

Position of the UN Special Rapporteur on violence against women, its causes and consequences, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Independent Expert on sexual orientation and gender identity, and the Working Group on discrimination against women and girls on the International Criminal Court policy on gender-related prosecutions

The Special Rapporteur on violence against women, its causes and consequences has participated in the consultations on the 2014 policy of the International Criminal Court (ICC) on gender-related persecutions (hereafter 2014 Policy). In their capacities pursuant to Human Rights Council resolutions 41/17; 42/22, 41/18, and 41/6, the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Independent Expert on sexual orientation and gender identity; and the Working Group on discrimination against women and girls presented several recommendations on the Policy for the consideration of the ICC Office of the Prosecutor (OTP), and would like to make their views public.

Recommendations to the Prosecutor of the ICC for the policy on gender-related persecutions

1. On the definition of gender in the new policy

Under article 7(3) of the Rome Statute of the International Criminal Court (ICC), the term ‘gender’ refers to the two sexes, male and female, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviors, activities, and attributes assigned to women and men, and to girls and boys.

The 2014 Policy regularly refers to sexual and gender-based crimes as if the two types of crimes can be used interchangeably to refer to the same violation. The paper explains that sex is “the biological and physiological characteristics that define men and women”¹ and speaks of gender-based crimes as those committed against persons, whether male or female because of their sex and/or sexually constructed gender roles”.² Accordingly, gender should not be confused with sex. “Instead, gender helps us to question that which we otherwise take for granted, including the category of sex”.³

In the course of their work, several UN Special Procedures have observed the status of gender as a source of distinct exposure to risk of human rights violations, and that the acknowledgment and visibility of stereotypes, power asymmetries, and inequality that lie at the foundation of violence and discrimination are a fundamental component of the formula for their eradication. The Special Rapporteur on violence against women, its causes and consequences has observed that “[g]ender-based killing due to sexual orientation and gender identity is a phenomenon that has been recently, albeit insufficiently, documented. Lesbian, gay, bisexual, transsexual, transgender, intersex and

¹ ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes June 2014, p. 3, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>.

² Ibid.

³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, Agnes Callamard, para 17, UN Doc. A/HRC/35/23 (6 June 2017).

queer persons (LGBTIQ), and also activists working in this sector, are targeted because they do not conform to stereotypes of gender sexuality and/or identity”.⁴ The Working Group on discrimination against women and girls has observed that women who do not conform to gender stereotypes are particularly vulnerable to discrimination, violence and criminalization.⁵ The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that gender “is understood to produce distinct vulnerabilities and risks linked to the way societies organize male and female roles and exclude those who transgress such roles.”⁶ The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) has observed that “the notion that there is a gender norm, from which certain gender identities ‘vary’ or ‘depart’ is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights.”⁷ The Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism has found that a “holistic and intersectional approach to addressing the relationship between gender and violent extremism” is needed to address “the gendered drivers of armed conflict and the relationship between violent and hegemonic masculinities and the production of violent extremism”.⁸ The Special Rapporteur on the right to physical and mental health has observed that “[i]t is increasingly clear that sexual orientation and gender identity derive from a complex interplay of biological, genetic and social factors and that individuals have little or no choice in its determination.”⁹

Special Procedures have also noted that gender intersects with other protected grounds, including sex and sexual orientation, to produce particularly heightened vulnerabilities for certain groups and individuals. The Special Rapporteur on the human rights of internally displaced persons, for example, has noted that “[i]nternally displaced women also often experience human rights challenges due to interlinked forms of discrimination based on gender and intersection of gender with other factors such as age, group affiliation (e.g., membership in minority groups), disability, civil status, socioeconomic status and displacement itself.”¹⁰ The Special Rapporteur on violence against women, its causes and consequences has noted that “factors such as ability, age, access to resources, race/ethnicity, language, religion, sexual orientation and gender identity and class can exacerbate the violence women experience”.¹¹

Disproportionate exposure to risk is also experienced, and often exacerbated, in the context of armed conflict and within situations under international criminal law. The United Nations Security Council recognized the role of gender in armed conflict in its landmark Resolution 1325 (2000). That resolution, together with earlier international criminal law instruments, acknowledges the importance of gender-based approaches to situations of conflict and violence.¹² Power dynamics and hierarchies connected to gender

⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, para. 71, UN Doc. A/HRC/20/16 (23 May 2012).

