

Women's Initiatives for Gender Justice

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Comments on the Renewal of the International Criminal Court Office of the Prosecutor 2014 Policy Paper on Sexual and Gender-Based Crimes

The Women's Initiatives for Gender Justice (WIGJ) welcomes the International Criminal Court (ICC) Office of the Prosecutor's (OTP) initiative to renew its 2014 Policy Paper on Sexual and Gender-Based Crimes. The 2014 Policy carries significant value as a guide for the OTP in its work for fighting impunity for sexual and gender-based crimes (SGBC), and promoting transparency and clarity, as well as predictability in the application of the legal framework of the Rome Statute to such crimes. Similarly, the 2014 Policy was of significant importance as a tool to advocate for enhanced accountability for SGBC at the regional and national level.

The renewal of the 2014 Policy offers an opportunity to further these goals and adapt to new understandings of sexual and gender-based crimes.

Women's Initiatives for Gender Justice

Women's Initiatives for Gender Justice is an international women's rights organisation that advocates for gender justice through the ICC and other justice mechanisms, as well as for accountability for SGBC within international and national criminal procedures. We work with survivors and communities most affected by armed conflict with a focus on countries with situations under investigation by the ICC.

The Women's Initiatives is the legacy of the many accomplishments of the Women's Caucus for Gender Justice that brought together women's human rights advocates from around the world to the negotiations towards the creation of the ICC. Their goal was to firmly ingrain the principles of gender justice and accountability for SGBC in the Rome Statute.

In these negotiations, the Women's Caucus worked to reveal and correct deficiencies in existing humanitarian law with respect to SGBC. The Caucus was among the strongest voices calling for a more active role for victims and witnesses in the justice process, a broad reparations scheme, strong mandates for the protection of victims and witnesses, and gender experts and women among Court staff at all levels. The Caucus worked to ensure that the achievements made in the Rome Statute negotiations were not undermined in subsequent discussions and ensured progressive definitions of the crimes and rules relating to evidence in cases of sexual violence.

The Women's Initiatives for Gender Justice's first Executive Director, Brigid Inder, served as the ICC Prosecutor's first Special Adviser on Gender during the development of the OTP 2014 Policy Paper on Sexual and Gender-Based Crimes.

Recommendations

The Women's Initiatives for Gender Justice presents five main calls to action in the renewal of the OTP SGBC Policy.

1. Enhance the focus on survivor centred approaches in the accountability process

To ensure meaningful accountability and support for survivors, legal entities and stakeholders must proactively integrate survivor-centred methodologies. By allocating resources and attention to this approach, a more comprehensive and empathetic approach to addressing crimes can be fostered, based on an understanding of survivors' priorities.

Our view on the importance of a survivor centred approach when addressing sexual violence is outlined in *The Hague Principles on Sexual Violence*.¹ Better understanding the lived experience of survivors ensures that violence is not overlooked or trivialized by practitioners who may not always recognize these acts, and provides survivors with recognition and validation of their experiences.

The Principles were developed following the *Call it what it is* campaign through which input was gathered from more than 500 survivors, 60 civil society organizations, but also legal practitioners, academics and policy makers to translate the views of survivors into a practical guide and crucial reference point for practitioners on what makes violence sexual, which would subsequently increase accountability for conflict and atrocity-related sexual violence.

We call on the OTP to substantially engage with survivor activists and networks during the process of updating the SGBC Policy, in order to ensure that the renewed policy will reflect the reality of survivors' experiences.

2. Adopt the definition of sexual violence noted in *The Hague Principles on Sexual Violence* and refer to the Principles for guidance on what constitutes an act of a 'sexual' nature

While the Rome Statute is one of the more progressive international criminal law documents on SGBC, it fails to offer a definition or guidance on what can be considered an act of a 'sexual' nature. The Elements of Crimes provide no further clarification but rather a circular definition: sexual violence is defined with reference to acts of a sexual nature.²

This gap can lead to mischaracterising or overlooking acts of a sexual nature, as was the case in the 2008 application for arrest in the case against the former Congolese vice-president Jean-Pierre Bemba,

¹ The Hague Principles on Sexual Violence: <https://4genderjustice.org/the-hague-principles-en/>.

