

## **Submission to The Office of the Prosecutor, International Criminal Court**

### **Principles on Gender Persecution to Provide Guidance for Increasing its Prevention, and Ensuring Protection and Participation of its Survivors**

November 20, 2024

#### **Introduction**

The Center for Gender & Refugee Studies (CGRS) provides this submission in support of The International Criminal Court (ICC) Office of the Prosecutor (OTP) initiative to advance accountability for the crime against humanity of gender persecution.<sup>1</sup> To aid in the elaboration of a comprehensive set of principles on gender persecution, this submission focuses on refugees forced to flee their homes due to this crime and their potential contributions to prevent and redress it. Because of the unique challenges faced by refugees, justice efforts might overlook their perspectives. We believe that attentiveness to these challenges, however, can ensure that refugee knowledge and experience can be leveraged to paint a more nuanced picture of the social and cultural dimensions underlying the crimes and otherwise lead to more effective responses.

For twenty-five years, the Center for Gender & Refugee Studies (CGRS or Center) has worked to protect the human rights of refugees. We have pioneered the area of gender asylum law, litigating landmark cases establishing asylum eligibility for survivors of gender-based persecution including domestic violence, female genital mutilation/cutting, and sex trafficking as well as sexual orientation or gender identity-related harms. We work with legal advocates across the United States representing asylum seekers from dozens of countries, supporting more than 8,000 cases in the last year alone. CGRS maintains a one-of-a-kind database of asylum outcomes, which offers unique insight into how stories are molded to fit specific legal elements, how evidence is marshaled to meet the individualized burden of proof, and how adjudicators perceive facts.<sup>2</sup> Recognizing the impacts of trauma on refugees, CGRS has innovated in this area: our founding director was the first attorney

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<sup>2</sup> Information regarding the CGRS database and technical assistance program may be found at <https://cgrs.uclawsf.edu/assistance>.

to partner with forensic psychologists in asylum proceedings—a practice that has since become standard. We work closely with refugee communities and others with lived experience of forced displacement in our advocacy for a more humane and dignified asylum process and, therefore, see first-hand not only the obstacles but the powerful advantages to their participation.

The inclusion of refugees across the spectrum of activities of the ICC presents many benefits for the overall objectives to prevent and redress gender persecution. In 2023, the United Nations High Commissioner for Refugees (UNHCR) recorded 117.3 million forcibly-displaced individuals globally, which includes refugees and asylum seekers.<sup>3</sup> In the United States in 2024, United Nations (UN) figures show over 3 million asylum seekers.<sup>4</sup> The data underscore that there is a significant population of refugees whose vast experience should be included in the larger context of global justice.

This submission is organized by the four pillars which will guide the elaboration of the principles: prevention, protection, peacebuilding, and relief and recovery. Taking them in turn, each section identifies the challenges and opportunities posed by the inclusion of refugee perspectives. Challenges center around the difficulties of identifying refugees situated outside of formal support networks and who are experiencing trauma and isolation related to their flight. The opportunities highlight the unique contributions such refugees have to offer. This submission is based on our experience regarding the United States though much of the analysis could be applied to other contexts.

We hope that this submission will be of assistance in creating principles on gender persecution that are sensitive to the needs of refugees, recognize their expertise, and facilitate their participation.

## **I. Prevention Strategies for Gender Persecution**

Preventing gender persecution is a critical and urgent priority in addressing global human rights challenges and protecting those most at risk, particularly women, girls, and LGBTQI+ persons. Prevention requires improving strategies to anticipate gender persecution before the risk even occurs. In 2023, the UN Department of Political and Peacebuilding Affairs (DPPA) released an updated Women, Peace and Security (WPS) Policy which highlights several strategies to consider that can also be applied to prevent gender persecution. For

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<sup>3</sup> U.N. High Commissioner for Refugees, [Global Trends: Forced Displacement in 2023](#) (2024).

<sup>4</sup> U.N. High Commissioner for Refugees, [Refugee Data Finder](#) (accessed on Nov. 6, 2024).

example, it is essential to include early consideration of the risk of violence in conflict and conduct regular consultations with civil society organizations.<sup>5</sup>

Prevention of gender persecution also involves steps to minimize the exposure of vulnerable individuals to potential harm. This includes providing access to safe shelters, education, legal services, healthcare, and public awareness campaigns that address gender persecution. It also requires strengthening community-based support and enhanced cooperation with the civil society that works on relevant challenges.

