

GENDER DISCRIMINATION AND INTERNATIONAL CRIMINAL LAW: THE ROLE OF THE ICC IN ADVANCING WOMEN'S DIGNITY

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Abstract: Within the framework of international criminal law, the International Criminal Court (ICC) plays a pivotal role in tackling gender-based crimes and advancing women's dignity. This paper critically examines the ICC's increasing efforts to combat sexual, reproductive, and other forms of gender-based violence, focusing particularly on the Office of the Prosecutor's 2023 Policy on Gender-Based Crimes and related ICC case law.

Key words: gender-based violence, ICC, international criminal law, sex-based crimes, women's dignity

1. Introduction: Gender Discrimination and Gender-Based Crimes in the Rome Statute

This paper critically examines the expanding efforts of the International Criminal Court (ICC) to combat sexual, reproductive, and other forms of gender-based violence, focusing particularly on the Office of the Prosecutor's (OTP) 2023 *Policy on Gender-Based Crimes* (Section 2) and related ICC case law (Section 3). It concludes with reflections on the ICC's pivotal role in protecting women's rights and advancing their human dignity through international criminal law (Section 4).

Against the backdrop of the increasing significance of investigations and prosecutions of sexual and gender-based violence in international criminal law, this paper aims to clarify the most appropriate legal framework for holding those responsible for these grave crimes to account. Given the diverse forms these offences take and their pervasive nature across different contexts, most crimes within the ICC's jurisdiction may potentially involve gender-based elements.

Gender discrimination and gender-based crimes (GBC) are prosecutable offences under the ICC Statute (the Rome Statute). Article 7(1)(h) classifies "persecution against any identifiable group or collectivity on [...] gender [...] grounds [...] in connection with [...] any crime within the jurisdiction of the Court" as a crime against humanity when committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7(3) of the Rome Statute defines gender narrowly as "the two sexes, male and female, within the context of society", and

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clarifies that “the term ‘gender’ does not indicate any meaning different from the above”. In addition, rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization are acts amounting to war crimes under Article 8(2)(b)(xxii) of the Rome Statute. While the Rome Statute includes gender-based crimes, it does not define gender-based violence. Instead, this definition is provided in the *Policy on Gender-Based Crimes: Crimes Involving Sexual, Reproductive and Other Gender-Based Violence* adopted by the OTP in 2023, which draws on the 2015 Inter-Agency Standing Committee *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action*. The Policy conceptualises gender-based violence as “any harmful act that is perpetrated based on socially ascribed differences based on gender, typically due to a person’s actual or perceived gender, sex, or sexual orientation” (ICC OTP, 2023, para. 27). It further explains that gender-based violence encompasses physically, sexually, or mentally harmful acts, as well as “threats of such actions, coercion, and other deprivations of liberty”, whether committed in public or in private. The Policy also recognises gender-based violence as “both a symptom of gender inequity and a tool to reinforce it” (ibid., para. 28).

Importantly, gender-based violence is part of the broader category of gender-based crimes. As the OTP notes, this category also includes “non-sexual attacks on women and girls, and men and boys, because of their gender” (ICC OTP, 2014, p. 3).

Beyond these definitions, the Rome Statute itself sets out several provisions addressing gender-based crimes. Article 42(9) instructs the Prosecutor to “appoint advisers with legal expertise” on matters including, *inter alia*, sexual and gender-based violence, and to take all appropriate measures to ensure the effective investigation and prosecution of such crimes. Article 54(1)(b) reinforces this obligation by requiring that investigations “respect the interests of victims and witnesses”, taking into account “the nature of the crime, in particular where it involves sexual violence [or] gender violence”. Similarly, Article 68(1) emphasises the protection of victims and witnesses, directing the Court to consider all relevant factors, particularly in cases involving “sexual or gender violence”, while ensuring that such measures do not infringe upon the rights of the accused or the impartiality of the trial.

Together, these provisions underscore the ICC’s commitment to prosecuting GBC and safeguarding the victims of such offences. They form the normative foundation for the Court’s evolving policies and practices in combating gender-based violence, issues that will be examined in greater detail in the next section.

