

**Comments to the Office of the Prosecutor
of the International Criminal Court (ICC)**
on the nature and scope of **victims'**
participation that the principles of the
policy on the **crime of gender persecution**
ought to include

May 2024

The Due Process of Law Foundation (DPLF) presents the following comments in response to the Office of the Prosecutor’s request for the nature and scope for preventing, protecting, and including victim participation that the principles of the policy on the crime of gender persecution ought to include and address¹.

As a civil society organization dedicated to the promotion of the rule of law and human rights in Latin America,² DPLF particularly appreciates the Office of the Prosecutor’s commitment to seeking accountability for the crime against humanity of gender persecution. This commitment has been reflected in, among other actions, the investigations and filing of charges for this serious crime in several cases brought before the Court³ and in the adoption of the *Policy on the Crime of Gender Persecution of December 2022*.

In this document, we will first briefly outline the context; then, we will highlight some elements that are already present in several policy documents of the Office of the Prosecutor that we consider relevant in defining the nature and scope for preventing, protecting, and including victim participation that the principles of the policy on the crime of gender persecution ought to include. These elements are: (i) due diligence; (ii) a systemic approach to the discrimination underlying gender persecution; (iii) an intersectional perspective; and (iv) the victim-centered and people-centered approach to justice. The comments on these topics are presented in light of paragraphs 1(b) and 3 of Article 21 of the Rome Statute.

1 See <https://www.icc-cpi.int/news/office-prosecutor-launches-public-principles-advance-understanding-crime-gender-persecution>.

2 See <https://dplf.org/en>.

3 At present, the cases of *Prosecutor v. Al Hassan*, *Prosecutor v. Abd-Al-Rahman*, and *Prosecutor v. Mahmat Said Abdel Kani*.

1. Brief contextual reference

International human rights law and international human rights protection bodies have considered that the persecution of individuals, groups of people, or communities entails serious violations of civil, political, and economic, social, and cultural human rights;⁴ and they have specifically considered gender persecution as such.⁵

In international criminal law, gender persecution—as an international crime and, specifically, as a crime against humanity—was first criminalized in the Rome Statute of the International Criminal Court.⁶ In its case law, the ICC has referred to the crime of persecution as a particularly heinous crime of the highest gravity.⁷ The crime of persecution constitutes a serious attack on fundamental human rights, which, as the Court has pointed out, is perpetrated “for the purpose of excluding a person from society on discriminatory grounds.”⁸ The objective of discrimination is a crucial element of the crime of persecution.⁹

The crime of persecution, as provided for in the Rome Statute and as has been emphasized by the Chambers of the Court, may be gender-based,¹⁰ and in itself entails the objective of discrimination, since it is a crime that identifies or is directed against persons or individuals on the basis of their sex characteristics and/or the social and cultural constructs and criteria used to define gender-determined behaviors, roles, attributes, and responsibilities.¹¹

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- 4 See, *inter alia*, Universal Declaration of Human Rights, art. 14; European Parliament resolution of 3 May 2022 on the persecution of minorities on the grounds of belief or religion (2021/2055(INI)); UN. Report of the International Law Commission. A/74/10, 2019, Ch. IV, art. 2; UNHCR. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, para. 16; CCPR. Concluding observations on the fifth periodic report of the Bolivarian Republic of Venezuela. CCPR/C/VEN/CO/5, 28 November 2023, para. 37; CCPR. Concluding observations on the eighth periodic report of the Russian Federation. CCPR/C/RUS/CO/8, 1 December 2022, paras. 34–35, 38; CCPR. Concluding observations on the fifth periodic report of the Philippines. CCPR/C/PHL/CO/5, 30 November 2022, para. 13; CCPR. Concluding observations on Eritrea in the absence of its initial report. CCPR/C/ERI/CO/1, 3 May 2019, para. 35; CCPR. Concluding observations on the fourth periodic report of the Democratic Republic of the Congo. CCPR/C/COD/CO/4, 30 November 2017, para. 46.
- 5 See UN. Report of the International Law Commission. A/74/10, 2019, Ch. IV, art. 2; Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, art. 60; UNHCR. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Ref. HCR/GIP/02/01, 7 May 2002; CEDAW. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW/C/GC/32, 14 November 2014, paras.13–15, 30–31; CCPR. Concluding observations on the eighth periodic report of the Russian Federation. CCPR/C/RUS/CO/8, 1 December 2022, para. 8; CCPR. *M. I. v. Sweden*. CCPR/C/108/D/2149/2012, 26 September 2013, para. 7.5; UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/38/43, 11 May 2018, para. 29.
- 6 See ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, p.4; UN WOMEN. Identifying Gender Persecution in Conflict and Atrocities, New York, December 2021, p. 4.
- 7 ICC. Trial Chamber IX. Case of *the Prosecutor v. Dominic Ongwen*. Sentence. No.: ICC-02/04-01/15, paras. 174, 213.
- 8 ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 663.
- 9 ICC. Trial Chamber IX. Case of *The Prosecutor v. Dominic Ongwen*. Sentence. No.: ICC-02/04-01/15, para. 174.
- 10 Rome Statute, art. 7.1(h); ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 667; Pre-Trial Chamber II. Case of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Ahman (‘Ali kushayb’)*. Decision on the confirmation of charges. No. ICC-02/05-01/20, paras. 80, 116.
- 11 See ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, p. 3, para. 4; See also UNHCR. Guidelines

