



BRIEF



Comments on the Development of a Policy on the Crime against Humanity of Gender Persecution

Submission from UN Women to Office of the Prosecutor at the International Criminal Court

March 2022

UN Women thanks the Prosecutor of the International Criminal Court (ICC), Mr. Karim Khan, and the Special Advisor to the Prosecutor on Gender Persecution, Ms. Lisa Davis, for their leadership to pursue accountability for the crime of gender persecution. The development of a policy on gender persecution for the Office of the Prosecutor (OTP) is an important step to ensure that the Office is fully prepared to investigate and prosecute this complex crime. UN Women also acknowledges the OTP's inclusive process for collecting submissions from interested parties to inform the policy.¹ This initiative creates space for civil society organizations and victims and survivors of gender persecution to have their voices heard. UN Women hopes that this submission amplifies the messages of our civil society partners around the world, and the clear call by victims and survivors for accountability.

Accountability for gender persecution is at the heart of UN Women's mandate on gender equality. UN Women is committed to the pursuit of accountability for all human rights violations and crimes, particularly those violations and crimes with a disproportionate or targeted impact on women, girls and people of diverse sexual orientations, gender identities and expressions and sex characteristics (SOGIESC). There is no crime that fits this description more closely than the crime of gender persecution. In addition, UN Women is dedicated to supporting the meaningful participation of women, girls and people of diverse SOGIESC in public life, including in decision-making on peace and security issues. The crime of gender persecution is often used as a tactic to

Artwork by a survivor of conflict-related sexual violence

silence women, girls, lesbian, gay, transgender, intersex and queer (LGBTIQ+) people, and those who defy gender norms and stereotypes, to keep them from participating in public life and to prevent their work as peacebuilders. For this reason, the prevention, investigation and prosecution of gender persecution is fully aligned to UN Women's mandate to implement the women, peace and security agenda, including support to women human rights defenders, peacebuilders, politicians and journalists in conflict and atrocity-affected contexts.

The proposed policy on gender persecution offers an important opportunity for the OTP to recognize and protect the fundamental rights of women, girls, and LGBTIQ+ people. UN Women recently supported the development of two publications on the crime of gender persecution: a [toolkit](#) for investigators and prosecutors with MADRE and CUNY Law, and a policy brief with Justice Rapid Response (forthcoming). We encourage the OTP to utilize both publications in the development of its policy. In addition to these publications, and complementary to them, UN Women wishes to highlight two points in this submission: **(1) a legal argument, regarding the scope of "fundamental rights violations" that the OTP may consider investigating and prosecuting as acts of gender persecution; (2) an operational argument, regarding the importance of conducting a gender analysis of the human rights context and of crime patterns, to lay the foundation for successfully investigating and prosecuting the crime of gender persecution.**

1. The Scope of Acts to be Considered as Gender Persecution

UN Women encourages the OTP to crystalize its past practice (e.g., in the *Al Hasssan* case), of [including civil, political, economic, social and cultural rights violations as acts of gender persecution, in addition to other crimes under the jurisdiction of the Court, such as rape, sexual slavery, enforced prostitution, etc.](#)

Under Art. 7(1)(h) of the Rome Statute, persecution on political, racial, national, ethnic, cultural, religious, or gender grounds is a crime against humanity. Art. 7(2)(e) further clarifies, “Persecution’ means the intentional and severe deprivation of **fundamental rights** contrary to international law by reason of the identity of the group or collectivity.” Although the Rome Statute stipulates that an act of persecution should be a “severe deprivation of a fundamental right,” it does not provide guidance as to what such a “fundamental right” might be, or when it becomes a “severe deprivation.”