2. The OTP’s Policies on Gender-Based Crimes

The ICC’s policies on gender-based crimes derive from the relevant provisions of the Rome Statute and from the evolving practice of the Office of the Prosecutor, which recognises that such crimes are among the most serious under the Rome Statute (ICC OTP, 2014, p. 7). The evolution of international criminal law in this area, as evidenced by the partial inclusion of gender-based crimes in the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) (Article 5(g)) and Rwanda (ICTR) (Article 3(g)), culminated in the Rome Statute’s provisions, described as the “most advanced

articulation in the history of gender-based violence" (Inder, 2010, p. 7; ICC OTP, 2014, p. 9).

Taking these developments and statutory norms into account, the OTP published its first *Policy Paper on Sexual and Gender-Based Crimes* on 27 June 2014. The primary objective of this document was to affirm the OTP's commitment to "prioritising" the investigation and prosecution of GBC and to ensure the full implementation of the relevant provisions of the ICC's legal framework. The Policy Paper aimed to clarify and guide the investigation and prosecution of GBC, promote best practices, and contribute to the development of international jurisprudence in this area (ICC OTP, 2014, pp. 10-11). It also outlined the OTP's policies concerning cooperation with external organisations, engagement with the public, and the Office's institutional development.

While the 2014 Policy represented a significant step forward in advancing the understanding of GBC within international criminal law (Oosterveld, 2018, p. 456), it was not without limitations. A brief issued by the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) in 2023, submitted in response to the OTP's call for public consultation on a new policy, identified several areas in need of improvement and submitted five suggestions: strengthen the gender analysis framework; differentiate between gender-based crimes and sexual crimes; include people of diverse sexual orientations, gender identities and expressions and sex characteristics, and devise specific measures for addressing male experiences; develop a survivor-centred approach; formulate an implementation plan and of a monitoring framework with targets.

Nearly a decade later, the 2014 Policy Paper was comprehensively revised with the publication of the aforementioned 2023 *Policy on Gender-Based Crimes*. The updated Policy reflects the ICC's evolving approach to gender-based crimes (Grey, 2025, p. 388) and the feedback received during the public consultation process (UN Women, 2023).

The new Policy builds on the 2014 Policy and is grounded in the aforementioned Article 54 of the Rome Statute, which emphasises the Prosecutor's duty to pay particular attention to crimes involving sexual and gender-based violence. It therefore reaffirms that combating these crimes remains a strategic priority for the OTP. The 2023 Policy's objectives include: confirming the Prosecutor's commitment to investigating and prosecuting gender-based crimes; clarifying key concepts and guiding principles; integrating a "survivor-centred and trauma-informed" approach into all interactions with victims; interpreting the Rome Statute, the ICC *Elements of Crimes*, and the ICC *Rules of Procedure and Evidence* in a manner that ensures effective accountability; contributing to the ongoing development of international jurisprudence and best practice (ICC OTP, 2023, paras. 5(i-v)).

To operationalise these objectives, the 2023 Policy sets out ten guiding principles: a survivor-centred approach; a trauma-informed approach; intersectionality; gender competence; due diligence; addressing myths and stereotypes; contextualising gender-based crimes; full and faithful characterisation; inclusion and relationships; implementation, monitoring, and evaluation (ibid., paras. 70-92). It also sets out specific actions and methods to be followed at every stage of ICC proceedings, from preliminary examinations to reparations (ibid., paras. 93-144).

Like the provisions of the Rome Statute itself, the OTP's policy papers emphasise the challenges involved in investigating and prosecuting gender-based crimes while maintaining a focus on protecting and dignifying victims.

Having examined the statutory framework and the OTP's policy development, the next section critically assesses the implementation of the ICC's case law on GBC in practice.

3. Gender Justice in ICC Case Law

The following analysis discusses several influential ICC cases addressing gender-based crimes: *Prosecutor v. Dominic Ongwen*, *Prosecutor v. Joseph Kony* (concerning the Situation in Uganda), *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (relating to the Situation in the Republic of Mali), *Prosecutor v. Haibatullah Akhundzada* and *Prosecutor v. Abdul Hakim Aqqani* (referring to the Situation in Afghanistan).

3.1. Gender-based crimes in Uganda before the ICC

On 4 February 2021, ICC Trial Chamber IX delivered its judgment in the *Ongwen* case. He was found guilty and sentenced to 25 years' imprisonment for crimes he committed against civilians while he was a member of the Lord's Liberation Army (LRA) in northern Uganda between 2002 and 2005 (ICC, *Ongwen*, Sentence, 2021, p. 138). He was found guilty, *inter alia*, of numerous gender-based crimes, including forced marriage, sexual slavery, and forced pregnancy, both as crimes against humanity and as war crimes (ICC, *Ongwen*, Judgment, 2021, para. 3116).