This same identification leads to the crime of gender persecution depriving people of a wide range of human rights precisely because, as has been explained by the Office of the Prosecutor, gender criteria and constructs determine people's lives in their respective social contexts and, to that extent, the scope and exercise of their fundamental rights.¹² The Chambers of the Court and the Office of the Prosecutor have considered, among these rights, a person's right to life; to physical integrity; not to be subjected to torture or cruel, inhuman, or degrading treatment; not to be subjected to slavery or the slave trade; freedom from rape; freedom from arbitrary detention; freedom of expression; freedom of assembly and association; freedom of movement; freedom of religion; and the rights to private property, political participation, education, and health.¹³

The wide range of fundamental human rights of which people can be deprived by the crime of gender persecution is compounded by the fact that this deprivation, as a concrete manifestation of the persecution, can be carried out through different and multiple acts. While, according to the Rome Statute, the conduct of gender persecution must take place in relation to any act referred to in Article 7(1) of the Statute or any crime within the jurisdiction of the ICC,¹⁴ acts of gender persecution—as the Chambers of the Court have noted—are not limited to the crimes enumerated in the Rome Statute.¹⁵ Acts of gender persecution may include physical violence, psychological violence, destruction or seizure of property, or the imposition of norms or conventions that define and regulate different aspects of people's lives and relationships on the basis of gender and deprive them of their individual freedoms.¹⁶ The severe deprivation of fundamental rights that characterizes the crime of gender persecution may be established based on the type of international human rights violation or due to the cumulative effects of these violations.¹⁷

Gender persecution, therefore, as a crime—and as a gross violation of human rights—is a complex offense that involves the severe deprivation of a wide range of human rights. It is committed through different acts, and is carried out with a discriminatory aim or purpose.

on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Ref. HCR/GIP/02/01, 7 May 2002, para. 3.

12 ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, p. 5.

13 ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 664; Pre-Trial Chamber II. Case of *the Prosecutor v. Ali Muhammad Ali Abd-Al-Ahman (Ali kushayb)*. Decision on the confirmation of charges. No. ICC-02/05-01/20, para. 51; Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 24.

14 Rome Statute, art. 7.1(h); Elements of Crimes, crime against humanity of persecution, element 4.

15 ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 668.

16 See ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 668; Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 23–24; CEDAW. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW/C/GC/32, 14 November 2014, para.15.

17 See ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 24; ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 672.

2. Considerations relevant to the nature and scope for preventing, protecting, and including victim participation that the principles of the policy on the crime of gender persecution ought to include, cover, and address

Given the seriousness and complex nature of the crime of gender persecution, we consider that the nature and scope of the principles of the policy on this crime should guide the Office of the Prosecutor, at all stages of its work,¹⁸ toward the timely and effective identification of the acts that constitute the offense, as well as the conditions that facilitate or encourage its commission, in order to comply with the objectives of preventing and protecting against gender persecution and including victim participation. The rights of victims in criminal proceedings before the ICC have been clearly acknowledged. However, it has not yet been possible to overcome all the arguments against victims' active participation, ranging from the idea that it delays the proceedings to the fact that it causes them to be revictimized because they must "relive" the acts perpetrated against them. Confronted with these arguments, we must insist that victims cannot be left out of principles and practices.