² Elements of Crimes, Article 7 (1) (g)-6: Crime against humanity of sexual violence, para 1.

which included the crime against humanity and war crime of “any other form of sexual violence.”³ However, the ICC Pre-Trial Chamber declined to confirm the charge as a crime against humanity on the grounds that the alleged forced nudity did not pass the ‘comparable gravity’ test.⁴ Another example is the Kenyatta case, where the Pre-Trial Chamber II refused to characterise the forcible circumcision of Luo men as acts constituting ‘other forms of sexual violence’, insisting that they were more accurately to be considered as part of the charge of ‘other inhumane acts.’⁵ These examples reflect the reality that a lack of clarity on what constitutes sexual violence can leave survivors’ experiences unrecognized and invalidated.

As such, we encourage the OTP to adopt the definition of sexual violence noted in *The Hague Principles on Sexual Violence*, as “singular, multiple, continuous, or intermittent acts which, in context, are perceived by the victim, the perpetrator, and/or their respective communities as sexual in nature. Such acts are to be characterized as sexually violent if they violate a person’s sexual autonomy or sexual integrity.”⁶

3. Reconcile the definitions on “gender,” “intersex,” and “LGBTQI+” to enhance inclusivity

The definition of “gender” outlined in the 2022 OTP Policy Paper on Gender Persecution acknowledges the evolving nature of gender and embraces a broader understanding that goes beyond binary concepts.⁷ It notes that “As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.”⁸ Furthermore, it is added that “Gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender”. In this way it expands the conducts that can amount to persecution and recognizes the persecution on gender basis against men and LGBTQI+ people and the intersectional and systemic aspects of persecution.

We encourage the OTP to adopt the definitions of “gender,” “intersex,” and “LGBTQI+” as they feature in the 2022 OTP Policy on Gender Persecution.

4. Adopt language on intersectionality

Intersectionality acknowledges the interconnected nature of various forms of discrimination and oppression. By recognizing the complex intersections of identities, the multifaceted experiences of

³ The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-28, 23 May 2008, [Prosecutor's Application for Request for Provisional Arrest under Article 92](#).

⁴ The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#).

⁵ The Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11-382-Red, 29 January 2012, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#).

⁶ [The Hague Principles on Sexual Violence](#), p. 1.

⁷ [Policy on the Crime of Gender Persecution \(2022\)](#).

⁸ *Ibid* at p. 3.

survivors can be better addressed. Additionally, adopting an intersectional approach allows for a more sensitive analysis of various elements of a crime.

We encourage the OTP to adopt the language of the 2022 Policy on Gender Persecution relating to intersectionality. This policy states that the OTP will “pursue an intersectional approach to discrimination to fully reflect the inter-relationship between gender, age and other aspects of an individual’s identity or circumstances (such as race, ethnicity or social origin, Indigenous status, language, religion or belief, political or other opinion, nationality, culture, wealth, birth, health or other status, disability status, statelessness, status as a refugee or migrant, among other grounds).”⁹

5. Implement a robust monitoring mechanism and engage with stakeholders to identify areas of strengths and weaknesses

In the 2014 OTP Policy on Sexual and Gender-Based Crimes, the OTP committed to monitoring the practices in relation to investigations of SGBC and ensuring their implementation.¹⁰ In addition to the existing commitments to implementation, we encourage the OTP to dedicate sufficient resources and expertise to ensure prompt, thorough, and effective investigations, and prosecutions of SGBC. This can be done by establishing a robust monitoring mechanism which creates standardised monitoring tools to track progress and the quality of investigations and prosecutions. These tools should include indicators that capture key dimensions such as timeliness, effectiveness, victim-centred approaches, and adherence to international standards.

In addition, we recommend regular evaluations conducted by independent experts who incorporate feedback from survivors, witnesses, civil society organizations, and relevant stakeholders. This would help identify strengths and weaknesses of the response and areas of improvement.

This policy recommendation emphasizes the importance of transparency, accountability, and continuous learning to ensure effective implementation. We call on the OTP to systematically monitor, evaluate, and learn from its practices.

We remain available to discuss and develop the above-mentioned points, but also to offer our further expertise and assistance in the process of developing and implementing the policy.

Thank you.

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⁹ Ibid at para 29.

¹⁰ [Policy on Sexual and Gender-Based Crimes \(2014\)](#), at paras 120 – 122.