This case is particularly significant in discussions about GBC, and more specifically, gender-based violence in ICC jurisprudence, as it marked the first time an international court had convicted an individual for the crime of forced pregnancy under Articles 7(1)(g) and 8(2)(vi) of the Rome Statute. The offence was part of the LRA's systematic practice of allocating "wives" to its soldiers through forced marriages (*Ibid.*, para. 216). This landmark judgment represents a notable development in the recognition and prosecution of forced pregnancy as a distinct crime and has been hailed as a milestone in enhancing gender sensitivity within international criminal justice (Kirabira and Jesse, 2021).

Counts of forced pregnancy also appear in the charges against Joseph Kony, leader of the LRA. The case against Kony is noteworthy not only for the gender-based crimes he is accused of, but also because it is the first ICC trial to proceed against a defendant who remains at large. Namely, he has been indicted *in absentia* for several crimes such as rape, forced marriage, sexual slavery, and persecution on the grounds of gender (ICC, *Kony*, 2025, para. 260).

3.2. ICC case law on gender-based persecution in Mali

In the context of the Situation in the Republic of Mali, Al Hassan Ag Abdoul Aziz (an alleged member of Ansar Dine and the *de facto* head of the Islamic police in Timbuktu between April 2012 and January 2013) was charged with, *inter alia*, persecution on gender grounds under Article 7(1)(h), and with rape and sexual slavery under Article

7(1)(g) (ICC, *Al Hassan*, 2018, para. 12). The significance of this case lies in the fact that gender-based persecution was adjudicated as a specific charge at trial for the first time in the ICC's history (Oosterveld and Dotson, 2023), preceding the aforementioned charges against Joseph Kony for the same offence.

Initially, ICC Trial Chamber X considered the imposition of *sharia* law by Ansar Dine and Al-Qa'ida in the Lands of the Islamic Maghreb (AQIM) as the enforcement of behavioural obligations on the population of Timbuktu that were "*per se* discriminatory on religious grounds" (ICC, *Al Hassan*, Judgment, 2024, para. 1562-1565). However, the Chamber later clarified that the interpretation of *sharia* law enforced by these groups constituted a policy that "specifically targeted local women and girls by reason of their gender", thereby depriving them of numerous fundamental rights based on the gender roles imposed on them (*ibid.*, para. 1566).

In its judgment, the Court found Al Hassan guilty of the crime against humanity of persecution on religious grounds under Article 7 (1)(h) of the Rome Statute (*ibid.*, para. 821), but acquitted him of persecution on gender grounds due to the absence of unanimity among the judges, as set out in Judge Tomoko Akane's dissenting opinion (ICC, *Al Hassan*, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, 2024, para. 95).

The acquittal drew considerable criticism, with some describing it as evidence of the "long-entrenched patriarchal biases endemic to international criminal law", and as minimising the disproportionate harm suffered by women and girls (O'Brien and Maloney, 2024). On 18 September 2024, the OTP lodged an appeal against the judgment in the *Al Hassan* case, disputing, *inter alia*, the acquittals on charges of rape, sexual slavery, and gender-based persecution. The OTP argued that these crimes were central to its case theory, noting that a majority of the Trial Chamber had concluded that Al Hassan had participated "with intent and knowledge" in these offences (ICC, *Al Hassan*, Prosecution's Appeal against Judgment, 2024, para 2-5), and therefore requested convictions for sexual slavery, rape, and persecution on gender grounds (*ibid.*, para. 17).

However, on 17 December 2024, both the Prosecution and the Defence, which had also appealed the verdict, filed "their respective notices of discontinuance of the appeals against the Conviction Decision" (ICC, *Al Hassan*, Notices of discontinuance of the Appeals, 2024, para. 5). In discontinuing its appeal, the Prosecution noted that "in withdrawing his appeal, Mr Al Hassan has asked for forgiveness from all those he harmed and from all the victims of Timbuktu [...]. Mr Al Hassan also stated that he firmly opposes any forms of extremism, especially those affecting women and girls, because they fuel hatred and division, and undermine the values of justice and humanity" (Khan, 2024). Some commentators viewed this decision as implying that an apology and withdrawal of an appeal could effectively terminate pending proceedings (O'Brien and Maloney, 2025; Grey, 2025, p. 392), and as inconsistent with the OTP's stated commitment to pursuing accountability for GBC. Others characterised the discontinuance as a missed opportunity, arguing that the Prosecutor's appeal had raised hopes for a more assertive stance on gender-based crimes, which were ultimately "shattered" (O'Brien, Maloney and Oosterveld, 2024).