From this perspective, we consider that the principles should include and address the nature and scope of at least the following considerations: (i) due diligence; (ii) a systemic approach to the discrimination underlying gender persecution; (iii) the intersectional perspective; and (iv) the victim-centered and people-centered approach to justice. Below we outline some of the reasons why, in accordance with international human rights law, we consider these issues to be relevant.

2.1 Due diligence

Due diligence, as a principle of international human rights law, establishes specific duties of State authorities to prevent, deter, investigate, prosecute, punish, and redress human rights violations.¹⁹ It

¹⁸ To wit: preliminary examination, investigation, trial, sentencing, appeal, and reparations. ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 3.

¹⁹ See, *inter alia*, CCPR. General comment No. 36. Article 6: right to life. CCPR/C/GC/36, 3 September 2019, paras. 7, 21; CAT. General comment No. 2. Implementation of article 2 by States parties. CAT/C/GC/2, 24 January 2008, para. 18; I/A Court H.R., *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4., para. 172; I/A Court H.R., *Case of Baptiste et al. v. Haiti*. Merits and Reparations. Judgment of September 1, 2023. Series C No. 503, paras. 75, 98; I/A Court H.R., *Case of Honorato et al. v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 27, 2023. Series C No. 508, para. 106.

also requires private individuals to act in certain circumstances to prevent and avoid the violation of human rights.²⁰

In relation to gender-based violence and discrimination, due diligence establishes duties under international human rights law to take measures to prevent violence, protect rights, investigate, prosecute, and punish the perpetrators, and provide reparations to victims and survivors,²¹ and also, from a perspective of non-repetition, to confront and transform the root causes of this violence and other forms of gender-based discrimination.²²

In its *Policy on Gender-Based Crimes* of December 2023, the Office of the Prosecutor established the principle of due diligence as one of the guiding principles of its approach to these crimes at all stages of its work.²³ According to this principle, the Office of the Prosecutor must take into account the circumstances and interests of victims, survivors, and witnesses, as well as the nature of the crimes.²⁴

We consider that due diligence, understood here as enhanced due diligence, applied to cases of gender-based violence—going beyond the investigation and prevention measures related to particular acts of discrimination in order to implement measures to eradicate future practices of gender-based violence²⁵—could guide the actions of the Office of the Prosecutor in preventing and protecting against the crime of gender persecution, and in including the participation of victims.

The Office of the Prosecutor has stated that “All persons who are victims of crimes under the jurisdiction of the Court may be vulnerable to grounds for persecution under article 7(1)(h) of the Statute, including gender.”²⁶ Given this recognition, special care must be taken to ensure that no victim or survivor is rendered invisible, especially those belonging to, or identified or perceived as belonging to, groups that are vulnerable or have been historically and socially excluded, oppressed, or discriminated against in the context of the respective society, or those who carry out advocacy work on their behalf. Focusing on these groups and on the forms of exclusion, oppression, or discrimination

20 See, *inter alia*, CERD. General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials. CERD/C/GC/36, 17 December 2020, para. 66; CRC. General comment No. 20 (2016) on the implementation of the rights of the child during adolescence. CRC/C/GC/20, 6 December 2016, para. 48.

21 See Declaration on the Elimination of Violence against Women, 20 December 1993, art. 4(c); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belém do Para,” 1994, art. 7(b); Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, art. 5; Recommendation Rec (2002) 5 of the Committee of Ministers of the Council of Europe on the Protection of Women Against Violence, 30 April 2002, para. 4, II; CEDAW. General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19. CEDAW/C/GC/35, 26 July 2017, para. 24.2(b); UN. Discrimination and violence against individuals based on their sexual orientation and gender identity: report of the Office of the United Nations High Commissioner for Human Rights. A/HRC/29/23, 4 May 2015, para. 11.

22 See, *inter alia*, UN. Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk. E/CN.4/2006/61, 20 January 2006.

23 ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, par.77-78.

24 ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, par.77.

25 See I/A Court H.R., *Case of López Soto et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of September 26, 2018. Series C No. 362, para. 136.

26 ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 5.

could make it possible to identify and prevent risk factors that incite, encourage, or facilitate the commission of the crime of gender persecution.