⁵ A/HRC/29/40, para. 21.

⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings, Agnès Callamard, para. 16, UN Doc. A/HRC/35/23 (6 June 2017) at para. 22.

⁷ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, para. 6, UN Doc. A/73/152 (12 July 2018).

⁸ *Ibid.*, par. 39.

⁹ Report of the Special Rapporteur on physical and mental health, Dainius Pūras, para. 12, UN Doc. A/HRC/32/32 (4 April 2016).

¹⁰ Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani, para. 21, UN Doc. A/HRC/23/44 (18 March 2013).

¹¹ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, para. 13, UN Doc. A/67/227 (3 August 2012).

¹² Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art. 5.g, rape as crime against humanity. Related landmark decisions and case law by the ICTY: Prosecutor v. Duško Tadić, Opinion and Judgement, Trial Chamber, 7 May 1997; Prosecutor v. Mucić et al. (Čelebići Camp), Judgment, Trial Chamber, 16 November

are at the root of many instances of violence and conflict, including those that are perpetrated in situations of armed conflict.

The preceding observations clearly reflect the intersections between sex, sexual orientation, and gender, but it must be emphasized that these are distinct concepts which exist independently of one another. To this respect, the IE SOGI has found that gender is “used in international human rights law as concerning human persons who live in gendered societies, among preconceptions and power hierarchies that will create a context for the development of their personal identities and social interactions. In this manner, gender theory is also relevant as a tool to address, analyse and transform systems of violent masculinity,”¹³ and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has recognized, “[w]hile women, girls, lesbian, gay, bisexual and transgender persons, sexual minorities and gender-non-confirming individuals are the predominant targets, men and boys can also be victims of gender-based violence, including sexual violence stemming from socially determined roles and expectations.”¹⁴

Indeed, all human beings live in gendered societies traversed by power hierarchies and preconceptions. This process of consolidation of one’s identity has been described by different UN Special Procedures, including among others, by the Working Group on discrimination against women and girls. At a regional level, the jurisprudence of the European Court of Human Rights has adopted an expansive conception of gender. It has been recognized as one of the most intimate aspect of a person’s private and family life (under article 8 of the European Convention),¹⁵ as well as in the Court’s jurisprudence on non-discrimination.¹⁶ The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) thoroughly integrates a sophisticated understanding of gender, and contains a progressive definitional framework that includes gender and gender identity, as well as sex and sexual orientation.¹⁷ In the Inter-American system, the Organization of American States initiated the adoption of the Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) in 1994, which the Inter-American-Court of Human Rights has subsequently recognized as applying to trans women on the basis of gender identity and self-identification.¹⁸ Likewise, the African Court of Human and People’s Rights has accepted that impacts on gender-nonconforming persons contribute to a pattern of discrimination in violation of the African Charter of Human and Peoples’ Rights.¹⁹

In this vein, the new policy should go beyond the binary mold to recognize the identity and rights of non-binary persons, i.e., those that may not identify as exclusively man or

1998; *Prosecutor v. Anto Furundžija*, Judgement, Appeals Chamber, 21 July 2000; *Prosecutor v. Kunarac, Kovač and Vuković*, Judgement, Appeals Chamber, 12 June 2002; *Prosecutor v. Radislav Krstić*, Judgement, Trial Chamber, IT-98-33-T, 02 August 2001. See also United Nations Security Council Resolution 2467.

¹³ Report of the Independent Expert protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, para. 3, UN Doc. A/HRC/47/27 (3 June 2021).

¹⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, para. 7, UN Doc. A/HRC/31/57 (5 January 2016).

¹⁵ *Van Kuck v. Germany* (application No. 35968/97).

¹⁶ See e.g. *Napotnik v. Romania* (application No. 33139/13); *Khamtohu and Aksenchik v. Russia* (applications Nos. 60367/08 and 961/11); *Markin v. Russia* (application No. 30078/06); *Enache v. Romania* (application Nos. 16986/12) and *Petrovic v. Austria* (156/1996/775/976).

¹⁷ Istanbul Convention art. 4(3).

¹⁸ Advisory Opinion OC-24/17 at para. 78.