3.3. The ICC and gender Apartheid in Afghanistan

Afghanistan has been a State Party to the Rome Statute since 2003 (Bogaert, 2022), providing a critical context for examining GBC.

The Situation in Afghanistan before the ICC is particularly significant as it involves the investigation of a *de facto* government policy enacted outside an armed conflict, and marks the first instance in which ICC arrest warrants have been requested solely for crimes under Article 7(1)(h) of the Rome Statute.

In this Situation, the ICC Prosecutor filed applications for arrest warrants against Haibatullah Akhundzada, the Supreme Leader of the Taliban, and Abdul Hakim Haqqani, the Taliban's Chief Justice, for their criminal responsibility in the persecution of women by the *de facto* Afghan government. These acts have been classified as crimes against humanity under Article 7(1)(h) of the Rome Statute (Khan, 2025). On 8 July 2025, the ICC's Pre-Trial Chamber II issued the requested arrest warrants, which remain under seal at the time of writing.

Although the current Taliban regime is not widely recognised internationally (Hasar, 2024), it exercises full control over Afghanistan and enforces its interpretation of Sharia as the *de facto* national authority (ICC, *Akhundzada*, 2025, para. 46). Both accused individuals hold top government positions, with Haqqani described as having "ultimate authority over the judiciary in Afghanistan" (ICC, *Haqqan*, 2025, para. 166). The lack of realistic national proceedings against the accused has been a key factor in the issuance of ICC warrants (ICC, *Akhundzada*, 2025, para. 164; ICC, *Haqqan*, 2025, para. 165).

Specifically, the accused are charged with persecuting girls, women, and individuals who fail to comply with Taliban policies concerning gender, gender identity, or expression. These alleged crimes are believed to have been committed since the Taliban regained power on 15 August 2021. During their previous rule from 1996 to 2001, the Taliban imposed severe restrictions on women's freedom of movement, expression, assembly, association, education, and employment (Telesetsky, 1998; Bogaert, 2022, pp. 12-26; ICC, *Akhundzada*, 2025, para. 32).

The United Nations Human Rights Council has described the scale and severity of these measures as "gender persecution and an institutionalized framework of gender apartheid" (UNGA HRC, 2023, p. 97). The large number of individuals affected is cited as a relevant factor in meeting the gravity threshold under Article 17(1)(d) of the Statute for the admissibility of the cases against Akhundzada and Haqqani (ICC, *Akhundzada*, 2025, para. 166; ICC, *Haqqan*, 2025, para. 167).

4. Conclusions

Both the ICC's Statute and the OTP's strategies and policies provide an adequate normative framework for investigating and prosecuting gender-based crimes before the Court. However, an examination of the case law shows that the ICC is still in the early stages of developing its practice in this area. Persistent challenges remain, particularly with regard to the Court's reliance on State cooperation to execute arrest warrants, the continued impunity of accused individuals who are still at large, and the difficulty of

achieving consistent judicial interpretations and unanimous verdicts.

In conclusion, any shortcomings in the current normative framework can be mitigated through the Court's progressive interpretation of its mandate in its decisions and judgments. Strengthened State cooperation is also essential to ensure the apprehension of suspects and the effective prosecution of gender-based crimes, thereby reinforcing the ICC's vital role in protecting women's rights and advancing their dignity through international criminal law.

References

Akane, T. (2024, June 26). *Separate and Partly Dissenting Opinion of Judge Tomoko Akane*. ICC-01/12-01/18-2594-OPI 26-06-2024 1/39 T.

Bogaert, H. (2022). History Repeating Itself: The Resurgence of the Taliban and the Abandonment of Afghan Women. *Immigration and Human Rights Law Review*, 4(1), 1–35.