The seriousness and complexity of this crime also requires a careful and thorough approach to the context in order to adequately and timely identify the different acts through which the crime of gender persecution is perpetrated, considering that these acts, as expressed by the Office of the Prosecutor, can be multiple and varied and are not limited to acts of sexual violence.²⁷

A fundamental principle of due diligence is the principle of nondiscrimination;²⁸ therefore, any gender-based distinction, exclusion, or restriction requires, in this regard and in the respective context, particularly strict scrutiny²⁹ to establish whether it is gender-based discrimination or a distinction that is permitted under international law. It is also important to bear in mind that the crime of gender persecution can be carried out through acts of omission, consisting of permitting, tolerating, or failing to protect.³⁰ Acts may also constitute gender persecution if they disproportionately affect vulnerable gender groups such as women, girls, and LGBTQI+ people.³¹

The adequate and timely identification of these acts and of the fundamental human rights violated by the crime of gender persecution necessarily requires a contextual analysis with a gender perspective³² and should be considered as part of a due diligence-driven approach to the respective social contexts.

27 ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, paras. 23-24. Similarly, see UN. Discrimination and violence against individuals based on their sexual orientation and gender identity: report of the Office of the United Nations High Commissioner for Human Rights. A/HRC/29/23, 4 May 2015, para. 21; CEDAW. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW/C/GC/32, 14 November 2014, para. 15.

28 See UN. Economic and Social Council. Integration of the human rights of women and the gender perspective : violence against women, E/CN.4/2006/61, 20 January 2006, para. 35.

29 See IACHR. Compendium on Equality and Non-Discrimination. Inter-American Standards. OEA/Ser.L/V/II.171. Doc. 31, February 12, 2019, para. 36.

30 See UNHCR. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Ref. HCR/GIP/02/01, 7 May 2002, para.15.

31 See Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, art. 3.d; CEDAW. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW/C/GC/32, 14 November 2014, para. 15; IACHR. Access to Justice for Women Victims of Violence in the Americas. OEA/Ser.L/V/II. Doc. 68, January 20, 2007, para. 91; UN. Mandate of the United Nations Independent Expert on Protection from Violence and Discrimination based on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz. Country Visit to the United States of America. Preliminary Observations, para.7, 31, 35; ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 667.

32 See IACHR. Compendium of the Inter-American Commission on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts. OEA/Ser.L/V/II. Doc. 121, April 12, 2021, para. 7.

2.2 Systemic analysis of discrimination underlying gender persecution

As noted by the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation or gender identity, only when the power hierarchies and asymmetries, stereotypes, prejudices and stigmas, inequality, and violence that are at the basis of the gender-based social system are acknowledged, can gender-based violence and discrimination be prevented and addressed in the respective social context.³³ It has also reminded us that “all human beings live in gendered societies traversed by power hierarchies and preconceptions.”³⁴ These hierarchies and preconceived ideas shape the cultural, social, and political contexts in which people develop their identities and social interactions, and create dominant gender narratives³⁵ that give rise to gender-based structural discrimination and violence³⁶

Gender-based crimes, as an expression of such violence, are caused precisely by the underlying intent to punish people for their nonconformity to preconceived notions of gender and for their defiance of the dominant gender norms and conventions of the respective social context.³⁷

The Office of the Prosecutor has stated, in this regard, that crimes of gender persecution “can reflect the continuum of historical and longstanding structural discrimination and fundamental rights deprivations experienced by women, girls and LGBTQI+ persons.”³⁸

The objective of discrimination is, as the Chambers of the Court have held, a crucial element of the crime of persecution.³⁹ The commission of this crime directly deprives people—solely on the basis of gender—of their ability to enjoy and exercise their human rights without discrimination,⁴⁰ i.e. in open contravention of the principle of nondiscrimination. The prevention of and protection from the crime

33 See UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/38/43, 11 May 2018, para. 3.

34 UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz. A/HRC/47/27, 3 June 2021, para. 15.

35 See UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/38/43, 11 May 2018, para. 14.

36 See Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women “Convention of Belém do Para,” 1994, Preamble; Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, Preamble; ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, paras. 23, 28.

37 See UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. A/HRC/38/43, 11 May 2018, para. 48; UN. Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. A/HRC/19/41, 17 November 2011, para. 20; UNHCR. Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, para. 15; UN WOMEN. Identifying Gender Persecution in Conflict and Atrocities, New York, December 2021, p. 12.

38 ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 9.