¹⁹ Advisory Opinion 001/2018.

woman, boy or girl. Similarly, the new policy should also take into consideration the profile and needs of gender-diverse persons, i.e., those who do not conform to prevailing narratives that define socially-accepted gender expressions: while international instruments recognising gender have traditionally focused on women and girls, there is now greater recognition that these frameworks are adequate to address other forms of gender-based violence in situations of conflict, such as violence directed at LGBTIQ+ and non-binary and gender non-conforming persons.²⁰ The UN Secretary-General, for example, has called for greater attention to the various ways that gender identity can intersect with other grounds of violence and discrimination in situations of armed conflict.²¹

The new policy should also make a clear distinction between sexual orientation and gender identity and to recognize each. As the IE SOGI has recently observed, “[g]ender identity does not determine sexual orientation, or vice-versa, and the fact that human diversity, in its immense scope, resists neat categorizations for these features is precisely what places them at the origin of violence and discrimination when they do not conform to certain expectations or rules”.²² Importantly, they follow different bases for protection under international human rights law, which increasingly recognizes sexual orientation as a basis for protection, either as an autonomous ground of anti-discrimination, or because of its relationship to the notion of “sex”.

As part of the process of recognition of gender-based frameworks in international human rights law, identity and expression, and their nature when they manifest internal and external autonomous and free choice in relation to gender, are likewise increasingly recognized as distinct grounds of protection, and the ICC Prosecutor is invited to incorporate these distinct concepts in preparation of the policy of gender-related persecutions. This distinction is important, as *sexual orientation* is conceptually distinct from *gender*, which is similarly distinct from *sex*. Protection on the ground of gender identity and gender expression must ultimately rest on an understanding which goes beyond biological attributes and recognizes their socially constructed dynamics. As several of Special Procedures mandate holders and their predecessors have previously observed:²³

... autonomous recognition of these grounds is required to adequately address the root causes of violence and discrimination and ensure accountability. In effect, proper identification of the motive is an essential component of investigation and prosecution, and the design of reparation measures. In this connection, the Independent Expert [on protection against violence and discrimination based on sexual orientation and gender identity] has concluded that negation hinders proper collection of evidence and data and diligent exploration of all lines of investigation, and fosters a climate where hate speech, violence and discrimination are condoned and perpetrated with impunity.

²⁰ For a detailed discussion on the nature and scope of UNSC Resolution 2467 see Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW.

J. HUM. RTS. 1 (2021); <https://scholarlycommons.law.northwestern.edu/njihr/vol20/iss1/1>, p.56.

²¹ United Nations Security Council, Women and peace and security, Report of the Secretary-General, S/2020/946, 25 September 2020, para. 10; United Nations Security Council, Conflict-related sexual violence, Report of the Secretary-General, S/2021/312, 30 March 2021, para. 71 (b).

²² Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, A/76/152, para. 48 (15 July 2021).

²³ Letter of several mandate holders to the International Law Commission, Re: Comments Regarding the Persecutory Grounds in the Draft Crimes Against Humanity Convention, 30 November 2018, available at <https://www.ohchr.org/Documents/Issues/SexualOrientation/LetterPersecution.pdf>.

Article 21 (3) of the Rome Statute requires the court to interpret its provisions in light of international human rights law. The 2014 Policy requires the OTP to “ensure that it applies and interprets the Statute in line with internationally recognized human rights, including those relating to women’s human rights and gender equality”.²⁴

There are now nine core international human rights treaties, complemented by various protocols that interrelate with the issue of sexual orientation and gender identity, to some extent.²⁵ This is in addition to the recognition of sexual orientation and gender identity under the European Convention on Human Rights,²⁶ the European Union²⁷ and the inter-American system, which also appointed a regional rapporteur specifically to cover these issues.²⁸ The General Assembly of the Organization of American States also approved two treaties that refer to sexual orientation and gender identity as grounds on which discrimination must be prohibited. Furthermore, Resolution 275 of 2014 of the African Commission on Human Rights and Peoples’ Rights on the protection against violence and other human rights violations against persons based on their real or imputed sexual orientation or gender identity. This is a line of interpretation consistent with the findings of regional human rights tribunals. The European Court of Human Rights, for example, has found discrimination on the basis of sexual orientation to amount to discrimination prohibited by article 14 of the European Convention on Human Rights.²⁹ Discrimination on the basis of sexual orientation is explicitly prohibited by the Charter of Fundamental Rights of the European Union.³⁰ The Inter-American Court of Human Rights has likewise found that discrimination on the basis of sexual orientation violates the American Convention on Human Rights.³¹ Meanwhile, resolutions of the Inter-American Commission on Human Rights and the African Commission on Human and Peoples’ Rights have established programs to combat discrimination and violence on the basis of sexual orientation.³² The experts also note that sex characteristics – a person’s physical features related to sex, including genitalia – are also a ground deserving of autonomous legal protection against violence and discrimination. This is particularly important in relation to intersex individuals.³³