In its decision to authorize an investigation into the situation in Burundi, ICC Pre-Trial Chamber III interpreted Art. 7(2)(e) of the Rome Statute, and described what can be considered a fundamental right in relation to persecution:

“Persecutory acts can take many forms. Not every infringement of human rights is relevant but only a ‘severe deprivation’ of a person’s ‘*fundamental rights*’ contrary to international law. This may include a variety of rights, whether derogable or not, such as the right to life, the right not to be subjected to torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of assembly and association, and the right to private property.”²

In a footnote, the Pre-Trial Chamber says, “The Chamber will have recourse to, for example, 1948 Universal Declaration of Human Rights; 1966 International Covenant on Civil and Political Rights; 1966 International Covenant of Economic, Social and Cultural Rights; African Charter on Human and Peoples’ Rights; American Convention on Human Rights; (European) Convention for the Protection of Human Rights and Fundamental Freedoms.”³

In its application for an arrest warrant in the *Al Hassan* case, the Prosecutor cited to the above decision of the Pre-Trial Chamber on the situation in Burundi.⁴ In its decision to grant an arrest warrant in the case, Pre-Trial Chamber I summarized the Prosecutor’s argument: “[T]hat the people of Timbuktu suffered violations of their fundamental rights, viz. the rights to freedom of religion, freedom of expression, freedom of thought, freedom of association and assembly, freedom of movement, equality, education, privacy, personal dignity, security and property.”⁵ The Trial Chamber agreed with the Prosecutor’s reasoning and found reasonable grounds to believe that the crime against humanity of

persecution on gender grounds was committed.⁶ The Pre-Trial Chamber decision makes clear that the Court is willing to consider a wide range of human rights violations as possible grounds for gender persecution, when they are committed in connection with another crime under the jurisdiction of the Court.

This broad interpretation of “severe deprivation of a fundamental right” is also in line with the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in relation to persecution on political, racial and religious grounds. In the *Krnjelac* judgment, the ICTY Trial Chamber found that a violation of a fundamental right amounting to persecution could take various forms, and that there was no “comprehensive list” of such acts.⁷ Acts and omissions listed under Art. 5 of the ICTY Statute (crimes against humanity) were “by definition serious enough” to be considered persecutory when committed with discriminatory intent, while those acts not listed may constitute persecution if they are of the same gravity as the enumerated acts; that is, the acts must be “gross or blatant denials of fundamental human rights.”⁸

Further, the *Krnjelac* judgment explained that when considering the gravity of non-enumerated acts, the acts must be seen in their context. Although an individual act may not meet the gravity threshold, the cumulative effect of a series of acts may satisfy this burden.⁹ In the *Kupreskic* judgment, the ICTY Trial Chamber examined the Nuremberg Tribunal’s jurisprudence on persecution and noted that, “A narrow definition of persecution is not supported in customary international law,”¹⁰ and that attacks on political, social, and rights could rise to the level of persecution.¹¹ The Chamber provided the example of restrictions on social life, such as a prohibition on entrance to parks, theatres, or libraries, and suggested that such restrictions could be persecutory when taken in their broader context.¹²

UN Women encourages the OTP to use the policy as an opportunity to formalize its own past practice on gender persecution in from the *Al Hassan* case, and draw upon the ICTY’s precedent: acts and omissions listed as crimes in the Rome Statute should be “by definition serious enough” to be considered persecutory when committed with discriminatory intent.¹³ The OTP may consider violations of political, civil, economic, and social rights to be of sufficient gravity, when taken in their context,¹⁴ and committed in connection with another crime under the jurisdiction of the court.

By including civil, political, economic, social and cultural rights violations as potential acts of persecution, the OTP opens up a new realm of protection for women, girls and LGBTIQ+ people. Persecution is a unique crime, in that it does not typically take the shape of a single act of violence – it is the accumulation of systemic and discriminatory deprivations of fundamental rights that often occur on a daily basis, like violations of the right to

bodily autonomy, the right to education, or the right to decent work. For women, girls and LGBTIQ+ people, the crime of gender persecution has the potential to recognize the continuum of violence and human rights violations that they experience at all times and across all contexts, and which can escalate into gender persecution in conflict and atrocity situations.