### ***Challenges Faced by Refugees in Gender Persecution Prevention***

Refugees who have survived gender persecution have unique expertise that could help prevent such crimes for those who remain in their home country. At the same time, they face particular challenges to engaging in actions to address the conditions from which they fled. Many refugees—even after receiving lawful status in the United States—still experience long-term psychological trauma, cultural displacement, language barriers, and obstacles to social and economic integration, including isolation in their new communities. A dearth of culturally-sensitive mental health resources, social networks, and employment exacerbates a sense of insecurity and vulnerability. This is especially so in the United States where asylum seekers receive few public benefits and face significant delays in receiving employment authorization.

### ***Opportunities for Refugees in Prevention Efforts***

There are good reasons to emphasize prevention efforts with participation from women, LGBTQI+ individuals, and civil society groups still living in the country. But this narrow approach risks overlooking victims who might be in other vulnerable situations. Individuals who flee may have been exposed to different or graver violations, and can identify early warning signs and emerging risks that might otherwise be missed by analysts. As survivors, they are attuned to sometimes subtle triggers and patterns preceding gender persecution, making them invaluable in effective prevention efforts and early warning systems.

One effective mechanism to implement refugee expertise in practice is to promote channels for listening to their experience and ensuring psycho-social support. For example, CGRS integrates refugee testimony and experiences into case tracking mechanisms that

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<sup>5</sup> The United Nations Department of Political and Peacebuilding Affairs, [Gender, Women, Peace and Security](#) (accessed on Oct. 1, 2024) at 12 [hereinafter - WPS Policy].

paint a larger picture of patterns of displacement. Other initiatives aimed at evaluating information of this nature, often developed in the context of their legal claim to asylum, could help refine the predictive strategies to detect and prevent gender persecution that is ongoing or likely to occur (or recur) in the future.

Refugees are also an invaluable asset for public awareness campaigns. Their personal experiences and insights as survivors can help educate and train local communities and policymakers. Additionally, their observations can help shape national and international policies and narratives on gender persecution in a more survivor-centered and holistic manner. By integrating refugee expertise, global efforts to prevent gender persecution can become more nuanced, effective, and tailored to different circumstances.<sup>6</sup> Empowering refugees to take on leadership roles in prevention efforts significantly strengthens those initiatives.

## **II. Protection Mechanisms for Survivors of Gender Persecution**

Protection from gender persecution involves implementing well-informed strategies to safeguard women, girls, and LGBTQI+ individuals from all forms of gender-based violence in high-risk contexts such as war zones, atrocity situations, and refugee camps. Human rights frameworks and humanitarian aid systems must integrate and provide such strategies. The WPS Policy emphasizes the need to address the unique protection concerns of human rights defenders, including issues such as online gender-based hate speech.<sup>7</sup>

Protection mechanisms should also be tailored to the specific vulnerabilities of different groups of people, including—most relevant for present purposes—refugees who are survivors of gender-based violence. These considerations are crucial for effective protection strategies.

### ***Challenges in Protecting Refugees from Re-Victimization***

The asylum protection framework in the United States often fails to account for the unique challenges faced by refugees who flee gender persecution, especially those in legal limbo. Individuals who are still in the process of obtaining asylum live in constant uncertainty,

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<sup>6</sup> The ICC can draw on the many local networks that exist to guide this work. In the United States, for example, the Asylum Working Group coalition and [#WelcomeWithDignity](#) campaign bring together organizations that support asylum seekers and could be an avenue for more initiatives and space to include refugee expertise.

<sup>7</sup> WPS policy, *supra* note 5, at 8.

struggling to secure basic needs such as food, housing, and employment. These challenges are exacerbated by language barriers, psychological trauma, and a lack of tailored medical, mental health, and other services. They are navigating a complex and lengthy asylum process, often without legal counsel, leaving them vulnerable to exploitation. In some instances, the persecution may be ongoing when perpetrators track them down in third countries or continue harassing them through other methods, for example, by sending online threats. Re-victimization can also occur when their personal information is not safeguarded.<sup>8</sup> Further, these individuals may ultimately face deportation to the same dangers they escaped.