Grey, R. (2024). On Hope, Reform and Risk: The Rome Statute's Definition of 'Gender' and the Crimes Against Humanity Convention. *European Journal of International Law*, 36(2), 369–398.

Hasar, S. (2024). Recognition of Governments and the Case of the Taliban. *Chinese Journal of International Law*, 23 (1), 73–122.

ICC (2018, 27 March). *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Pre-Trial Chamber I, Warrant of Arrest, ICC-01/12-01/18.

ICC (2018, 31 March). *Situation in Mali: Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud surrendered to the ICC on charges of crimes against humanity and war crimes in Timbuktu*.

ICC (2019, 30 September). *Al Hassan case: ICC Pre-Trial Chamber I confirms charges of war crimes and crimes against humanity and commits suspect to trial*.

ICC (2020, 6 January). Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Decision Setting the Commencement Date of the Trial*, ICC-01/12-01/18.

ICC (2021, 4 February). Trial Chamber IX, *The Prosecutor v. Dominig Ongwen*, Judgment, ICC-02/04-01/15.

ICC (2021, 6 May). Trial Chamber IX, *The Prosecutor v. Dominig Ongwen*, Sentence, ICC-02/04-01/15.

ICC (2024, 26 June). *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, Judgment, ICC-01/12-01/18.

ICC (2024, 18 September). *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Appeals Chamber, *Prosecution notice of appeal*.

ICC (2024, 19 December). *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Appeals Chamber, *Order concerning reclassification and the filing of observations on the notices of discontinuance of the appeals*, ICC-01/12-01/18 A A2.

ICC (2025, 23 January). Pre-Trial Chamber II, *Public redacted version of "Prosecution's application under article 58 for a warrant of arrest against Haibatullah Akhundzada*.

ICC (2025, 23 January) Pre-Trial Chamber II, *Public redacted version of "Prosecution's*

application under article 58 for a warrant of arrest against Abdul Hakim Haqqani.
ICC (2025, 6 November). Trial Chamber III, *The Prosecutor v. Joseph Kony, Decision on the confirmation of charges in absentia against Joseph Kony pursuant to articles 61(2)(b) and 61(7) of the Rome Statute.*

ICC, OTP (2014). *Policy Paper on Sexual and Gender-Based Crimes.*

ICC, OTP (2023). *Policy on Gender-Based Crimes: Crimes involving sexual, reproductive and other gender-based violence.*

Khan, K. A.A. (2024, 17 December). *Statement of ICC Prosecutor Karim A.A. Khan KC on the discontinuance of appeals filed in the case against Mr Al Hassan.* International Criminal Court.

Khan, K. A.A. (2025, 23 January). *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in Afghanistan.* International Criminal Court.

Kirabira, T. R., & Jesse M. (2021, 17 March). *Dominic Ongwen conviction: a move towards gender sensitive international criminal justice.* The London School of Economics and Political Science.

O'Brien, M., & Maloney, K. (2025, 4 March). *Gender Justice Denied at the ICC: Problematic Judicial and Prosecutorial Decisions in the Al Hassan Case.* *Völkerrechtsblog.*

O'Brien, M., Maloney, K., & Oosterveld, V. (2024, 23 July). *Forced Marriage in the Al Hassan Trial Judgment.* *OpinioJuris.*

Oosterveld, V. (2005). *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*, 18, 55–84.

Oosterveld, V. (2018). *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law.* *William & Mary Journal of Race, Gender, and Social Justice*, 24, 443–457.

Oosterveld, V., & Dotson, N. (2023, July 31). *Gendered Crime as a Central Focus in the ICC's Al-Hassan Case.*

Telesetsky, A. (1998). *In the Shadows and Behind the Veil: Women in Afghanistan Under Taliban Rule.* *Berkeley Women's Law Journal*, 13, 293–305.

United Nations General Assembly Human Rights Council (2023, 15 June). *Report of the Special Rapporteur on the Situation of human rights in Afghanistan and the Working Group on discrimination against women and girls*, A/HRC/53/21.

UN Women (2023). *Comments on the Development of a Revised Policy on Sexual and Gender-Based Crimes: Submission from UN Women to the Office of the Prosecutor at the International Criminal Court.*

Zammit Borda, A. (2023, December 22). *Reproductive Violence in International Criminal Law and the ICC OTP's Revised Policy on Gender-Based Crimes: An Emerging Concept.* *EJIL: Talk!.*