestic policy spaces around gender justice. The ICC's self-framing as a deterrent or normative architect suggests a view that considers its role beyond merely individual situations or cases. In this regard, it has the power, in conjunction with other actors, to globalise particular notions of both gender and victims, in so doing, omitting from consideration and justice those who fall outside of this.

It is incumbent on those engaged in the fight for gender justice to advocate for emancipatory possibilities for justice at every level. In this regard, in the 'gender perspective' component of the implementation of the Policy Paper, the OTP, and others in the Rome Statute system guided by its work would do well to attend to the multiple intersecting oppressions it is fomenting through fidelity to a problematic and exclusionary definition of and approaches to gender and sex. While it is not within the OTP's mandate to change the definition in the Rome Statute, it is within its realm to flesh out and explore contingencies around inclusions and exclusions. In the same way that it has included more reference to social construction than, one imagines, many of the more conservative delegates at the Rome Conference might have liked, it is equally within the realm of possibility in a policy paper to incorporate broader, less violent, and less binary notions of sex, gender, and their relationships. The OTP positions itself, and is assuredly committed to seeking normative change and broader impact. It is equally committed to taking gender seriously. In this regard, it is incumbent on all actors in the Rome Statute system, including the ICC, but also civil society, governments, academics, and legal practitioners to ensure that the visions of justice espoused are not themselves violent reproductions of erasure which both engender and permit violence. In essence, thus, totalising claims at gender justice must be matched by concomitant attention to the exclusions and marginalisations imbued in the narration of gender.

Perhaps, additionally, these exclusions speak to the need for a more humble and responsible approach to the role of the ICC. The ICC and the epistemic communities surrounding it, tend to frame it, very often, in grand terms, with promises about its delivery of justice to 'all victims'. In so doing, its role is elevated beyond that of a court, to being a promissory, all-embodying entity onto which justice is expansively envisaged. Kendall and Nouwen point to the ways in which 'the victims' broadly construed function as the *raison d'être* of the Court, in such ways as to silence critique, despite the relatively few juridified victims represented at the Court.[105] With broad claims to justice comes substantial power; in addition to operating as a court, the ICC also plays a role in what violence, and whose identity is considered legible. It is necessary for both the ICC and those around it to exercise this substantial power with tremendous responsibility. For if that power is instrumentalised to marginalise, it entrenches hierarchies, victimisations and unrequited promises of justice that are already so endemic to the international justice system. If we are to take the ICC's role as an institution which can instantiate justice and normative shifts seriously, we ought to take equally seriously its role to instantiate harms, and to rectify that at every turn.

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