

## Submission to the International Criminal Court on the Policy Initiative on Sexual and Gender-Based Crimes - March 18<sup>th</sup>, 2022

[Women's Declaration International](#) is a group of volunteer women from across the globe dedicated to protecting women's sex-based rights. Our volunteers include academics, writers, organizers, activists, and health practitioners, and aim to represent the total breadth of the human female experience. The Declaration on Women's Sex Based Rights was created by the founders of WDI to lobby nations to maintain language protecting women and girls on the basis of sex rather than "gender" or "gender identity", and has been signed to date by more than 30,500 individuals, from 157 countries in collaboration with 422 organizations.

The above groups, organizations and individuals herein respond to the call for input by the Office of the Prosecutor of the International Criminal Court on a policy initiative to advance accountability for Gender Persecution under the Rome Statute. The call for public consultation labels this as a new policy initiative to advance accountability for the crime against humanity of persecution on the grounds of gender under the Rome Statute which builds on the policy brief published by this Office in 2014.

Undoubtedly, the initiative to ensure justice and assistance for victims of some of the gravest crimes under the Statute, is laudable and is welcomed. However, the above-named organizations and signatories are concerned about terminological conflation and confusion in the policy brief. As with all legal matters, key terms and their understanding and interpretation have a determinative impact on the rights and remedies of groups.

**As such, terms should be used in a manner consistent with the intentions and aims of the Statute, which are based on international human rights law frameworks, and all clarifications should use previous development of the matter.**

**Moreover, as further substantiated below, it is clear that the word 'gender' as used in the Statute was definitively intended to refer to sex, and that was what the Assembly of States Parties have consented to. As such, it is not within the authority of this Office to change the meaning and purported intent of the Statute, as intended by the States parties, by introducing an entirely new concept and analysis based on that.**

## A. The Rome Statute

Article 7 Crimes against humanity states:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, *gender* as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

Paragraph 3: For the purpose of this Statute, ***it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.***

This article explicitly explains that persecution that will be considered a crime against humanity refers to groups or collectives that are universally recognized in international law. The original source can be found in Article 2 of The Universal Declaration of Human Rights: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

That the word *gender* in Article 7(3) is used as a synonym for the concept of sex is further supported by the French version of the Rome Statute, which shall be considered as equally authoritative, and uses 'sexiste' in Art 7(1)(h) where the English and Spanish versions use 'gender' and the term 'sexe' in Article 7(3), where again, the English and Spanish versions uses the term 'gender'.

The concept of 'sex' i.e., of male and female, is present in most languages, and is clearly understood. However, the term 'gender' as distinct from sex does not exist in many languages.

**Although the Statute decided to use Gender interchangeably with Sex, it explicitly states that it means nothing different to this. That is, for the Statute, Gender is synonymous with Sex.**

## b. Contradicting Definitions in the 2014 Policy Paper

In the 2014 Policy Paper on Sexual and Gender-based Crimes, key terms have been defined as follows:

Gender: "Gender", in accordance with article 7(3) of the Rome Statute ("Statute") of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys.

Sex: "Sex" refers to the biological and physiological characteristics that define men and women.

It is notable here that **only the first sentence** of the policy paper's definition of "Gender" is in accordance with the Statute. In fact, the Statute **clearly states** that the term 'gender' in the Statute is **not to be taken** as indicating any meaning other than the above.

This definition **is in direct contradiction to the** fact that Article 7(3) defines the word 'gender' as *referring to the two sexes i.e.*, that the word 'gender' in the English version of the Rome Statute is used as *synonym* for sex, and does not purport to introduce an additional concept. Hence, use of this definition is illegitimate and impermissibly changes the meaning and intent of the Statute.

The use of gender as a *synonym* for sex is nothing new. In the versions of the Statute where the word 'gender' is used, it does so a) only for the purposes of the Statute and b) as reiterated above, clearly **does not intend to imply that sex is socially constructed, but rather that the word 'gender'** (In the English, Russian and Spanish versions) is used to refer to the **two sexes in human beings**.

That the Statute **means sex as a biological, objectively determinable fact, and not as a 'socially constructed' or 'individually felt' category** is clear from the French, Chinese and Arabic versions of the Statute. Additionally, in the German version of the Statute, the wording is similar to the French statute, which uses in both parts of Art. 7 the term "Geschlecht", i.e., sex. The German version reads in Art. 7 (3) (translated): "'Sex' refers to both sexes, male and female within context of society. It has no other meaning than the aforementioned one". It is clear therefore that the Assembly of States Parties did not intend any alternative meaning nor is their assent to it obtained.