### ***Opportunities for Leveraging Refugee Expertise to Strengthen Protection Systems***

Survivors of gender persecution who have successfully obtained asylum can be a tremendous asset to the protection pillar. In navigating the complexities of asylum proceedings, they must meet high burdens of proof to substantiate their claims that can help identify persecutory patterns as well as gaps in the protection systems in their home countries. To qualify for asylum protection under U.S. law, individuals must demonstrate 1) a causal connection between the persecution feared and a protected ground (*e.g.*, a gender-defined social group); 2) a connection between the feared persecution and state involvement, either as the persecutory agent or where they are unable or unwilling to control the persecutor; and 3) an inability to safely and reasonably relocate internally to avoid persecution.<sup>9</sup> Having to demonstrate that they meet each of these standards to qualify for asylum protection requires refugees to develop testimony that could help strengthen protection systems.

To establish nexus under U.S. law, applicants can show direct evidence of a persecutor's motives or circumstantial evidence, such as broader country conditions that tolerate or even encourage violence against a particular group.<sup>10</sup> Applicants often rely on expert testimony to help flesh out these broader historical systems of gender discrimination and how they manifest across societal structures and institutions. Considered in isolation, the gendered motives may be obscured, but when viewed in this broader context, they become apparent.

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<sup>8</sup> Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence, at 2.3 and 5.6 (Apr. 13, 2022) [hereinafter - MURAD].

<sup>9</sup> 8 U.S.C. § 1101(a)(42).

<sup>10</sup> See, *e.g.*, *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

As to the state involvement component, asylum applicants can highlight the inadequate (or lack of) response from public authorities in their individual case, but can also rely on general evidence regarding the futility of seeking protection.<sup>11</sup> Meeting this onerous legal standard requires collecting evidence, including expert testimony, about a range of topics, from how authorities have failed to respond in similar situations to how the legal structures are inadequate in their design or implementation. The evidentiary records developed for purposes of asylum applications could help identify large structural deficiencies in a country, such as where legal frameworks must be amended. This collection of data can also identify with even greater specificity which agencies, including in which localities, are least exercising authority to protect those at risk for gendered harms.

With respect to demonstrating the impracticality of internal relocation, applicants often look to their personal circumstances and vulnerabilities that make relocation impossible (e.g., where gender discrimination is pervasive countrywide).<sup>12</sup> In addition, they can look to more universal circumstances present in the country (e.g., where it is difficult in a high-context society to move undetected by perpetrators, or where climate events have rendered other areas of the country uninhabitable).<sup>13</sup> Refugee expertise can therefore illuminate how to build more resilient social support systems in the country, which is especially valuable when those at risk in active conflict zones cannot participate effectively in consultations themselves.

CGRS' work with group of Haitian refugees provides a vivid illustration. The women are leaders of grassroots organizations who fled to the United States after experiencing sexual violence during a previous period of repression. They have maintained ties with the grassroots organization they founded in Haiti and have been able to identify local needs and direct small grants through a cash transfer app to bring women and girls living in areas most at risk to gang persecution to safety in a way that larger aid organizations have been unable to manage. Moreover, given their personal experiences with violence, they have been able to connect the present period of gang-related sexual violence to previous periods where sexual violence was used as a weapon of war to intimidate and break down community structures. Their deep knowledge and ties to the most vulnerable communities can therefore help meet both immediate and long-term protection needs.

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<sup>11</sup> See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1057 (9th Cir. 2017).

<sup>12</sup> See, e.g., 8 C.F.R. § 208.13(b)(3).

<sup>13</sup> CGRS, *Practice Advisory: Conducting Country Conditions Research for Asylum, Withholding of Removal, and Convention against Torture Claims* (Mar. 2023) (on file with authors).

