

Comments on the new policy initiative to advance accountability for Gender Persecution under the Rome Statute

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The European Center for Constitutional and Human Rights (ECCHR) and the German Women Lawyers Association (djB) respectfully submit this statement to the Office of the Prosecutor. We highly welcome the Prosecutor's initiative to promote accountability for gender persecution under the Rome Statute since we believe that such accountability is crucial for effectively addressing gender-based discrimination from an international criminal law perspective.

As rightly set out in the 2014 Policy Paper on Sexual and Gender-Based Crimes, gender-based crimes take many forms and are not necessarily manifested as acts of sexualized violence.¹ Almost every crime can qualify as gender-based when committed to enforce socially constructed gender roles. Justice for these crimes, if it is to be adequate, requires a recognition of this discriminatory motive. Otherwise, any attempt to fight impunity runs the risk of obscuring and thus perpetuating the underlying structures of oppression.² Accountability for gender persecution is crucial in this regard, as it necessarily involves addressing the gendered motivation to discriminate as part of the *mens rea* requirement. Its recognition as a crime against humanity by the Rome Statute was thus a decisive step towards acknowledging the enormous gravity of gender discrimination amounting to a severe deprivation of fundamental rights.

We believe the following aspects should be given special consideration when drafting the policy paper:

¹ Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, p. 3. A missed opportunity in this regard was the omission of gender-based persecution from the charges in the Mbarushimana case. In the Application under Article 58 regarding Callixte Mbarushimana (20 August 2010, ICC-01/04-01/10-11-Red2, marg. note 97), the OTP initially argued that males were also targeted by gender-based persecution, as they "are forced to rape [and] targeted to show FDLR dominance through violating their manhood in this manner". However, the OTP subsequently cited only persecution on grounds of political affiliation. See PTC I, Document de notification des charges presente par l'Accusation en application de l'article 61-3 du Statut de Rome, 4 August 2011, ICC-01/04-01/10-311-AnxA-Red, marg. notes 96 et seq.

² For an in-depth analysis of the importance of recognizing gender persecution, see Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. Hum. Rts. 1 (2021).

- We strongly encourage the OTP to build on an understanding of gender as a social construct, as already articulated in the 2014 policy paper.³ Drawing on this understanding, it should be clarified that persecution based on sexual orientation qualifies as gender persecution under Article 7(1)(h). Such clarification would, firstly, be the logical consequence of understanding gender as socially constructed and therefore understanding gender-based persecution as persecution based on non-conformity with gender roles, e.g. via sexual orientation. Secondly, this would give effect to the longstanding recognition of sexual orientation as a protected class under international human rights – a normative fact which must be taken into account when interpreting the Statute pursuant to article 21(3).⁴
- Gender persecution needs to be viewed through an intersectional lens. Gender as a category should always be understood in interplay with other categories such as ethnicity or religion.⁵ In case of intersecting grounds of discrimination, all categories should be stated as part of the charges if they fall within the scope of Article 7(1)(h), as only a comprehensive and intersectional understanding of the actual experiences of persecution will lead to their adequate legal assessment.
- In cases where both the elements of gender persecution and other crimes are fulfilled, the OTP should bring cumulative charges.⁶ This is essential for the recognition of the specific injustice of persecution and prevents discriminatory intentions from being overlooked. Also when it comes to other forms of gender-based or sexual violence, it is particularly important to separately address its different facets, especially with regards to such forms of gender-based violence that have so far been neglected, such as reproductive violence.⁷

³ Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, p. 3.

⁴ For a concise overview of the respective arguments, see, for instance, Valérie V. Suhr, “Rainbow Jurisdiction of the International Criminal Court? Gender-based Persecution of Gays, Bisexuals and Lesbians as a Crime Against Humanity”, *Völkerrechtsblog*, 12 March 2018, doi: 10.17176/20180311-110245.

⁵ A positive example is the Mali situation, where Pre Trial Chamber I recognized a gender-based persecution in strict regulations for women regarding their clothing and the requirement to go outside only when accompanied by a male person. See *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 8 November 2019, ICC-01/12-01/18, marg. notes 690, 697. It also acknowledged the intersection of sexism and colourism, as it was noted that darker-skinned females were more affected by violence than lighter-skinned females, see marg. note 702. Another example is the persecution of Yazidi women by ISIS/ISIL. See also Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 Wm. & Mary J. Women & L. 513 (2018), p. 514 et seq., 522 et seq.

⁶ The importance of bringing cumulative charges has already been acknowledged in the 2014 policy paper, see OTP, Policy Paper on Sexual and Gender-Based Crimes, para. 72.

⁷ On this topic, see Tanja Altunjan, *Reproductive Violence and International Criminal Law* (2021).

- Beyond that, in our view, the new initiative should draw from and advance the many promising approaches that were already raised in the 2014 policy paper. This includes, inter alia, adopting a survivor-centered approach, applying a gender analysis to all crimes under the Rome Statute, and paying particular attention to the commission of sexual and gender-based crimes at all stages of investigation.

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