As is well known, the Vienna Convention on the Law of Treaties that sets the general rules for treaty interpretation establishes the principle that treaties should have "at their root the more general principles of effectiveness". Moreover, according to Article 31,

1. treaty should be shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

**Accordingly, this principle of effectiveness of treaties and contextual reading requires the Office to take note of the fact that no less than three versions of the Statute in official UN languages only use the term 'sex' and the versions that use the term 'gender' do not do so in isolation, but clearly emphasize that 'gender' for the purposes of the Statute refers to sex.**

On the contrary, **the definitions used in the 2014 policy paper** are based on a World Health Organization paper which tries to explain the difference between sex and gender:

'Gender refers to the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.'...the difference would be that "male" and "female" are sex categories, while "masculine" and "feminine" are gender categories".

This definition accepts that socially constructed roles, behaviours, activities and attributes refer to men and women. That is, *gender* is connected to sex. Roles and behaviours which are referred to the biological sex of a person under which gender cannot be a category *independent* of sex.

The WHO explanation only speaks of what a given society considers "appropriate" but fails to speak about the cause for discrimination or persecution based on sex/gender which is **a power relationship in which these roles, behaviours, activities and attributes subordinate one of the sexes to the other. However, more authoritative human rights bodies (see Section c) below, have in fact taken cognizance of this.**

### c. CEDAW Definition of Gender

Women, are the single largest identifiable group or collectivity -to use the Rome Statute language-, which suffer from discrimination and persecution based on their sex. That is of being born in a female body. The only international law instrument widely signed and ratified which has elaborated on sex-based discrimination is the Convention on the Elimination of All Forms of Discrimination Against Women of 1979.

Article I - For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, .... on a basis of equality of men and women, of human rights and fundamental freedoms ....

Article 5 **emphasizes the elimination of prejudices** based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

The term 'gender' which had not been included in the Convention was only defined by the CEDAW Committee in General Recommendation No. 28 in 2010 explained the term *gender*

Paragraph 5: Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women..... This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face. This acknowledgement by the Committee is evidenced in its general recommendations, individual communications and inquiries under the Optional Protocol.

This General Recommendation which updates the Convention according to Article 20, explains this new term clearly. The WHO definition used in the Policy Paper, enters in contradiction with the most widely understood definition of Gender. Discrimination based on sex is related to biological difference, and *gender* refers to what was explained in Article 5a of the Convention: social and cultural patterns on women and men, prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority or on stereotyped roles on women and men. **Interpretation of gender is therefore linked to sex, and is described as a form of discrimination and inequality between men and women. It is understood as something that should be eliminated because of this.**

#### d. **Sex Specific Needs of Victims**

The Policy Paper also claims that the Office will “increasingly seek opportunities for effective and appropriate consultation with victims’ groups and their representatives to take into account the interests of victims.” (Paragraph 2).

While victims of sexual violence can be both male or female, it is an unfortunate truism that the vast majority of victims of rape, sexual slavery, forced pregnancy are female. A human-rights informed approach towards these victims therefore, requires an understanding of, and consideration of their sex-based needs, including but not limited to the provision of single sex facilities for recovery, same-sex counselors and psychologists, interview techniques and compensation tailored to their sex-specific needs.

How does the Office’s Initiative propose to deal with the very sex specific nature of many of the crimes against humanity? Does it simply plan to impose a concept like gender defined by WHO, inconsistently introduced and used in the Anglophone world, to deal with the needs and interests of victims from the rest of the world?

#### e. **Recommendations**

It is unfortunate that the Statute used the term ‘gender’ in place of sex in the English and Spanish text, **but the Statute is very clear that the word ‘gender’ is synonymous with sex in that context, and does not purport to introduce another meaning.** To maintain consistency with the French text, as well as with other languages that do not recognize the concept of ‘gender’ but do describe the fact of ‘sex’, it is imperative that the Office’s initiative recalls this meaning, and uses it as such.

If anything, the evidence submitted above is proof of the **complete lack of consensus among international bodies as to what is meant by the term ‘gender’ or what it implies. Incorporation of a ‘gender perspective’ or a ‘gender analysis’ as advocated by the Policy Paper therefore, is rendered meaningless, when the very idea of gender is defined inconsistently, and defined in completely opposite ways. When there is no consensus at an international level it is extremely unwise to use such a concept, as a one of the elements of a crime.** The Office represents the approach of the International Criminal Court towards all countries in the world, and should not adopt approaches that use confusing and fluctuating language, to bring universal justice.

**Women's Declaration International recommends the Court to:**

1. Remain cognizant that the Statute's use of the word 'gender' was as a synonym for 'sex', and that the Statute, the overarching authority for the Court and all who work under its aegis, is very clear about 'gender' as referring to 'sex'.
2. That if it continues to use the concept of gender interchangeably with sex in English, in order to avoid confusion, it should privilege the use of sex-based discrimination, sex-based persecution and female or male victims, as the most consistent terms used in international human rights law.