### III. Participation of Gender Persecution Survivors in Peacebuilding Efforts

Full, equal, and meaningful participation of survivors of gender persecution is a non-negotiable part of peace processes and peacebuilding efforts.<sup>14</sup> UNHCR defines such participation as “full and equal involvement of persons of concern in all decision-making processes and activities in the public and private spheres that affect their lives and the life of their community.”<sup>15</sup> The systematic inclusion of survivors more effectively addresses the root causes of gender persecution and meets the needs of those most affected.<sup>16</sup>

Engaging with refugees requires a mindful approach that respects their rights to dignity, privacy, and access to justice, and ensures they have adequate psycho-social support. A global consultative initiative, the Murad Code, provides suggested principles for engaging with survivors of sexual violence in an ethical way that ensures their fundamental rights, which has valuable lessons transferrable to the current context, especially during the information gathering stage. The principles include, for example, respecting survivors’ control and autonomy.<sup>17</sup> Similarly, the U.S. guidelines on adjudicating women’s asylum claims require awareness of and sensitivity to gender issues during the asylum interview. Guidelines direct asylum officers to consider that women might not feel comfortable sharing highly sensitive experiences in the presence of their family members or male interpreters due to cultural perspectives on gender persecution as sexual violence.<sup>18</sup>

While the ICC has set forward a Policy Paper on Victims’ Participation, providing essential principles of the victims’ involvement,<sup>19</sup> it is essential to consistently add a gendered perspective to them that could carry through these principles on gender persecution.

#### ***Challenges in Ensuring Meaningful Refugee Participation***

Survivors living in certain situations of displacement, such as refugee camps, or activists connected with grassroots organizations may be presented with opportunities to participate in public discussion. But, without focused attention, refugees who have survived gender persecution may be excluded from peacebuilding processes and policy initiatives that affect their lives. This exclusion may not be intentional, but, instead, could reflect the

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<sup>14</sup> S.C. Report S/2020/946, [Women and peace and security: Report of the Secretary-General](#), ¶ 113 (Sep. 25, 2020).

<sup>15</sup> UN High Commissioner for Refugees, [Handbook for the Protection of Women and Girls](#), p. 40 (Jan. 2008).

<sup>16</sup> WPS Policy, *supra* note 5, at Annex I.

<sup>17</sup> MURAD, *supra* note 8.

<sup>18</sup> Phyllis Coven, U.S. Dep’t of Justice, [Considerations for Asylum Officers Adjudicating Claims From Women](#) (1995).

<sup>19</sup> International Criminal Court, [Policy Paper on Victims’ Participation](#) (Apr. 2010).

challenges of incorporating a diffuse group lacking established networks. Moreover, refugees are navigating complex and prolonged legal processes which—combined with trauma, language barriers, and other challenges—can prevent them from participating meaningfully without special procedures put in place.<sup>20</sup>

### ***Opportunities for Refugee Participation in Peacebuilding***

Despite these challenges, opportunities exist for refugees to meaningfully participate in legal, social, and peacebuilding processes related to gender persecution from their countries of asylum. This section considers two. First, refugees can engage in public advocacy to draw attention to the issues. Second, refugees can be involved in bringing perpetrators to justice through local or international proceedings.

With respect to public advocacy, many refugees are rightfully wary of speaking out about their experiences should it place them or their family members still in their home country at risk, or should it have a negative impact on their immigration proceedings. For instance, any inconsistencies between their testimony and other public statements could be used to impeach their credibility. While this is a real concern, there are protections that can be put in place to mitigate these risks. CGRS has produced two resources which could help guide best practices in this regard: a guide for refugees on their rights when engaging with the media and tips for maintaining control of the narrative, and an internal policy on working with noncitizens in public advocacy that centers their voices and decision-making around risks through transparency and consultation.<sup>21</sup>

In regards to accountability efforts, refugees have been instrumental in bringing claims against perpetrators under universal jurisdiction statutes. The United States, for example, has two civil law statutes—the Alien Tort Statute (ATS)<sup>22</sup> and the Torture Victim Protection Act (TVPA)<sup>23</sup>—which empower foreign nationals to bring civil claims against perpetrators in U.S. courts. By way of example, refugees pursued justice for sexual violence, torture, massacres, and other human rights abuses in Haiti during the 1991-1994 coup period. In the first case, sexual violence survivors secured a default judgment against Emmanuel “Toto” Constant, a Haitian death squad leader responsible for rape, torture, and murder,

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<sup>20</sup> Tristan Harley, Harry Hobbs, *The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy*, International Journal of Refugee Law (May 8, 2020); see also Switchboard, *Access to Mental Health Services for Refugees and Other Vulnerable Immigrants in the U.S.* (Aug. 29, 2019).