2. On gender as a basis for discrimination

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health underscores that, despite the fact that equality and anti-discrimination laws in recent years have been enacted and implemented nationally, regionally and internationally, equality remains out of reach for many. Thus,

²⁴ Ibid, p. 16

²⁵ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity A/HRC/35/36, paras. 20-28.

²⁶ Id citing, European Convention on Human Rights, Art. 14. Council of Europe, 1950; European Court of Human Rights, *Mouta versus Portugal*, Application No. 33290/96, judgement of 21 December 1999.

²⁷ Id. Citing, Charter of Fundamental Rights of the European Union, Art. 21 (1), European Union, 2000.

²⁸ Id citing, Resolution AG/RES. 2435 *XXXVIII-O/08) Human Rights, Sexual Orientation and Gender Identity, approved at the fourth plenary session, held on June 3, 2008; Rapporteurship on the Rights of LGBTI Persons.

²⁹ *Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999.

³⁰ Article 21(1).

³¹ *Atlata Riffo v. Chile* Judgment of February 24, 2012, I/A Court H.R., Series C No. 239.

³² Resolution AG/RES. 2435 (XXXVIII-O/08) Human Rights, Sexual Orientation and Gender Identity, approved at the fourth plenary session, held on June 3, 2008; Rapporteurship on the Rights of LGBTI Persons; Resolution 275 on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola, April 28 to May 12, 2014.

³³ See the Report of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, para. 77 (1 February 2013).

to remedy this persistent inequality, substantive equality must be adopted as a goal that all nations should work towards. This approach allows us to address inequality as a problem of structural power, which creates and perpetuates systems of privilege and disadvantage in society.³⁴

Laws, policies, and gaps in services that directly or indirectly restrict access to abortion services or contribute to delays in access are leading sources of gender-based discrimination and violence that disproportionately impact women and girls in these settings and require increased recognition. It is already recognized under international law that “denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill treatment.”³⁵ This position has been reaffirmed by the Working Group on discrimination against women and girls which recognizes such violations as being linked to structural discrimination.³⁶

It would be important that the OTP underscores the issue of intersectionality when gender is a basis for discrimination. In the 2014 Policy, the OPT committed to “understand the intersection”³⁷ between gender and other factors without elaborating on the important nature of intersectionality and how it interplays with other factors such as race, age, disability, political opinion. The Working Group on discrimination against women and girls stressed that there are multiple and intersecting forms of gender-based discrimination that reinforce and sustain each other. All women, in their diversity and many different circumstances, are affected differently by discriminatory laws and practices. Women facing multiple and intersecting forms of discrimination experience inequality even more acutely. Nevertheless, there are shared aspects of discrimination against women that persist in all cultures, although with differing levels of intensity and differing impacts.³⁸

The experts would like to encourage the OTP to take an expansive approach to intersectionality. Other factors that intersect with persecution based on gender identity or sexual orientation should include factors such as language, social origin, age, disability, health, indigenous, refugee, statelessness, and migration status. More importantly however, adopting an intersectional approach to charges would require the OTP to move beyond looking at intersectional identities to using intersectionality as a framework for understanding structural forms of violence. It may also mean that the OPT (and subsequently the court) would have to be prepared to abandon an approach that consciously or subconsciously tries to identify a primary ground for persecution. Persecutors may target individuals for overlapping grounds in a given context, as individuals can be members of a combination of social groups and not only one.

The Working Group on discrimination against women and girls also stressed that women and girls are entitled to receive adequate reparations, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition, for violations of their sexual and reproductive health rights, and States have a core obligation to ensure access to effective and transparent reparations. Furthermore, the Special Rapporteur on

³⁴ See the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/47/28 (7 April 2021)

³⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC731/57, para.44 (5 January 2016)

³⁶ Report of the Working Group on discrimination against women and girls, A/HRC/47/38, para. 23 (28 April 2021).