39 ICC. Trial Chamber IX. Case of the Prosecutor v. Dominic Ongwen. Sentence. No.: ICC-02/04-01/15, para. 174.

40 See ICC. Office of the Prosecutor. Policy on the Crime of Gender Persecution, December 2022, para. 24; CCPR. Concluding observations on the initial report of Liberia. CCPR/C/LBR/CO/1, 27 August 2018, para. 18.

of gender persecution therefore requires a proactive approach that considers, at all stages of the work of the Office of the Prosecutor, not only the existence of acts of discrimination but also the structural or systemic nature of gender-based violence and discrimination. This approach should be able to identify the practices, routines, and dynamics of such discrimination in the respective social contexts and in the contexts of conflict and/or atrocities where these dynamics and practices are exacerbated and reinforced.⁴¹

2.3. Intersectional perspective

The intersectional perspective, as a perspective grounded in international human rights law,⁴² acknowledges the complexity of people's identities, the different forms of discrimination, and, above all, the fact that "individuals belonging to particular groups may be disproportionately affected by intersectional discrimination."⁴³

As the Committee on the Rights of Persons with Disabilities has explained, intersectional discrimination "refers to a situation where several grounds operate and interact with each other at the same time in such a way that they are inseparable and thereby expose relevant individuals to unique types of disadvantage and discrimination."⁴⁴ Intersectional discrimination occurs with any intersecting or overlapping combination of two or more motives. In the *Policy on Gender-Based Crimes*, the Office of the Prosecutor established intersectionality as one of the principles guiding its approach to these crimes.⁴⁵

In the terms outlined by the Office of the Prosecutor, this perspective requires an understanding of the differences in status, power, roles, and needs between people, as a result of social and political hierarchies and inequalities between individuals and groups for interrelated reasons that must be understood in the context of the respective society and its history. The Office of the Prosecutor lists race, ethnicity, socioeconomic status, religion, age, sex characteristics, gender (including sexual orientation, identity, and expression), caste, Indigenous status, legal or displacement status, and disability among these grounds.⁴⁶

41 See CEDAW. General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations. CEDAW/GC/30, 1 November 2013, paras. 34–37.

42 See ESCR Committee. General comment no. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/22, 2 May 2016, para. 2; ESCR Committee. General comment No. 5. Persons with disabilities, 1994, para. 19; CRPD. General comment no. 6 (2018) on equality and non-discrimination. CRPD/C/GC/6, 26 April 2018, paras. 3, 21; UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz. The law of inclusion. A/HRC/47/27, 3 June 2021, paras. 23–28; UN. report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. The gender perspective in transitional justice processes. A/75/174, 17 July 2020, paras. 4, 93; IACHR. Compendium of the Inter-American Commission on Human Rights on Truth, Memory, Justice and Reparation in Transitional Contexts. OEA/Ser.L/V/II. Doc. 121, April 12, 2021, para. 17.

43 ESCR Committee. General comment no. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/22, 2 May 2016, para. 30.

44 CRPD. General comment no. 6 (2018) on equality and non-discrimination. CRPD/C/GC/6, 26 April 2018, para. 19.

45 ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, para. 75.

46 ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, para. 75.

Along the same lines, we consider that the Office of the Prosecutor could integrate the intersectional perspective into the principles of the policy on the crime of gender persecution to ensure that, at all stages of its work, it addresses the objectives of protection and prevention in relation to this crime, as well as the inclusion of the victims' participation.

The intersectional perspective makes explicit the different forms of discrimination that intersect in a person, and leads to the understanding that gender, as a reason for discrimination, is inseparably and indivisibly combined with other reasons.⁴⁷ On this point, the United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity has stated that "often, violent acts against an individual are the result of intersecting factors."⁴⁸

With regard to gender-based discrimination, the UN Special Rapporteur on the independence of judges and lawyers has also pointed out that such discrimination "is aggravated if the person is part of a vulnerable ethnic, racial, cultural or religious group or suffers from a disability."⁴⁹

In this regard, an intersectional approach to and understanding of the respective context would make it possible to anticipate the additional presence of a gender motive, once it is identified that one or more grounds of discrimination are operating.

The identification or singling out of gender as a reason for persecution in the respective context is a predictor of the simultaneous and interdependent presence of one or more other grounds for discrimination.⁵⁰ Gender-based violence can also take the form of political or religious acts.⁵¹ The intersectional perspective would facilitate the identification of cumulative grounds of discrimination in the respective context, thereby helping to protect against and prevent the crime of persecution and, in particular, the crime of gender persecution. The Committee on the Elimination of Discrimination against Women has drawn attention to the fact that exacerbated or cumulative forms of discrimination amount to a form of persecution.⁵²

The inclusion of an intersectional perspective also provides an understanding of the unique forms of victimization experienced by an individual, based on factors of vulnerability and risk of discrimination,⁵³ that lead to unique and specific impacts on each individual. Knowing the unique forms of victimization

47 See UN. Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Rashida Manjoo. A/HRC/17/26, 2 May 2011, para. 51; IACHR. Indigenous Women and their Human Rights in the Americas. OEA/Ser.L/V/II. Doc. 44/17, April 17, 2017, para. 38.