<sup>21</sup> CGRS et al., *Your Rights with the Media: A Guide for People Seeking Asylum* (2023) (on file with CGRS).

<sup>22</sup> 28 U.S.C. § 1350.

<sup>23</sup> 28 U.S.C. § 1350 note.



who had moved to New York.<sup>24</sup> In the second case, survivors won the case against Florida-based Carl Dorélien, a former Haitian military leader who had committed many atrocities.<sup>25</sup> Throughout these proceedings, the plaintiffs were in touch with victim groups still in Haiti and working to reinforce justice efforts underway there as well.

These powerful examples underscore the important role refugees can play in advancing legal accountability and shaping conceptions of justice, particularly where they have access to culturally competent psycho-social services. Their participation can reveal insights into the root causes and persistent conditions enabling gender persecution, thus strengthening legal frameworks and accountability mechanisms. Most importantly, such involvement fosters a survivor-centered approach that not only enhances protections, but also ensures survivors' voices actively shape the policies that directly impact their lives.

#### **IV. Relief and Recovery for Survivors of Gender Persecution**

The relief and recovery pillar emphasizes both immediate and long-term support for gender persecution survivors ensuring that support is provided through a gender-sensitive lens. This approach recognizes that survivors face unique vulnerabilities and specific trauma, which should be accounted for with care and sensitivity. Relief efforts should include access to shelters, medical and psychological care, and legal assistance tailored to the distinct experiences of individuals. These efforts should empower survivors by helping them find paths to healing and resilience.

##### ***Challenges in Providing Relief to Gender Persecution Survivors***

Refugees who have survived gender persecution face multiple layers of psychological trauma that is often exacerbated by a prolonged, confusing, and, in some instances like in the United States, adversarial asylum process. It can take years, if not decades, to have their case resolved, during which time they may be unable to work or access social security benefits, housing, or medical care. This legal limbo compounds the trauma they have already endured, exacerbating feelings of isolation and fear. Survivors of gender persecution who have already obtained asylum or other legal status may also still be impacted by the trauma of displacement and concern for their family members who may still be in danger. The uncertainty about their family's safety adds an additional layer of emotional burden, further complicating their ability to recover. In addition, refugees often

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<sup>24</sup> Doe v. Constant, 354 F. App'x 543 (2d Cir. 2009).

<sup>25</sup> Jean v. Dorélien, 431 F.3d 776 (11th Cir. 2005).

face stigma associated with gender persecution that can further isolate them, making it difficult to seek support in their new community. There is a crucial need for targeted relief measures.

### ***Opportunities for Survivor-Led Relief and Recovery Initiatives***

Despite these challenges, refugees who have survived gender persecution bring invaluable strength and resilience that can help develop trauma-informed relief and recovery services for themselves and others. Having gone through the displacement process, they can offer critical insights into the types of psychological support, medical care, and legal assistance that are the most effective (and the most lacking). Additionally, if they have found safety and recovery in the United States, they might be able to support their communities from afar. Many hold hope that they will eventually be able to safely return home to help those affected by similar experiences.

Humanitarian organizations should engage refugees in the design and implementation of relief programs to ensure their services are most responsive to the needs of displaced survivors. This approach enhances relief services, fosters survivor empowerment, and creates more compassionate and sustainable support systems for survivors of gender persecution.

### **Conclusion**

CGRS commends the Prosecutor's attention to not only prosecuting, but also preventing and redressing the crime of gender persecution. In developing principles, we encourage sensitivity to the special needs and potential contributions of refugees seeking safe haven and attempting to rebuild their lives in countries throughout the world. Identifying and engaging refugee survivors presents myriad challenges. But principles attuned to their experiences will help overcome those barriers, providing both a blueprint and necessary encouragement for civil society to include refugee voices in powerful ways. Ultimately, their inclusion could help foster solutions that are survivor-centered, just, and sustainable.