³⁷ The Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 27, <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>.

³⁸ Reasserting Equality, Countering Rollbacks, A/HRC/38/46

violence against women, its causes and consequences has called for reparations to be transformative. The mandate has encouraged the implementation of a gender sensitive approach, which does not entrench pre-existing patterns of gender-based discrimination and which ensures meaningful participation and consultation of victims in the design, implementation, monitoring and evaluation of reparations. However, women and girls continue to face a variety of barriers to access to justice in situations of crisis, from the lack of recognition of the harm caused to them as being a violation of human rights to the absence of procedures and formal mechanisms.

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health observes a global patriarchal culture, a regressive climate and pushback in the areas of sexual and reproductive health rights and opposition to gender equality. Gains made in the past decades in these areas are at risk of being rolled back, with the rights and perspectives of women, girls and LGBTIQ+ persons side-lined³⁹ with regressive policy leading to being persecuted. The Working Group welcomes the judicial recognition of the harms caused by sexual and reproductive violence during conflict and the provision of reparations. States have been held responsible for failing to protect the sexual and reproductive health rights of women and girls in cases concerning access to safe abortion, non-discriminatory and timely access to maternal health care, mistreatment during childbirth and access to contraceptive information and services.⁴⁰

3. Method of work

In undertaking its work, the experts would recommend that the OTP consider:

- Using more systematically the emerging and relevant standards from findings and recommendations of the Special Procedures. This document presents some examples of how the Special Procedures have defined gender and how gender-related discrimination and persecution has been treated in some of the reports of mandate holders of the Special Procedure of the Human Rights Council;
- Analyzing acts of gender-related persecution through the lens of human rights obligations;
- Factoring in structural gender-based discrimination experienced by different groups, including its drivers and root causes, and the cumulative impact of multiple forms of discrimination such as but not limited to racism, ableism, transphobia, xenophobia, when they intersect;
- Attributing greater importance to the effective participation of victims in all their gender diversity;
- Ensuring a gender perspective in examining reparations that address the gendered aspect of harm to individual victims and the structural dimensions and harmful stereotypes that facilitated such violations, including violations of women's sexual and reproductive rights, through complex reparations that combine the whole set of reparations modalities -i.e. restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

³⁹ See the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/76/172 (17 July 2021)

⁴⁰ Women's and girls' sexual and reproductive health rights in crisis, A/HRC/47/38

In order to facilitate the implementation of these recommendations, the experts support the recommendation made by various academics, organizations and legal experts that the Prosecutor's Office ensures that the staff supporting his Office consistently adopts a gender perspective in all aspects of their work, including at the highest levels. As indicated by the Women's Initiative for Gender Justice,⁴¹ attention needs to continue on gender mainstreaming, the appointment of senior staff responsible for gender equality and the empowerment of female staff, support for the appointment of a Court-wide Gender Focal Point, gender balance in the OTP's staff, ongoing training of OTP staff (including the Prosecutor) on gender issues, and an office culture in which gender analysis is standard from preliminary examinations through to appeals.⁴²

Furthermore, and as other legal experts and academics have recommended, any analysis carried out by the OTP should include a mapping of relevant actors and explanation of the situation from a gendered perspective, including possible markers for sexual and gender-based crimes. This analysis should be provided to the investigation team once appointed to facilitate the early consideration of possible sexual and gender-based crimes and linkage to relevant actors.⁴³ The initiative will go a long way in addressing the underutilization of the charge of gender-based persecution relative to the prevalence of the crime.

⁴¹ Women's Initiative for Gender Justice, 12 March 2000, <https://4genderjustice.org/uncategorized/womens-initiatives-submission-to-the-group-of-independent-experts/>

⁴² Mark Kersten, ICC Prosecutor Symposium: The Prosecutor's Commitment to Ensuring Gender Equality, 16 April 2020, <https://justiceinconflict.org/2020/04/16/icc-prosecutor-symposium-the-prosecutors-commitment-to-ensuring-gender-equality/>

⁴³ FIDH and Women's Initiative for Gender Justice, Accountability for Sexual and Gender-Based Crimes at the ICC: An Analysis of Prosecutor's Bensouda's Legacy, June 2021, p. 19, <https://www.fidh.org/IMG/pdf/epiproc772ang-1.pdf>