2. Operational Considerations for an Investigation into Gender Persecution

Persecution is a distinctive crime in the Rome Statute. As described above, it has the potential to include a wide range of human rights violations that would otherwise not otherwise be criminalized. Persecution is also a crime of intent, like the crime of genocide, which is often established by interpreting contextual factors and patterns of behavior. Given the uniqueness and complexity of the crime, investigating and prosecuting it requires a specific approach – one that incorporates dimensions of human rights investigations that may be less familiar to criminal investigators and prosecutors. UN Women recommends that the OTP policy include a framework for conducting a human rights context analysis and a gender and crime pattern analysis for each situation under investigation, and assign adequate resources to these tasks.

For the OTP to identify situations where gender persecution might be present, the OTP should conduct a **gender analysis of the human rights context**, with a focus on rights violations affecting women, girls and LGBTIQ+ people. **Analyzing the human rights context in situations under investigation will help the OTP to see what types of fundamental rights deprivations might be taking place and warrant further investigation.** Such a context analysis must be conducted at the outset of investigation planning, to understand whether it might be relevant to investigate gender persecution, and to incorporate the widest possible range of human rights violations in the investigation.

For its gender analysis of the human rights context, UN Women recommends that the OTP conduct a desk review of reports from human rights treaty bodies, including the Committee on the Elimination of Violence against Women (CEDAW Committee); reports of special procedures of the UN Human Rights Council, such as the Special Rapporteur on Violence against Women, and

the UN Expert on Violence and Discrimination Based on Sexual Orientation and Gender Identity; the human rights investigations established by the Human Rights Council, including commissions of inquiry and fact-finding missions; reports from relevant regional human rights mechanisms and courts; and reports from civil society organizations, particularly women's rights organizations and LGBTIQ+ rights organizations. Further, individual women human rights defenders and defenders of the rights of LGBTIQ+ people should be considered invaluable sources of information for the OTP, in understanding the gendered nature of human rights violations in a situation.

To establish the discriminatory intent of alleged perpetrators, and the connection between fundamental rights deprivations and other Rome Statute crimes, the OTP should also undertake a **gender analysis of crime patterns**. In the case of gender persecution, fundamental rights deprivations should be considered as part of the crime pattern being analyzed, along with other Rome Statute crimes. Making this linkage visible is essential, so the OTP is able to satisfy the requirement of the Rome Statute, that persecutory acts be committed in connection with other crimes under the jurisdiction of the Court.

A gender analysis of the human rights context and of crime patterns is essential to successfully building a case that includes gender persecution. In addition, these analyses will support the OTP's efforts to investigate and prosecute other gender-based crimes under the jurisdiction of the Court, including sexual violence crimes.

3. Conclusion

UN Women reiterates its thanks the Prosecutor and his Special Advisor on Gender Persecution, for the opportunity to participate in this important process. UN Women submits these comments in solidarity with the victims and survivors of gender persecution around the world, who call for justice, and for gender equality. The OTP can count on UN Women as a partner and ally in its efforts to further develop the policy, and to support the OTP to implement the policy when it is adopted.

¹ This submission prepared in response to a call for inputs from the OTP, <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability>.

² ICC-01/17-X (9 November 2017), ¶132.

³ *Id.*, fn. 331.

⁴ ICC-01/12-01/18-1-Red (31 March 2018), ¶140.

⁵ ICC-01/12-01/18 (22 May 2018), ¶ 88.

⁶ *Id.* at ¶ 95-96.

⁷ See Prosecutor v. Krnojelac, Case No. IT-97-25-T, ¶¶ 433 (Mar. 15, 2002). "The act or omission constituting the crime of persecution may assume different forms. However, the principle of legality requires that the Prosecution must charge particular acts amounting to persecution rather than persecution in general. While a comprehensive list of such acts has never been established, it is clear that for the purposes of this Tribunal persecution

may encompass acts which are listed in the Statute as well as acts which are not listed in the Statute."

⁸ *Id.* at ¶ 434.

⁹ *Id.* See also Prosecutor v. Kupreskic, Case No. IT-95-16-T, ¶ 622 (Jan. 14, 2000) ("In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane.'").

¹⁰ See *id.* at ¶ 615(a).

¹¹ See *id.* at ¶ 610.

¹² See *id.*

¹³ *Id.* at ¶ 434.

¹⁴ See Kupreskic, *supra* note 9 at ¶ 610.