48 UN. Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Víctor Madrigal-Borloz. The law of inclusion. A/HRC/47/27, 3 June 2021, para. 23.

49 UN. Report of the Special Rapporteur on the independence of judges and lawyers, Diego Garcia-Sayán. Participation of women in the administration of justice. A/76/142, 25 July 2021, para. 15.

50 See ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Corrected Version of the Decision on the Confirmation of Charges. No. ICC-01/12-01/18, para. 702.

51 See UNHCR. Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11-13 April 2011. Summary Conclusions, para. 20.

52 CEDAW. General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW/C/GC/32, 14 November 2014, para. 14.

53 See I/A Court H.R., *Case of Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 290.

a person has experienced could provide guidance to the Office of the Prosecutor for the participation of victims and survivors—while minimizing the potential for revictimization or secondary victimization—needed to implement a victim and people-centered approach, as discussed below.

2.4. Victim-centered and people-centered approach to justice

The victim-centered approach is an approach to international human rights law that acknowledges victims, prioritizes attention to their needs, considers their personal situation, and ensures that they are treated with humanity, sensitivity, and respect for their dignity, differences, and human rights.⁵⁴ International human rights law broadly recognizes the right of victims of gross human rights violations to participate in the mechanisms and procedures established to access justice, taking into account their safety and well-being, respect for their privacy, their active participation, and secondary victimization.⁵⁵

International human rights law also recognizes the need to adopt special and differentiated measures to ensure equal access to justice for persons or groups of persons in vulnerable situations and/or subject to discrimination.⁵⁶ The need for such special and differentiated measures has been identified in relation to victims of gender-based violence and discrimination, and specifically for victims of gender persecution.⁵⁷

The Rome Statute, as an instrument of international criminal law, acknowledges victims⁵⁸ and recognizes, in particular, the important role of victims as active participants in the search for justice and, to that end, in the different stages of the trial before the Court.⁵⁹ The Statute recognizes, among other rights, the victims' right to participation and to the protection of their safety, well-being, and dignity. It recognizes their interests and personal circumstances; specifically, it recognizes the right to participation, care, and protection of victims of gender-based crimes.⁶⁰

54 See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution 60/147 adopted by the General Assembly on 16 December 2005, Preamble and para. 10; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA, paras. 9, 21, 38.

55 See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Adopted by General Assembly resolution 40/34, 29 November 1985, para. 6; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution 60/147 adopted by the General Assembly on 16 December 2005, para. 12-14; UN. Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. A/HRC/34/62, 27 December 2016, paras. 24-83.

56 See IACHR. Compendium on Equality and Non-Discrimination. Inter-American Standards. OEA/Ser.L/V/II.171. Doc. 31, February 12, 2019, para. 38.

57 See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA, para. 17; Council of Europe Convention on preventing and combating violence against women and domestic violence, 2011, arts. 26, 56, 60; IACHR. Access to Justice for Women Victims of Violence in the Americas. OEA/Ser.L/V/II. Doc. 68, January 20, 2007, paras. 100-107.

58 See Rome Statute, Preamble.

59 ICC. Court's Revised strategy in relation to victims. ICC-ASP/11/38, 5 November 2012, para. 10.

60 See, *inter alia*, Rome Statute, arts. 15.3, 19.3, 43.6, 54.1(b), 57.3(c), 64.2, 68, 75, 82.4, 87.4, 93.1(j); Rules of Procedure and Evidence, Rule 16, Rule 17, Rule 18, Rule 43, Rule 50, Rule 59, Rule 76.4, Rule 81.3 and 4, Rule 86, Rule 87, Rule 88, Rule 89, Rule 90, Rule 91, Rule 92.

The Court has established a set of principles that underpin its strategy in relation to victims. These include the recognition of the importance of victims and their participation in trials and their right to have their distinct needs and interests taken into account by the Court, which commits to ensuring their safety, well-being, dignity, and privacy.⁶¹ Victims' participation has been effective in cases before the Court,⁶² in which efforts have been made to make this participation not only effective, but also durable and efficient.⁶³

In this regard, it could be said that both the Statute and the Court's strategy provide for a victim-centered approach. In the *Court's Revised strategy in relation to victims*, the Court has expressly referred to the use of a "rights-based perspective" that focuses on the realization of victims' rights as contained in the Rome Statute and the Court's legal framework.⁶⁴

The Office of the Prosecutor has also recognized the importance of victims and the role of their participation in the achievement of efficient and fair trials.⁶⁵ Specifically, the *Policy on Gender-Based Crimes* establishes, among other key principles of this policy, the survivor-centered approach and the trauma-informed approach.⁶⁶ These principles fundamentally guide the treatment of survivors and victims with dignity, respect, compassion, and empathy. They recognize the right of all survivors to equal care and support, while also acknowledging that survivors are unique and different, react differently to the experience of violence and trauma, and have different needs, strengths, and capacities.

The survivor-centered and victim-centered approach could also be integrated into the nature and scope of the principles of the policy on the crime of gender persecution in order to protect and include victims in the proceedings related to this crime.

Closely related to the intersectional approach, the focus on individuals, groups, and communities makes it possible to identify, among other considerations, the diachronous or dynamic way in which the different forms of discrimination combine with each other over time in the respective social

61 ICC. Court's Revised strategy in relation to victims. ICC-ASP/11/38, 5 November 2012, paras. 15(a) and (e).

62 See, *inter alia*, ICC. Trial Chamber X. The Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial. No. ICC-01/12-01/18; ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Decision establishing the principles applicable to victims' applications for participation. ICC-01/12-01/18-37; ICC. Pre-Trial Chamber I. The Case of *The Prosecutor v. Laurent Gbagbo*. Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings. ICC-02/11-01/11-138; ICC. The Appeals Chamber. The Case of *The Prosecutor v. Thomas Lubanga Dyilo*. Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions. No. ICC-01/04-01/06 A 4, A 5, A 6; ICC. Trial Chamber. The Case of *The Prosecutor v. Thomas Lubanga Dyilo*. Decision on victims' participation. No. ICC-01/04-01/06. See also ICC. Chambers Practice Manual. Sixth edition. Adopted following the judicial retreat of 2021, paras. 96, 97, 101, Annex.

63 See ICC. Pre-Trial Chamber I. Case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*. Decision establishing the principles applicable to victims' applications for participation. ICC-01/12-01/18-37, para. 21.

64 ICC. Court's Revised strategy in relation to victims. ICC-ASP/11/38, 5 November 2012, para. 6.

65 ICC. Policy Paper on Victims' Participation, April 2010, p. 2.

66 ICC. Office of the Prosecutor. Policy on Gender-Based Crimes. Crimes involving sexual, reproductive and other gender-based violence, December 2023, para. 70, 71-74.

contexts, giving rise to simultaneous or cascading violations of different fundamental human rights.⁶⁷ This perspective allows and facilitates a thorough approach to these violations, their consequences, and the specific justice needs of the individuals, groups, and communities that experience them. Such a people-centered approach is therefore not only relevant in identifying structural barriers to access to justice and supporting the empowerment of individuals and communities in the exercise of this right; from the objectives of prevention and protection, it can also be especially useful in identifying how gender-based discrimination occurs, the ways in which it combines and accumulates with other grounds of discrimination, and the practices that could amount to persecution in the respective social and temporal context.

⁶⁷ See UN. Report of the Special Rapporteur on the independence of judges and lawyers, Margaret Satterthwaite. The promise of legal empowerment in advancing access to justice for all. A/78/171, 13 July 2023, para. 11.

Conclusion

The crime of gender persecution defined in the Rome Statute is serious and complex. To prevent, protect, and include the participation of victims, the principles of the policy on this crime ought to include and address, in their nature and scope, elements that help guide the actions of the Office of the Prosecutor at all stages of its work toward the timely and adequate identification of acts through which this crime is committed, of the victims, and of the fundamental human rights violated. These include considerations specifically related to due diligence, the systemic analysis of the discrimination underlying gender persecution, the intersectional perspective, and the victim-centered and people-centered approach to justice. These elements are reflected and developed in the fundamental principles adopted in the *Policy on Gender-Based Crimes* of December 2023, and the Office of the Prosecutor should also consider them in the principles that are adopted in the policy on the crime of gender persecution.

